
University of Oxford, Faculty of Law

**States' International Obligations to Control
Private Military & Security Companies
in Armed Conflict**

D.Phil Thesis

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Abstract

Tens of thousands of contractors work for private military and security companies (PMSCs) in armed conflicts around the world, often hired by states to fulfil functions that were once the exclusive domain of the armed forces. In this context, PMSCs have performed a wide range of activities including offensive combat, prisoner interrogation, military advice and training, armed security, intelligence and logistics.

The proliferation of PMSCs during the past two decades has challenged conventional conceptions of the state as the primary holder of coercive power in the international arena. Nonetheless, this Thesis argues that the traditional state-centred frameworks of international law remain vitally relevant to the regulation of private security activity in contemporary armed conflict. Three states are in a strong position to influence PMSCs in this context—the state that hires the PMSC, the state in which the company is based or incorporated, and the state in which the company operates—and this capacity for influence enables international law to regulate PMSC activities *indirectly* using these states as an intermediary.

This Thesis critically analyses the pertinent international obligations on these three categories of states and identifies the circumstances in which PMSC misconduct may give rise to state responsibility in each case. It also examines the recent practice of certain key states in order to evaluate their compliance with these obligations. By providing a clear and in-depth analysis of states' international obligations to control PMSCs in armed conflict, this Thesis may not only facilitate the assessment of state responsibility in cases of PMSC misconduct; it may also play an important prospective role in setting standards of conduct for states in relation to the private security industry. This in turn may encourage and assist states to develop their domestic laws and policies in order to improve overall PMSC compliance with international law.

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Abbreviations

AJIL	American Journal of International Law
Am Soc Intl L & Proc	American Society of International Law & Procedure
BAPSC	British Association of Private Security Companies
BIICL	British Institute of International and Comparative Law
BYBIL	British Yearbook of International Law
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CETS	Council of Europe Treaty Series
CFR	Code of Federal Regulations
CIA	Central Intelligence Agency
Colum Hum Rts L Rev	Columbia Human Rights Law Review
Colum J Transnatl L	Columbia Journal of Transnational Law
Consol TS	Consolidated Treaty Series
CPA	Coalition Provisional Authority
CUP	Cambridge University Press
DoD	Department of Defence
ECHR	European Convention on Human Rights
EComHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
ECOMOG	Economic Community of West African States Military Observer Group
EJIL	European Journal of International Law
EO	Executive Outcomes
FCO	Foreign Commonwealth Office
GCI	First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GCII	Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
GCIII	Third Geneva Convention relative to the Treatment of Prisoners of War
GCIV	Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War

German YBIL	German Yearbook of International Law
Hague III	Convention Relative to the Opening of Hostilities
Hague IV	Convention Respecting the Laws and Customs of War on Land
Hague V	Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land
Hague XIII	Convention Concerning the Rights and Duties of Neutral Powers in Naval War
Harv Intl LJ	Harvard International Law Journal
HC	House of Commons
HCJ	High Court of Justice (Israel)
HRL	Human Rights Law
IAComHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant of Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
Intl Rev Red Cross	International Review of the Red Cross
IPOA	International Peace Operations Association
Iran-USCTR	Iran-United States Claims Tribunal
LRTWC	Law Reports of Trials of War Criminals
LNTS	Law of Nations Treaty Series
MEJA	Military Extraterritorial Jurisdiction Act
Mil L Rev	Military Law Review
MPRI	Military Resources Professional Incorporated
Neth YBIL	Netherlands Yearbook of International Law
NGO	Non-Governmental Organisation
NY Law School J Intl & Comp L	New York Law School Journal of International & Comparative Law
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development

PCIJ	Permanent Court of International Justice
PNG	Papua New Guinea
PMC	Private Military Company
PMSC	Private Military and Security Company
Prcdgs Am Soc Intl L	Proceedings of the American Society of International Law
Protocol I	First Additional Protocol to the Geneva Conventions of 12 August 1949, and Relative to the Protection of Victims of International Armed Conflicts
Protocol II	Second Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
PSC	Private Security Company
Recueil des Cours	Recueil des Cours de l'Academie de Droit International de la Haye
Res	Resolution
RIAA	Reports of International Arbitral Awards
RUF	Revolutionary United Front
Stan J Intl L	Stanford Journal of International Law
UCIHL	University Centre for International Humanitarian Law
UCMJ	Uniform Code of Military Justice
UNCAT	United Nations Convention Against Torture
UNHRC	United Nations Human Rights Committee
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
U Pitt L Rev	University of Pittsburg Law Review
Va J Intl L	Virginia Journal of International Law
Vanderbilt J Transnatl L	Vanderbilt Journal of Transnational Law
Wash L Rev	Washington Law Review
WTO	World Trade Organisation
YBIHL	Yearbook of International Humanitarian Law
YBILC	Yearbook of the International Law Commission

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Third Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 Aug 1949, entered into force 21 Oct 1950) 75 UNTS 135	81-82, 109-113, 122, 167-189, 246-267, 326, 329, 331, 338-340
Treaty of Washington (8 May 1871)	86, 336
UN Convention Against Torture (adopted 10 Dec 1984, entered into force 26 June 1987) 1465 UNTS 85	196, 205, 215-216, 270, 285, 293, 301, 341-342
UN Convention on Jurisdictional Immunities of States and their Property (adopted 2 Dec 2004) 44 ILM 803, UN Doc A/RES/59/38	143
Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 Jan 1980) 1155 UNTS 331	170, 253

Introduction

The past two decades have witnessed the rapid growth and consolidation of the global private security industry. Tens of thousands of contractors working for private military and security companies (PMSCs) now provide a wide range of services to states, international organisations, corporations and non-governmental organisations around the world. Many PMSCs operate in zones of armed conflict, where they carry out functions that were formerly the exclusive domain of the armed forces. In this context, PMSCs have performed coercive activities such as offensive combat, armed security, and the detention and interrogation of prisoners, as well as non-coercive activities such as military advice and training, transport, housing, and intelligence collection and analysis.

The extensive outsourcing of military and security activities calls into question twentieth-century paradigms of interstate warfare and conventional conceptions of the state as the primary holder of coercive power.¹ Indeed, although private force is by no means a new phenomenon in historical terms, the recent proliferation of private, profit-driven military and security actors signals a clear shift in the modern conceptualisation and delivery of security.² This presents significant challenges for the normative frameworks and accountability structures of traditional

¹ Max Weber's classic definition of the modern nation-state as 'a human community that (successfully) claims the monopoly of the legitimate use of physical force' has been conventional wisdom since the mid-nineteenth century and remains the obvious point of reference for most contemporary inquiries: see, eg, HH Gerth and CW Mills, *From Max Weber: Essays in Sociology* (Routledge & Kegan Paul, London 1948), 77-78; M Weber, *The Theory of Social and Economic Organization* (Free Press, New York 1964).

² For an analysis of the changing nature of war, see M Van Creveld, *On Future War* (Brassey's, London 1991).

international law, which largely assume that the use of force in the international arena falls within the mandate of state institutions. Of particular concern is the reduction in state *control* over military and security activities, as well as the lack of adequate *accountability* mechanisms for PMSC misconduct in the field. Whilst there is no evidence that private contractors are more likely to misbehave than national troops, private contractors certainly can, like national soldiers, engage in inappropriate or harmful behaviour in the course of performing their functions. Yet states often fail to take the same measures to control PMSC personnel that they would ordinarily take to control national soldiers, and many of the accountability mechanisms that exist for the national armed forces are weak or absent in the case of PMSCs.

Notwithstanding these challenges, this Thesis argues that the state-centred frameworks of traditional international law are in fact sufficiently flexible to accommodate the modern private security industry. The extensive use of PMSCs has certainly reduced reliance on national armed forces, but it has not undermined the role of the state *per se* in regulating contemporary armed conflict. In fact, for every PMSC working in a conflict zone, three states generally retain a significant capacity to influence company behaviour and to promote accountability in cases of contractor misconduct: first, the state that hires the PMSC (the hiring state); second, the state in which the PMSC operates (the host state); and third, the state in which the PMSC is based or incorporated (the home state). This Thesis critically analyses the principal international obligations on these three categories of states and discusses how PMSC misconduct may give rise to state responsibility in each case.

Furthermore, this Thesis evaluates the recent laws and practices of certain key states in each category, in order to ascertain the extent to which those states appear to be fulfilling their international obligations. This two-way analysis fills a critical gap in the existing private security literature, as there is currently little in-depth analysis of the relationship between states' domestic frameworks on the one hand and states' international legal obligations and responsibility on the other.

This first Chapter of this Thesis presents the historical, normative and factual background of the private security industry. It traces the historical evolution of private military actors and assesses how the perceived legitimacy of those actors has shifted over time. It then critically examines the moral and practical objections that consistently arose in relation to private military actors in the past, and considers the extent to which similar concerns have arisen in relation to modern PMSCs. Within this historical and normative context, Chapter I scrutinises the facts surrounding the contemporary private security industry, first locating PMSCs on the broader spectrum of military and security service provision, and then examining their general character and the main activities that they perform in armed conflict today. This analysis focuses on PMSCs operating in armed conflict, including situations of military occupation, but it is important to bear in mind that some PMSCs also operate in other contexts such as peacekeeping and post-conflict reconstruction.

Chapter II lays the theoretical groundwork for the Thesis by outlining the basic normative structure of the international legal system and explaining how the law of state responsibility operates within that systemic context. It discusses the

general nature of international obligations and the conditions for breach, and identifies the key categories of obligations on the hiring state, the home state and the host state of a PMSC. Within this conceptual framework, this Chapter identifies the different ways in which states may violate their obligations through state organs or other individuals acting as state agents, and it then outlines the general circumstances that may justify or excuse states' otherwise wrongful acts. This paves the way for a detailed analysis of the obligations and responsibility of the hiring state, the host state and the home state in the subsequent Chapters of the Thesis.

Chapter III critically examines the attribution of PMSC misconduct to the hiring state. It identifies three situations in which such attribution may occur: first, in rare cases the contractor may form part of the hiring state's armed forces; second, and more commonly, the contractor may be empowered by the law of the hiring state to exercise elements of governmental authority; and third, the contractor may be acting on the instructions or under the direction or control of the hiring state when he or she engages in the relevant misconduct. This Chapter argues that a large proportion of PMSC activity in armed conflict will fall within at least one of these three categories. In practice, however, it will frequently be more difficult to prove the responsibility of the hiring state for violations committed by a PMSC employee than it would be if a national soldier of that state were to behave in the same way, and some PMSC conduct may fall outside the rules of attribution altogether. This reveals a potential responsibility gap between states that act through their national armed forces and states that hire PMSCs.

Chapters IV, V and VI closely analyse the obligations on the host state, the hiring state and the home state to take positive steps to prevent, investigate, punish and redress PMSC misconduct in the field. Where such an obligation applies and a state fails to take the necessary measures to control PMSC behaviour, misconduct by a PMSC may give rise to the responsibility of that state under international law. Although it is the PMSC misconduct that triggers state responsibility in such cases, it is the state's *own failure* to take adequate preventive or remedial measures that in fact constitutes the basis for the state's responsibility, and not the PMSC activity itself. The obligations discussed in these three Chapters may provide a pathway to state responsibility that is independent of the attribution of PMSC misconduct to the hiring state, thus helping to bridge the gap (identified in Chapter III) in the rules of attribution as applied to PMSCs compared with national soldiers.

Overall, this Thesis may facilitate the assessment of state responsibility in cases of PMSC misconduct, by identifying and expounding the content of states' obligations to control PMSCs in armed conflict and the precise circumstances in which contractors' misconduct may give rise to state responsibility. This Thesis does *not* argue that the law of state responsibility is sufficient in itself to address the control and accountability concerns surrounding the private security industry; on the contrary, any response should incorporate a range of strategies targeting a variety of actors including individual contractors, PMSCs and states. Nonetheless, the law of state responsibility provides a useful mechanism for addressing some of those concerns and, in doing so, it provides a significant legal incentive to states themselves to exert greater control over PMSC activity. More generally, by

highlighting and clarifying the pertinent international obligations on states, this Thesis may play an important standard-setting role to encourage and assist states in developing their domestic practices with a view to improving overall PMSC compliance with international law.

I. The private security industry uncovered

Private, profit-driven military actors are almost as old as warfare itself, and were a central component of most wars until the mid-nineteenth century. Throughout history, these individuals triggered moral and practical objections which ultimately affected their success in the international system. Whilst the modern private security industry is unprecedented in its scale and sophistication, it shares a number of characteristics with past markets for force, and some PMSCs have attracted social stigma similar to that borne by their historical counterparts. An understanding of this historical and normative backdrop provides a key foundation for the analysis of states' international obligations to control PMSCs in armed conflict today.

Accordingly, this Chapter provides a critical overview of the private security industry in its historical and normative context. Part I traces the historical evolution of private military actors and assesses how perceptions of those actors shifted over time. Part II draws on that historical analysis in order to identify three recurring objections to private force, and considers the extent to which those objections have arisen in response to modern PMSCs. Next, Part III critically examines the contemporary spectrum of military/security service provision and locates modern PMSCs on that spectrum by reference to other actors such as mercenaries and national soldiers. Finally, Part IV examines the private security industry in depth. What exactly are PMSCs and what do they do? It first considers the nature of the companies themselves, the conflicts in which they operate and the clients for whom they work, and it then develops a typology of the private security industry by

classifying PMSC services into four categories. This typology is crucial to the overall Thesis because the international obligations on states to control PMSCs depend primarily on the activities performed by each company in a particular case.

I. History of private military actors in international relations

Max Weber's classic definition of the modern nation-state as 'a human community that (successfully) claims the monopoly of the legitimate use of physical force' has been conventional wisdom since the mid-nineteenth century.¹ Twentieth-century paradigms of interstate warfare between standing national armies reflect this model of the state as the primary holder of coercive power. Even as states privatised many core public services during the latter half of the twentieth century, the military continued to be regarded as *qualitatively* different and thus remained one of the last bastions of government monopoly. Indeed, as Samuel Huntington noted in 1957, 'while all professions are to some extent regulated by the state, the military profession is monopolised by the state'.²

Although Weber's conception of the state has been the obvious reference point for most modern debates about international security, in historical terms state monopoly over force is actually an anomaly. States have a long history of reliance on the private sector for military operations, going right back to the armies of ancient

¹ See HH Gerth and CW Mills, *From Max Weber: Essays in Sociology* (Routledge & Kegan Paul, London 1948), 77-78; M Weber, *The Theory of Social and Economic Organization* (Free Press, New York 1964); M Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, London 1978), 54.

² SP Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Random House, New York 1957), 37.

China, Greece and Rome.³ Twelfth century feudal lords supplemented their forces by hiring foreign, independent and profit-motivated fighters, as did the Pope, the Renaissance Italian city-states and most of the European forces during the Thirty Years' War of 1618-1648. Reliance on private force essentially persisted in various forms until the nineteenth century, when the modern paradigm of interstate warfare between citizen armies prevailed. Thomson explains:

The contemporary organisation of global violence is neither timeless nor natural. It is distinctively modern. In the six centuries leading up to 1900, global violence was democratised, marketised, and internationalised. Non-state violence dominated the international system.⁴

The first four Sections of this Part critically examine how the 'contemporary organisation of global violence' evolved from the twelfth century to today. The final Section then discusses how changing perceptions of the legitimacy and utility of private force can help to explain that evolution. This discussion focuses on the *perceived* legitimacy of private military actors, and does not attempt to assess their actual legitimacy on the basis of some moral, political and/or legal criteria. In other words, the notion of legitimacy is used in this Chapter in a descriptive rather than a normative sense.⁵ This is appropriate as it is the *perception* of illegitimacy that can influence the responses of states and the international media, and this in turn can hinder the success of the private military actors themselves.

³ For a detailed history of private military service, see A Mockler, *The New Mercenaries* (Sidgwick & Jackson, London 1985), ch 1; JE Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton University Press, Princeton 1994); S Percy, *Mercenaries: The History of a Norm in International Relations* (OUP, Oxford 2007); J France (ed), *Mercenaries and Paid Men: The Mercenary Identity in the Middle Ages* (Brill Leiden 2008).

⁴ Thomson (n 3), 3.

⁵ For a discussion of legitimacy in the normative sense, see A Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (OUP, Oxford 2004).

A. Private force in twelfth–seventeenth century Europe

Foreign, independent and profit-motivated fighters—known in common parlance as mercenaries⁶—were widespread in Europe between the twelfth and seventeenth centuries. These individuals freely sold their military services to the highest bidder on the international stage. Some mercenaries joined together to offer a collective form of military service known as ‘free companies’. Perhaps the earliest example was the Grand Catalan Company hired by the Byzantine Emperor to fight the Turks around 1300.⁷ Free companies played a crucial role in the Hundred Years war of 1337-1453 and continued to provide military services on the European market for some time thereafter. Far from being accepted as legitimate actors on the international stage, these companies gained notoriety as quasi-criminal, loosely organised bands whose members often behaved reprehensibly whilst performing their contracts and then worked for themselves pillaging Europe in between formal employment.⁸ Fowler notes that the free companies were ‘an affront to order’⁹ and ‘one of the major problems facing those responsible for government and the rule of law in western Europe’.¹⁰

⁶ The term ‘mercenaries’ is used in Parts I and II of this Chapter in a non-technical and non-legal sense to refer to any foreign, independent and profit-motivated fighters; the legal definition of a mercenary, on the other hand, is discussed in Part III of this Chapter, and in greater detail in Chapter V.

⁷ A Mockler, *The Mercenaries* (MacDonald, London 1969), 9-10.

⁸ ME Mallett, *Mercenaries and their Masters: Warfare in Renaissance Italy* (The Bodley Head, London 1974), 27-29.

⁹ KA Fowler, ‘War and Change in Late Medieval France and England’ in KA Fowler (ed) *The Hundred Years War* (Macmillan, London 1971), 171.

¹⁰ KA Fowler, *Medieval Mercenaries I: The Great Companies* (Blackwell, Oxford 2001), 1.

In Renaissance Italy, instead of hiring free companies, the northern city-states contracted with independent commanders known as *condottieri* to supply specific numbers of troops for particular military services.¹¹ Although the *condottieri* were less problematic than the free companies in other parts of Europe, the system nonetheless caused periodic difficulties for the Italian city states, particularly during the pause in the Hundred Years War between 1360 and 1369.¹²

The use of private fighters enabled rulers to further foreign policy interests abroad without having to accept responsibility if their endeavours failed. This contributed much to rulers' political, territorial and economic goals, at little cost to themselves.¹³ Nonetheless, this international system of marketised force had serious practical shortcomings, as the ad hoc delegation of violence to freelance mercenaries led to a lack of legitimate control over force—that is, a lack of control imposed by the entity that was understood to have the authority to wage war, be it a sovereign state, a king, a prince, or even the Pope.¹⁴ The practice of privateering, whereby rulers authorised private naval actors to carry out hostilities at sea, led to organised piracy. Mercenaries' activities overseas threatened to drag their home states into foreign conflicts to which they were not a party. Empowered mercantile companies used violence against each other and even against their home states.¹⁵ In short, states and other rulers proved unable to control the independent fighters that

¹¹ Mockler, *Mercenaries* (n 7), 44.

¹² Mallett (n 8), 27.

¹³ See Thomson (n 3), 21, 32-33, 43, 84-88; D Avant, *The Market for Force: The Consequences of Privatizing Security* (CUP, Cambridge 2005), 27.

¹⁴ See Percy (n 3), 57.

¹⁵ See Thomson (n 3), 67-68.

they hired, and then simply disclaimed responsibility when their private endeavours produced negative consequences. The post-Westphalian rise of the nation state did not immediately reverse this trend, leading to a situation which Thomson describes as 'probably the closest the modern state system has come to experiencing real anarchy'.¹⁶

B. The first shift away from mercenary use: state troop exchange

Between the fifteenth and seventeenth centuries, many European rulers addressed the practical problems of control identified above by formally integrating foreign fighters into their standing armies and buying or leasing army units from other rulers. As Percy explains, '[t]he challenges posed by independent companies of mercenaries were overcome by bringing the use of force under centralized control and creating more permanent armies.'¹⁷ The practice of states officially buying and leasing troops from other states became so common that, by the eighteenth century, foreigners constituted between 25 and 60 percent of regular European standing armies.¹⁸ Accompanying this increase in official state-based troop exchange was a decrease in states' use of independent mercenaries hired on the open market. In fact, by the eighteenth century, independent mercenaries freely selling their services to the highest bidder had virtually disappeared.¹⁹ This broad shift in practice towards the formal exchange of foreign fighters within state-based

¹⁶ *ibid*, 43.

¹⁷ Percy (n 3), 83.

¹⁸ Mockler, *New Mercenaries* (n 3), 8.

¹⁹ See Percy (n 3), ch 3.

institutions eliminated many of the practical problems of control and accountability that had been associated with the independent mercenaries of earlier years.

C. The second shift away from mercenary use: citizen armies

It was not until the nineteenth century, however, that states shunned the use of foreign fighters altogether by ending the official exchange of military units with other states. The Napoleonic Wars separated the 'wars of kings' from the 'wars of people', and this led to a remarkable change in the conduct of European warfare as states began to fight wars using their own citizens exclusively. As Avant observes, '[m]ercenaries went out of style in the nineteenth century...It became common sense that armies should be staffed with citizens.'²⁰

A combination of material and ideational changes had preceded the French Revolution and laid the groundwork for the shift toward citizen armies.²¹ Material changes arose from the pressures of population growth, which required territorial expansion and organisational and technological changes in military institutions. Armies of nationalistic soldiers fighting for their country gradually came to be seen as more effective than armies of mercenaries.²² Ideational changes arose from

²⁰ D Avant, 'From Mercenaries to Citizen Armies: Explaining Change in the Practice of War' (2000) 54 (1) *Intl Organization* 41, 41.

²¹ The term 'citizen army' is sometimes used to refer to an army of conscripts and other times to an army of citizens fighting for their own country (even if they volunteer). For the purposes of this discussion, the latter definition is more important.

²² E Cohen, *Citizens and Soldiers: The Dilemmas of Military Service* (Cornell University Press, New York 1985); J Gooch, *Armies in Europe* (Routledge and Keegan Paul, London 1980); B Posen, 'Nationalism, the Mass Army, and Military Power' (1993) 18 (2) *Intl Security* 80; W McNeill, *The Pursuit of Power:*

Enlightenment ideas which motivated military and constitutional reformers to advocate citizen armies as part of a new relationship between citizens and states. No longer were the armed forces regarded solely as a 'military' institution; they were now regarded as central to the construction and consolidation of national identities. The new connection between citizen and state meant that it was increasingly considered dishonourable for states to hire foreign soldiers and, conversely, for soldiers to serve in a foreign army.²³ States also had to accept some responsibility to control private violence emanating from their territory, since citizens were increasingly considered representatives of their home state. The international law of neutrality thus developed, which encouraged states to prevent their citizens from serving in foreign armies and thereby helped to dry up the supply of private foreign fighters.²⁴

Whatever the precise explanation for the shift, the practice of hiring foreign fighters was clearly delegitimised by the nineteenth century, and states ceased buying or leasing troops from other states.²⁵ In addition, states moved to prohibit foreign recruitment on state territory, and many passed municipal neutrality laws

Technology, Armed Force, and Society since AD 1000 (Blackwell, Oxford 1982); G Rothenberg, *The Art of Warfare in the Age of Napoleon* (BT Batsford, London 1977).

²³ See Thomson (n 3); Avant, 'From Mercenaries to Citizen Armies' (n 20), 45; A Leander, 'Drafting Community: Understanding the Fate of Conscription' (2004) 30 (4) *Armed Forces & Society* 571; Mockler, *New Mercenaries* (n 3), 6-7.

²⁴ See Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 Oct 1907, entered into force 26 Jan 1910) 205 *Consol TS* 299, arts 4-6. The German delegation to the Hague Conference of 1907 put forward a proposal to take neutrality law one step further and prohibit belligerent states from accepting the service of foreigners, but that proposal was rejected: see A de Bustamante, 'The Hague Convention Concerning the Rights and Duties of Neutral Powers and Persons in Land Warfare' (1908) 2 *AJIL* 95, 100.

²⁵ Avant also highlights the importance of domestic politics and path dependency in accounting for the fact that different countries shifted toward citizen armies at different times: Avant, 'From Mercenaries to Citizen Armies' (n 20), 67. Percy argues that mercenaries were considered inherently objectionable because they fought for financial gain rather than for a cause: see Percy (n 3), ch 4-5.

prohibiting the enlistment of their citizens in foreign armies. Britain was the last major power to shun the use of foreign fighters, thereby signifying the general acceptance of a new paradigm of international warfare and paving the way for the nationalistic World Wars of the twentieth century.

D. Private force in the twentieth century

Private, profit-motivated military participation in foreign conflicts was relatively infrequent for several decades into the twentieth century, as the citizen army was the clear model for international warfare. That model came under serious challenge, however, in the Spanish Civil War (1936-1939) when a large number of foreigners known as 'volunteers' fought in the International Brigade for ideological reasons.²⁶ Like mercenaries in other conflicts, the volunteers in the Spanish Civil War were foreign to the conflict and posed serious problems of control and accountability because they were not part of the regular armed forces of any state. These factors led virtually every European government to take positive action to deter volunteer recruitment. Nonetheless, the volunteers did not attract the same degree of moral opprobrium as mercenaries had attracted in other conflicts. The international community appeared to consider profit-motivated mercenaries to be more morally problematic than ideologically-motivated volunteers, despite the fact that both

²⁶ Although commonly labelled 'volunteers', many of these individuals were in fact paid for their military service. The crucial point is that they were motivated by political ideals rather than profit.

actors were foreign to the conflicts in which they fought and operated outside formal state control.²⁷

Foreign, independent and profit-motivated fighters re-entered the spotlight during Africa's postcolonial wars of the 1960s, this time associated with the lone mercenary 'thug' who lacks morals and restraint and who is motivated solely by personal profit. The most notable examples were *Les Affreux* ('The Terrible Ones'), who included the infamous Irishman 'Mad' Mike Hoare and Frenchman Bob Denard.²⁸ Mercenaries suppressed national liberation movements and directly challenged nascent state regimes in Africa, and even fought against the UN during its operation in Congo (1960-1964),²⁹ provoking widespread disgust in the international community – a reaction which Mockler notes had become 'almost instinctive'.³⁰ In 1977 states incorporated their abhorrence for mercenaries into international humanitarian law through Article 47 of Additional Protocol I to the Geneva Conventions (Protocol I), which denies mercenaries the right to prisoner of war status.³¹ Also in 1977 the Organisation of African Unity (OAU) concluded a regional

²⁷ See AVW Thomas and AJJ Thomas, 'International Legal Aspects of the Civil War in Spain, 1936-39' in R Falk (ed) *The International Law of Civil War* (Johns Hopkins Press, Baltimore 1971); I Brownlie, 'Volunteers and the Law of War and Neutrality' (1956) 5 ICLQ 570; HC Burmester, 'The Recruitment and Use of Mercenaries in Armed Conflicts' (1978) 72 AJIL 37, 38.

²⁸ See P Singer, 'War, Profits, and the Vacuum of Law: Privatised Military Firms and International Law' (2004) 42 Colum J Transnatl L 521, 527.

²⁹ See A Cassese, 'Mercenaries: Lawful Combatants or War Criminals?' (1980) 40 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1.

³⁰ Mockler, *New Mercenaries* (n 3), 7.

³¹ First Additional Protocol to the Geneva Conventions of 12 August 1949, and Relative to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 Dec 1979) 1125 UNTS 3.

Convention which criminalised mercenarism in Africa.³² Yet despite repeatedly denouncing mercenaries during the 1960s and 1970s, the international community failed to establish a broad prohibition of mercenarism in international law.³³

The modern private security industry emerged in the early 1990s. Singer argues that three converging dynamics can largely account for the rapid growth and consolidation of the industry at that time.³⁴ First, the end of the Cold War (and, on a local level, the end of apartheid in South Africa) led states to downsize their armed forces and this released a flood of professional soldiers available for hire, many with little to offer on the open market but their military skills.³⁵ Second, this increase in the supply of military skills coincided with an increase in the demand for those skills on the private market. As superpower support diminished in various parts of the world, many weak states collapsed into civil war and embattled governments sought private outside assistance to restore and maintain security.³⁶ Non-state actors operating in these states, such as private corporations and humanitarian groups, also sought private security services to guard installations and personnel. At the same time, demand for private security came from militarily strong states which sought to develop leaner, more efficient and more flexible national forces by

³² Convention of the OAU for the Elimination of Mercenarism in Africa (adopted 3 July 1977, entered into force 22 April 1985) OAU Doc CM/433/Rev.L Annex 1.

³³ For a more detailed discussion of international mercenary law, see Chapter V-I.

³⁴ See P Singer, 'Outsourcing War' *Foreign Affairs* (1 Mar 2005); see also Avant, *Market for Force* (n 13), 30-38.

³⁵ For statistics about the downsizing of armed forces from the late 1980s to 2003, see Bonn International Center for Conversion, *Conversion Survey 2003: Global Disarmament, Demilitarization and Demobilization* (Baden-Baden, Nomos Verlagsgesellschaft, 2003).

³⁶ In some regions the number of conflict zones and the incidence of civil wars doubled: see TB Seybold, 'Major Armed Conflicts' *Stockholm International Peace Research Institute Yearbook 2000* (OUP, Oxford), 15-75.

focusing on core capabilities and outsourcing non-core services to the private sector. Kinsey notes, for example, that the growing technical complexity of military equipment created a strong need for specialist civilian contractors to provide maintenance and support, due to the difficulty of developing and retaining the relevant skills in the military.³⁷ Third, Singer argues that perhaps the most important factor leading up to the rise of the private security industry was the neo-liberal revolution that had taken place during the preceding decades – that is, the normative shift towards the marketisation of the public sphere.³⁸

The private security industry burst into the international spotlight in the mid-1990s when the South African firm Executive Outcomes (EO) and the London-based firm Sandline International³⁹ provided offensive combat services to the governments of Angola and Sierra Leone. The companies' operations proved crucial in quelling hostilities and compelling the rebels in each country to negotiate respective settlements. The impressive military capabilities of EO and Sandline, combined with their readiness to take on messy tasks of intervention which developed states and multilateral institutions were unable or unwilling to tackle, led some commentators to suggest that PMSCs could play a key role in helping to end otherwise intractable civil conflicts.⁴⁰ Supporters of the industry further proposed that PMSCs could

³⁷ C Kinsey, *Corporate Soldiers and International Security: The Rise of Private Military Companies* (Routledge, London 2006), 96-97.

³⁸ P Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (updated edn, Cornell University Press, London 2008), 49-70; see also Avant, *Market for Force* (n 13), 30-38; D Shearer, 'Private Armies and Military Intervention' (1998) *Adelphi* paper 316, 26-34.

³⁹ Sandline was registered in the Bahamas but had its head office in the UK.

⁴⁰ See, eg, --, 'We're the Good Guys These Days' *Economist* (29 Jul 1995) 32; D Brooks, 'Help for Beleaguered Peacekeepers' *Washington Post* (2 June 2003) A17; D Brooks, 'Write a Cheque, End a

undertake peacekeeping operations to assist governments of developing countries.⁴¹

Even former UN Secretary-General Kofi Annan admitted that he had seriously considered hiring a private firm to assist with the 1994 Rwandan crisis.⁴²

It soon became clear, however, that there remained strong international opposition to private warfare. As in the past, critics focused both on moral concerns about private force *per se* and on more pragmatic concerns relating to the way in which private force is utilised, particularly the lack of adequate state control over PMSCs and the lack of adequate accountability mechanisms for PMSC misconduct.⁴³ Widespread media reports describing private security contractors as 'mercenaries' or 'dogs of war' tarnished the image of PMSCs,⁴⁴ and in 1998 South Africa enacted legislation severely restricting PMSC activities in a deliberate attempt to crush the local private security industry.⁴⁵ The provision of offensive combat services became bad for business, eventually leading both EO and Sandline to dissolve and deterring

War' (2000) 6 Conflict Trends; S Mallaby, 'Think Again: Renouncing Use of Mercenaries Can Be Lethal' *Washington Post* (5 June 2001); see also Shearer (n 38).

⁴¹ See, eg, S Mallaby, 'Mercenaries Are No Altruists, But They Can Do Good' *Washington Post* (4 June 2001); S Fidler and T Catan, 'Private Military Companies Pursue the Peace Divide' *Financial Times* (23 July 2003); see also UN Commission on Human Rights, 'Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination' (20 Feb 1997) UN Doc E/CN.4/1997/24 (Mercenaries Report), 19-20.

⁴² Kofi Annan ultimately decided against this option, declaring that 'the world may not be ready to privatise peace': see Ditchley Foundation lecture (26 June 1998); see also UNHRC Executive Committee, 'Operationalizing the "Ladder of Options"' (27 June 2000) UN Doc EC/50/SCINF.4.

⁴³ See, eg, A-F Musah and JK Fayemi (eds), *Mercenaries: An African Security Dilemma* (Pluto Press London 2000); K Silverstein, *Private Warriors* (Verso, London 2000).

⁴⁴ See, eg, --, 'Papua New Guinea Hires Mercenaries' *Washington Times* (28 Feb 1997) A16; P Waugh, '"Mercenaries as Peacekeepers" Plan under Fire' *Independent* (14 Feb 2002) 8; C Adams, 'Straw to Back Controls over British Mercenaries' *Financial Times* (2 Aug 2002); P Van Niekerk, 'Africa's Diamond Dogs of War' *Observer* (13 Aug 1995) 19; K Pech and D Beresford, 'Corporate Dogs of War Grow Fat in Africa' *Guardian Weekly* (26 June 1997).

⁴⁵ Regulation of Foreign Military Assistance Act (1998) No 18912.

other companies from offering offensive combat services on the open market.⁴⁶ In the shadow of these relatively few instances of private offensive combat, a wider private security industry has burgeoned around the globe.

E. Lessons from history

The above survey has revealed two broad historical shifts against the use of foreign, independent and profit-motivated fighters. A closer examination of the reasons behind each shift illustrates how changing perceptions of the legitimacy and utility of private fighters can influence their prominence in the world system. The first historical shift took place between the fifteenth and seventeenth centuries as state rulers tried to bring independent fighters under greater state control. Whilst this shift was largely a functional attempt by states to minimise the practical problems of control and accountability posed by freelance mercenaries, it also had a normative dimension: the independent mercenaries were seen as morally problematic *per se* because they fought for their own interests rather than for the legitimate sovereign. The functional and normative objections were sometimes linked through the assumption that independent mercenaries would behave badly on the battlefield precisely because they were not attached to a just cause. The official state-based exchange of troops helped to address both the functional and normative objections by bringing freelance fighters under formal state control and, at the same time,

⁴⁶ EO dissolved in 1999 and Sandline dissolved in 2004, but most commentators agree that both companies later re-emerged in different forms: see, eg, Silverstein, *Private Warriors* (n 43), 165.

compelling them to fight for a cause that was widely perceived as legitimate.⁴⁷ The second shift in the nineteenth century saw states shun the use of foreign fighters altogether—even foreign fighters operating under tight state control—and embrace national armies made up exclusively of citizens, thus establishing the centrality of the citizen-state military relationship to the modern state system.

Throughout history, in making decisions about private force, states appear to have been influenced both by material factors and by the relevant standards of behaviour in existence at the time. These standards can be broadly labelled ‘norms’, a wide category which includes, but is not limited to, legal rules.⁴⁸ Changing perceptions of the legitimacy of private force can help to explain why states gradually stopped using private military services and why individuals gradually stopped offering such services. In other words, the associated stigma helped to discourage both the demand and supply of private force, and this contributed to the eventual abandonment of private force by the nineteenth century. In some cases, normative reservations may have deterred states from using mercenaries even when private force appeared to be the best response in functional terms. Indeed, Krasner acknowledges that ‘a utilitarian calculus alone’ struggles to explain the virtual absence of mercenaries in the present world system, since mercenaries would seem

⁴⁷ Percy (n 3), 79.

⁴⁸ There is broad agreement on the general definition of a norm: see, eg, D Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton University Press, Princeton 2001), 21; R Price, ‘A Genealogy of the Chemical Weapons Taboo’ (1995) 49 (1) *Intl Organization* 73. However, theorists disagree fundamentally on what norms do. Structural realists argue that norms have no independent effect on state behaviour, whereas the other main streams of international relations theory agree that norms can influence state behaviour but disagree as to the nature and extent of that influence: see Percy (n 3), ch 1.

to be an optimal solution for states such as the US which have material and financial resources but which lack citizens willing to fight.⁴⁹

Without understanding the influence of norms, it is difficult to understand the negative international reaction to the combat operations of EO and Sandline in the 1990s and the subsequent market shift in the private security industry away from the provision of offensive combat services.⁵⁰ Despite their apparent military successes, these companies triggered hostile reactions in their hiring states (such as PNG), their home states (South Africa and the UK) and the broader international community. The continuing stigma attached to private offensive combat ultimately led to the dissolution of EO and Sandline, and deterred other companies from offering offensive combat services on the open market. Percy argues that 'the reaction to these companies, and the evolution of the industry from one that openly promoted the use of active combat to one that actively avoids it, demonstrates that the anti-mercenary norm is still influential.'⁵¹

The next Part of this Chapter seeks to identify the primary components of this anti-mercenary norm by identifying the main reasons *why* private force was considered morally objectionable in the past. It then discusses the extent to which those past objections have arisen in relation to modern PMSCs.

⁴⁹ Krasner is a leading structural realist: see SD Krasner, 'Sovereignty: An Institutional Perspective' in JA Caporaso (ed) *The Elusive State: International and Comparative Perspectives* (Sage, Newbury Park 1989), 92.

⁵⁰ For a detailed discussion of the influence of norms on the modern private security industry, see Percy (n 3), ch 7.

⁵¹ *ibid*, 207.

II. Objections to private force, mercenaries & modern PMSCs

Why do we care if an individual fights for money? Why is it a problem if fighters are foreign to the conflict or if they are not part of the armed forces of a state? The various definitions (both legal and non-legal) of a mercenary provide some clues as to the characteristics that render these individuals objectionable. These definitions usually include at least two basic criteria: that mercenaries are foreign or external to the conflict in which they fight, and that mercenaries are motivated to fight primarily by financial gain.⁵² Some definitions add a third criterion that mercenaries are not part of the armed forces of any state.⁵³ These criteria are not merely a checklist for assessing the status of a particular fighter; they are in fact indicative of deeper objections to private force. Three such objections are particularly common: first, private military actors do not fight for an appropriate cause; second, they undermine democracy by fighting outside the citizen-state military relationship; and third, they are not subject to adequate control and accountability mechanisms. Whereas the first and second objections stem from the *status* of private fighters—that is, what these fighters *are*—the third objection stems from the *activities* of private fighters—that is, what these fighters actually *do* on the battlefield.

There are echoes of each of these objections in contemporary private security literature. Indeed, despite considerable investment in public relations, modern

⁵² For non-legal definitions of a mercenary see, eg, Burmester (n 27), 37; Thomson (n 3), 26; Musah and Fayemi (eds) (n 43), 16; Singer, *Corporate Warriors* (n 38), 41; Mockler, *Mercenaries* (n 7), ch 1; 'Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries' (June 1982) UN Doc A/37/43. For the international legal definition of a mercenary, see Protocol I, art 47.

⁵³ See, eg, FJ Hampson, 'Mercenaries: Diagnosis Before Proscription' (1991) 3 Neth YBIL 1, 5-6; Protocol I, art 47(e).

PMSCs have been dogged by accusations that they are merely mercenaries packaged in corporate form. PMSCs are fully aware that perceptions of their legitimacy are crucial to their commercial success, and they have worked hard to distance themselves from the mercenaries of past eras. They emphasise that they do not provide offensive combat services, that they work only for 'legitimate' clients such as states, NGOs and registered corporations, and that they work alongside and in cooperation with national armed forces. Moreover, many PMSCs actively encourage greater regulation to enhance control and accountability, knowing that such regulation may improve business prospects.⁵⁴ Notwithstanding these efforts, the same basic objections have continued to impede the industry's quest to achieve full public acceptance. The next three Sections consider these three objections in turn.

A. Lack of attachment to a cause

The principal 'status' objection to private force stems from the idea that taking human life in warfare is only morally justified by some attachment to a cause bigger than oneself.⁵⁵ As the UK government explained in its 2002 Green Paper, 'there is a natural repugnance towards those who kill (or help kill) for money...To encourage such activity seems contrary both to our values and to the way in which we order

⁵⁴ Conversely, some opponents of the industry have argued that regulation would bestow unwarranted legitimacy on PMSCs: see, eg, Musah and Fayemi (eds) (n 43); Campaign Against Arms Trade, *Comments on the Green Paper on Private Military Companies* (August 2002). On regulation more generally, see J Cockayne and others, *Beyond Market Forces: Regulating the Global Security Industry* (International Peace Institute, New York 2009).

⁵⁵ See S Percy, 'Morality and Regulation' in S Chesterman and C Lehnardt (eds) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP, Oxford 2007), 14-18. For a discussion of the difference between justifications and excuses in this context, see T Lynch and AJ Walsh, 'The Good Mercenary' (2000) 8 (2) *J Political Philosophy* 133, 139.

society.⁵⁶ This objection is reflected in most definitions of a mercenary through the requirement that the individual be motivated to fight principally by financial gain. National soldiers are assumed to be motivated by patriotism rather than personal profit (although this assumption is perhaps questionable in an era when many soldiers join the army at least in part for the salary and benefits), and they are therefore assumed to be fighting for a cause bigger than themselves. Other participants in the conflict might be motivated by the ideological, political or religious goals of the group for which they fight, or they might be peacekeepers fighting for the goals and values of the UN or a regional body such as the African Union. Morally, it is generally considered more acceptable to fight for such causes than to fight for money. This provides some clues as to why the international community reacted less vigorously to the ideologically-motivated foreign volunteers who fought in the Spanish Civil War than to the profit-motivated mercenaries who fought in postcolonial Africa. The volunteers were generally considered morally superior to the mercenaries because they were motivated to fight for a cause larger than themselves, even though both categories of fighters caused serious practical problems of control and accountability.⁵⁷

The notion that individuals should fight for a cause also helps to explain why well-established and permanently integrated foreign forces, such as the French

⁵⁶ UK Foreign Commonwealth Office Green Paper, 'Private Military Companies: Options for Regulation' (Feb 2002), [53].

⁵⁷ Although some commentators point out the unsatisfactory nature of this position, eg Lynch and Walsh note that there is little proof that 'organized violence centred on strong group identification is in itself morally better': see Lynch and Walsh (n 55), 134; see also Percy, *Mercenaries: History of a Norm* (n 3), 54-57.

Foreign Legion⁵⁸ and the Brigade of Gurkhas in the British army,⁵⁹ are generally considered morally superior to mercenaries. Indeed, during discussions at the Diplomatic Conference which led to the creation of Protocol I, states made it clear that they did not consider permanently incorporated foreigners to be mercenaries.⁶⁰ Far from roaming around the world fighting for foreign clients on an ad hoc basis, French Legionnaires and Gurkhas are assumed to have permanently adopted the goals and values of France and Britain as their own. They are long-term employees of the state regardless of whether the state is at war, and in the case of Legionnaires after a certain period of service they are offered French citizenship.⁶¹ Thus, although they may not be citizens of a party to the conflict, these fighters are not 'external' in the same way as a freelance foreign fighter who is recruited especially to fight in a particular conflict.⁶²

In addition to arguing that individuals who fight for money rather than a cause are morally inferior *per se*, some commentators object to mercenaries' lack of a cause on a more instrumental level. According to this argument, financially-motivated fighters might be more likely to misbehave than national soldiers

⁵⁸ The French Foreign Legion was established in 1831 as a unit of foreign fighters, since foreigners were forbidden to enlist in the French Army after the July Revolution of 1830. Today, the Legion comprises around 60% French citizens, and continues to play an important role in the French army as an elite military unit: see <<http://www.legion-etrangere.com>> (accessed 10 Aug 2009); D Porch, *The French Foreign Legion: A Complete History* (Macmillan, London 1991).

⁵⁹ The Brigade of Gurkhas is the collective term for British Army units that are composed of Nepalese soldiers: see <http://www.army.mod.uk/brigade_of_gurkhas/index.htm> (accessed 10 Aug 2009); J Parker, *The Gurkhas: The Inside Story of the World's Most Feared Soldiers* (Headline, London 2005).

⁶⁰ See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1976)* (1978), [99]-[100].

⁶¹ See Thomson (n 3), 91; Percy, *Mercenaries: History of a Norm* (n 3), 61. Members of the Gurkhas and the French Foreign Legion are also considered more acceptable because they operate under tighter state control than freelance fighters: see Section C below.

⁶² See Burmester (n 27), 38; Musah and Fayemi (eds) (n 43), 16.

precisely because the former are not motivated to fight for a cause. Other commentators argue, however, that there is no reason to assume that a financially-motivated fighter is more likely to misbehave than a patriotically-motivated one; in fact, in some cases the reverse might be true.⁶³ In states engaged in civil wars, foreign PMSC personnel might be more professional than local soldiers and might encourage proper behaviour in local forces.⁶⁴ Sierra Leone's national army in the 1990s, for example, consisted largely of untrained, underpaid and underage soldiers, many addicted to drugs and alcohol, and some even known to moonlight as rebel troops.⁶⁵

The objection that it is morally wrong to kill or fight for money also arises in relation to modern PMSCs which, as private corporations, are assumed to be motivated by profit rather than by a cause. Whilst this objection is clearly pertinent to the offensive combat PMSCs of the 1990s, it may not apply as strongly to PMSCs that provide only peripheral support services (such as cooking food for soldiers) or security services that are not directly linked to ongoing hostilities. In light of these considerations, it is perhaps unsurprising that industry representatives today promote themselves as 'security' contractors rather than 'military' contractors. The latter term tends to evoke images of killing on the battlefield, which are morally

⁶³ See, eg, Y Sandoz, 'Private Security and International Law' in J Cilliers and P Mason (eds) *Peace, Profit, or Plunder: the Privatisation of Security in War-Torn African Societies* (Institute for Security Studies, Pretoria 1999), 210.

⁶⁴ Avant, *Market for Force* (n 13), 60-61; JC Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International law, and the New World Disorder' (1998) 34 *Stan J Intl L* 75, 150-152.

⁶⁵ A Venter, 'Sierra Leone's Mercenary War Battle for the Diamond Fields' (1995) 28 *Intl Defence Rev* 65, 67; E Rubin, 'An Army of One's Own' (Feb 1997) *Harper's Magazine* 44, 49.

problematic when linked to a profit-driven corporation rather than a national soldier fighting for his or her country.⁶⁶

B. Fighting outside the citizen-state military relationship

The second common 'status' objection to mercenaries is that they might undermine democracy because they fight outside the context of the citizen-state relationship.⁶⁷ According to this argument, which can be traced at least as far back as Machiavelli, the citizen army may constrain the state from going to war. Conversely, the use of foreign mercenaries may impede the development of a healthy relationship between citizen and state, and may even corrupt the citizens themselves if mercenaries fight without regard for the public good. Thus, in order to prevent tyranny the army should be recruited from and at one with the people.⁶⁸ These ideas were central to the nineteenth century shift towards the exclusive use of citizen armies, and they are reflected in most definitions of a mercenary through the requirement that the individual be foreign to the conflict in which he or she fights. In a related objection, private fighters are often said to threaten democratic control over force because they are not part of the national armed forces of the hiring state, since states' democratic mechanisms to control warfare are generally directed toward their national militaries. This objection is reflected in many definitions of a

⁶⁶ See T Pfanner, 'Interview with Andrew Bearpark' (2006) 88 (863) *Intl Rev Red Cross* 449, 451; <<http://www.bapsc.org.uk>> (accessed 16 May 2009); see also the discussion of terminology below in Part IV.

⁶⁷ See Percy, 'Morality and Regulation' (n 55), 18-22.

⁶⁸ See K Grundy, 'On Machiavelli and the Mercenaries' (1968) 6 (3) *J Modern African Studies* 295.

mercenary through the requirement that the individual not be part of the armed forces of a state party to the conflict.

The objection to individuals fighting outside the democratic citizen-state military relationship might help to explain why members of the French Foreign Legion and Gurkhas are often regarded with some suspicion, even though they are integrated into the French and British forces and they are assumed to have adopted the goals of France and Britain as their own. Equally, this argument might help to explain why the Netherlands abandoned its own foreign legion known as the 'KNIL' (*Koninklijk Nederlandsch-Indische Leger* or Royal Netherlands-Indian Army), which was created in 1830 around the same time as the French Legion but which ceased recruiting foreigners (with the exception of Dutch colonials) around 1900.

Various permutations of these arguments are evident in contemporary literature on the private security industry. For example, the 2002 UK Green Paper on Private Military Companies argues that '[i]n a democracy it seems natural that the state should be defended by its own citizens since it is their state'.⁶⁹ During the 1990s, failing governments in Sierra Leone, Angola and Papua New Guinea hired foreign PMSCs to assist in fighting civil wars, and many commentators feared that this might threaten indigenous police and military forces which are crucial to the social contract.⁷⁰ Both Avant and Singer highlight the reduction of democratic control over

⁶⁹ UK Green Paper (n 56), [53].

⁷⁰ See, eg, *ibid*, [46]–[49]; Mercenaries Report (n 41); A Leander, 'The Market for Force and Public Security: The Destabilizing Consequences of Private Military Companies' (2005) 42 *J Peace Research*

war, arguing that that the use of PMSCs instead of national militaries may make it easier for states to go to war and may hide the true costs of war from the public.⁷¹ Indeed, it is easier to sustain an unpopular war when it is private contractors who are coming home in body bags rather than national troops.⁷² Singer also points out that PMSCs can seriously disrupt the civil-military balance and thus threaten domestic stability.⁷³ In extreme cases PMSCs may even act as foreign policy proxies for governments wishing to intervene in foreign conflicts unofficially, just as the American firm MPRI 'undoubtedly functioned as an instrument of US policy' in the Balkans conflict of the 1990s.⁷⁴

C. Fighting outside state control

In addition to objections based on the status of private fighters as morally problematic *per se*, critics often raise more pragmatic objections to the *activities* of these individuals in armed conflict. One contention is that private fighters might be more likely than national soldiers to desert or otherwise to misbehave in the field.⁷⁵ This is sometimes linked to the first 'status' objection outlined above, in the sense that private fighters might misbehave precisely because they are not attached to a

605, 615-618; Caroline Holmquist, 'Private Security Companies: The Case for Regulation' (Stockholm International Policy Research Institute, Stockholm 2005), 15-17.

⁷¹ Singer, *Corporate Warriors* (n 38), 206-215; Avant, *Market for Force* (n 13), 155-156.

⁷² C Walker and D Whyte, 'Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom' (2005) 54 ICLQ 651.

⁷³ See Singer, *Corporate Warriors* (n 38), 191-205.

⁷⁴ UK Green Paper (n 56), [50]; see also Silverstein, *Private Warriors* (n 43), 145; Zarate (n 64), 148; Singer, *Corporate Warriors* (n 38), 48. MPRI's operations in the Balkans are discussed in Part IV of this Chapter.

⁷⁵ See, eg, David Isenberg, 'A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq' (British-American Security Information Council Research Report, Sept 2004), 40-50.

cause. Yet there is also a more practical explanation for this objection: private fighters are not subject to the same mechanisms of state control and accountability as national soldiers. The historical overview in Part I illustrated how the lack of legitimate control over independent mercenaries caused serious practical problems in the past, eventually leading states to incorporate foreign fighters into their national armies. In a similar vein, contemporary commentators have raised concerns about the lack of hiring state control, home state control, and general transparency in the private security industry today.

1 The hiring state's lack of control over PMSC activities

When states outsource military and security tasks to PMSCs, the screening, selection and training of individual contractors shift into the hands of the firm, together with the locus of judgment on how operations are carried out on the ground. Commercial subcontracting practices exacerbate this loss of hiring state control. Individuals can work as independent contractors for PMSCs, which are themselves subcontractors of larger companies, which are subcontractors of prime contractors, which may have been hired by a government agency. These convoluted relationships often mean that the government has no real control over the PMSC personnel who are performing military and security tasks on its behalf.⁷⁶

The hiring state's lack of control over PMSCs can lead to inadequate screening and training standards for contractors. For example, following the 2003 invasion of Iraq, the US government contracted the American firm CACI to provide a number of

⁷⁶ *ibid*, 16.

interrogators to work at Abu Ghraib prison, as well as contracting the firm Titan to provide interpreters. An official report into the Abu Ghraib prisoner abuse scandal of 2003-2004 found that employees of both CACI and Titan had participated in the abuse.⁷⁷ It further emerged that approximately thirty-five percent of the contract interrogators working at the prison lacked formal military training as interrogators, and their hiring firm CACI had failed to conduct adequate background investigations prior to their employment.⁷⁸ More recently, serious deficiencies in contractor qualifications and training have surfaced in relation to ArmorGroup security guards hired by the US in Afghanistan and Iraq.⁷⁹ A June 2009 US Senate report on the ArmorGroup contract to guard the American Embassy in Kabul revealed that a large proportion of the guards could not speak English and had no security training or experience, leaving the US embassy in Kabul vulnerable to a possible attack.⁸⁰ Investigations into ArmorGroup contractors working at the Embassy also revealed numerous incidents of sexual misconduct, which one former company manager attributed to a failure to screen potential employees.⁸¹ In an unrelated incident in

⁷⁷ GR Fay, 'Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade' (Aug 2004) (Fay Report). A class action against the companies under the Alien Torts Claims Act is ongoing: see *Saleh v Titan* (US District Court-DC, 6 Nov 2007) Civil Action No 05-1165.

⁷⁸ See Fay Report (n 77); SL Schooner, 'Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government' (2005) 16 *Stanford L & Pol Rev* 549, 556-557; G Gibson and S Shane, 'Contractors Act as Interrogators' *Baltimore Sun* (4 May 2004); J Borger, 'Cooks and Drivers were Working As Interrogators' *Guardian* (7 May 2004).

⁷⁹ ArmorGroup was acquired by the Danish company G4S plc in April 2008: see <<http://www.armorgroup.com>> and <<http://www.g4s.com>> (accessed 19 Sept 2009).

⁸⁰ Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Contracting Oversight, 'New Information about the Guard Force Contract at the US Embassy in Kabul' (June 2009), available at <<http://mccaskill.senate.gov/pdf/061009/StaffAnalysis.pdf>> (accessed 14 Sept 2009).

⁸¹ Project on Government Oversight Letter to Secretary of State Hillary Clinton regarding US Embassy in Kabul (1 Sept 2009), available at <<http://www.pogo.org/pogo-files/letters/contract-oversight/cogp-20090901.html>> (accessed 13 Sept 2009); see also --, 'Ex-Managers: Security Firm Cut Corners at Embassy' *New York Times* (11 Sept 2009). A number of company guards and supervisors have resigned or been fired in connection with the investigations: see D Alexander, 'US Says 16 Guards

Baghdad in August 2009, an ArmorGroup security guard allegedly shot and killed two fellow guards and wounded at least one Iraqi. It subsequently emerged that the guard had a criminal record and was described by one security guard who worked with him as 'a walking time-bomb', raising serious concerns about the company's vetting process.⁸²

The reduction in hiring state control over PMSC activities can also create serious practical problems on the ground. PMSC personnel fall outside the military chain of command, and this can make it difficult to sort out lines of authority and communication. For PMSCs hired by the US, a civilian contracting officer is designated to administer and monitor the contract in the field, but he or she 'is not always colocated with the military commander or the contractor personnel and may not even be within the theater of operations'.⁸³ Moreover, the contracting officer is authorised only to monitor the details of contractual performance, and cannot modify the scope or size of the contract.⁸⁴ This reflects a broader problem in that the contractual instrument provides little flexibility to adjust to changes in government objectives or practical conditions on the ground. This rigidity can pose a constant challenge for the hiring state as it seeks to maintain effective operations in a fluid conflict environment.⁸⁵

Removed In Afghan Embassy Scandal' *New York Times* (10 Sept 2009); A Cole, 'Firm Fires US Embassy Guards in Kabul' *Wall Street Journal* (5 Sept 2009).

⁸² See --, 'Briton held in Iraq over shooting' *BBC News* (10 Aug 2009); D Haynes and R Ford, 'Briton Facing Iraq Murder Trial on Probation for Gun Offence' (13 Aug 2009).

⁸³ US Congressional Budget Office, 'Contractors' Support of US Operations in Iraq' (Aug 2008), available at <<http://www.cbo.gov/ftpdocs/96xx/doc9688/08-12-IraqContractors.pdf>> (accessed 14 Sept 2009), 20 (references omitted).

⁸⁴ *ibid.*

⁸⁵ See Avant, *Market for Force* (n 13), 85.

2 The home state's lack of control over PMSC activities

In addition to reducing the hiring state's control over its military and security activities, the privatisation of security may reduce the ability of the PMSC's home state to control violence that emanates from its territory. This is particularly pertinent to states such as the US and the UK, in which most of the major PMSCs are based or incorporated. In many cases when a firm provides military services to a foreign actor, it shares skills learned in its home state's military in a transaction that its home state might want to control.⁸⁶ Furthermore, if the PMSC wishes to provide services to one side in a foreign civil war, it must make a complex and highly political decision as to which party is the 'legitimate' government and is therefore entitled to request outside military assistance. The home state of a PMSC might prefer to handle such decisions itself in deciding whether to provide official military assistance.⁸⁷

Another potential concern for the home state of a PMSC is that the company's behaviour overseas may affect the state's reputation. Although most companies claim that they work only for legitimate clients such as governments, international organisations, NGOs and corporations, there have been reports of firms working for dictatorships, rebel groups, drug cartels, and even radical jihadist groups.⁸⁸ In extreme cases PMSC behaviour overseas could even implicate the home state in foreign conflicts to which it is not a party, particularly if other states interpret the

⁸⁶ See *ibid*, 143.

⁸⁷ See M Malan and J Cilliers, *Mercenaries and Mischief: The Regulation of Foreign Military Assistance Bill* (Institute for Security Studies Occasional Paper No 25, Johannesburg, 1997).

⁸⁸ See Singer, *Corporate Warriors* (n 38), 170, 180-182; Silverstein, *Private Warriors* (n 43).

company's behaviour to be effectively an act of the home state. There are reports from the seventeenth and eighteenth centuries of states being implicated in conflicts by virtue of private violence emanating from their territory.⁸⁹ In more recent times, some members of the British government were worried that the involvement of British firm Gurkha Security Guards in Sierra Leone in 1995 might be interpreted as British intervention.⁹⁰ There are also historical examples of empowered private actors using violence against each other and against other states with which their home states were at peace. Thomson cites one extreme case in which the British East India Company actually blockaded British troops in relation to a dispute over Indian territory.⁹¹

Close links between PMSCs and their home governments generally increase the likelihood that firms will act in line with international norms and with the national interest of their home state. In addition, states that are themselves significant consumers of PMSC services can provide strong market incentives for local companies to conform to foreign policy objectives. In the US, the same firms that sell military and security services to foreign governments also sell services to the US government – and the US government is an excellent customer.⁹² The desire to preserve their government contracts gives US firms a strong market incentive to

⁸⁹ See Thomson (n 3), 43-68.

⁹⁰ See A Vines, 'Gurkhas and the Private Security Business in Africa' in J Cilliers and P Mason (eds) *Peace, Profit, or Plunder: the Privatisation of Security in War-Torn African Societies* (Institute for International Studies, Pretoria 1999), 128-130.

⁹¹ Thomson (n 3), 67.

⁹² In 2001, the Pentagon's contracted workforce exceeded its civilian employees for the first time: see generally Avant, *Market for Force* (n 13), 143-177.

conform to US foreign policy, even when working overseas for foreign actors.⁹³ US regulations supplement this market control. In other states, however, in the absence of significant consumption and formal regulation of the local private security industry, the risk remains that company actions overseas may conflict with national interests. The scandal surrounding the actions of British company Sandline International in Sierra Leone, discussed below in Part IV, illustrates this danger.

3 General lack of transparency in the private security industry

More generally, a serious concern about the private security industry is the lack of transparency. In many cases there is no ongoing duty of disclosure on firms to divulge information about their operational activities, and corporate confidentiality privileges often exempt company documents from freedom of information laws.⁹⁴ Estimates of the cost of the industry and the number of contractors working in a particular conflict can vary widely. This lack of information impedes effective oversight of the industry and diminishes states' capacity to make informed and sound decisions about private force.⁹⁵ Private security contracts have implications which go far beyond those of other transactions, as they may entail the use of violence or they may impact upon stability within a country or a region. The nature of the private security industry therefore demands a significantly *higher* level of transparency in order to facilitate a greater degree of accountability.

⁹³ Zarate (n 64), 148; Avant, *Market for Force* (n 13), 146-157.

⁹⁴ See Singer, *Corporate Warriors* (n 38), 214.

⁹⁵ See S Percy, 'Regulating the Private Security Industry' (2006) Adelphi Paper No 384, 21.

Historically, mercenaries were considered less threatening when placed under state control. As in the past, contemporary objections to private security that are based on the lack of control and accountability might be resolved, or at least diminished, through greater state regulation aimed at controlling PMSC activities. In contrast, regulation cannot easily resolve the objections discussed above in Sections A and B, which stem from the *status* of PMSCs as morally problematic actors *per se*.⁹⁶

III. The spectrum of military & security activity today

A broad spectrum of actors may be involved in the supply of military and security services today, and these actors tend to attract varying degrees of social stigma. Mercenaries lie at one end of the spectrum, bearing the strongest social stigma, and national soldiers lie at the other end of the spectrum, as the most legitimate military actors in the international system. This Part locates modern PMSCs on the spectrum of military/security service provision by reference to other actors such as mercenaries and national soldiers. This contextual analysis is particularly important given that, unlike the terms ‘mercenary’ and ‘armed forces’, the term ‘private military and security company’ and its variants⁹⁷ have no *legal* definition, and the designation of a particular entity as a PMSC carries no legal consequences in itself. The outer contours of the PMSC category are largely shaped by what PMSCs are *not* rather than what they are; most PMSC personnel are not mercenaries within the

⁹⁶ See Percy, 'Morality and Regulation' (n 55), 23.

⁹⁷ Some commentators label all PMSCs ‘private military companies’ (PMCs), whilst others label all PMSCs ‘private security companies’ (PSCs); still others distinguish between PMCs and PSCs. For a discussion of terminology, see Part IV of this Chapter.

international legal definition (although some PMSC personnel may fall within non-legal conceptions of a mercenary), they are not volunteers, they are not soldiers working permanently for another state, and they are not national soldiers. Accordingly, this Part delineates the PMSC category by reference to the broader spectrum of military and security activity.

A. Mercenaries

Mercenaries lie at the far-end of the spectrum as they generally bear the strongest social stigma. These individuals constituted a major problem in the African wars of decolonisation, but their activities today are more sporadic and limited. As discussed above in Part II, whilst there is some variation between the different definitions of a mercenary, there is general agreement that the term in its ordinary, non-legal sense refers to a foreign, independent and profit-motivated fighter.

Despite broad agreement on the general characteristics of a mercenary, it has proved difficult for states to translate this common understanding into a workable *legal* definition. Article 47 of Protocol I sets out the accepted international definition of 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.

Although this provision captures the norm against mercenary use, discussed in Part II of this Chapter, it constitutes a flawed legal definition as it creates a series of loopholes by which individuals can exclude themselves from the mercenary classification with relative ease.⁹⁸ Chapter V of this Thesis examines this definition in detail and considers how it applies to modern PMSC personnel.⁹⁹ One of the principal defects of the definition is that it focuses on the *motivation* of the individual; it identifies mercenaries not by reference to *what* they do, but *why* they do it. Yet human motives are highly complex. In many cases (including national soldiers) monetary reward will be one of several factors motivating an individual to take part in a conflict, but it will rarely be the sole or even the ‘essential’ motivation, and in any event motivation can be extremely difficult to prove. Paragraphs (d) and (e) create further loopholes: where a state hires a foreign individual to fight in a conflict it can easily circumvent paragraph (d) by granting the individual citizenship, or it can circumvent paragraph (e) by temporarily enrolling the individual in its national military forces. The combination of these factors has led to a general consensus that any mercenary who cannot exclude himself from this definition ‘deserves to be shot – and his lawyer with [him].’¹⁰⁰ Thus, many of the individuals who qualify as mercenaries as the term is commonly understood in ordinary parlance—as foreign, independent fighters who are motivated by profit—would not qualify as mercenaries under the strict legal definition in Article 47 of Protocol I.

⁹⁸ See S Percy, 'Mercenaries: Strong Norm, Weak Law' (2008) 61 (2) Intl Organization 367.

⁹⁹ See Chapter V-I.

¹⁰⁰ G Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (Weidenfield & Nicholson Ltd, London 1980), 375, n 83; see also Hampson (n 53), 29; Singer, 'War, Profits' (n 28), 531; E Kwakwa, 'The Current Status of Mercenaries in the Law of Armed Conflict' (1990) 14 (1) Hastings Intl & Comp L Rev 67, 73-74.

B. Private military & security companies

Further along the continuum of private force lies the broad category of 'private military and security companies'. This category encompasses a wide range of firms providing services intricately linked to armed conflict, including Executive Outcomes providing combat-ready battalions in the 1990s, DynCorp providing military training and advice, Blackwater providing armed security, and Brown & Roots providing military support. Some PMSCs also work outside the context of armed conflict, but such activities fall outside the scope of this Thesis.

Many modern PMSC personnel cannot reasonably be described as mercenaries, particularly those individuals who perform military support services like preparing food or doing laundry. Nonetheless, there is undoubtedly some overlap between the PMSC and mercenary categories, and many of the same objections tend to arise in relation to both. A small number of PMSC personnel would probably fall within the legal definition of a mercenary, as discussed in Chapter V of this Thesis,¹⁰¹ and a larger number would probably qualify as mercenaries as the term is generally understood in common parlance.

That said, it is important to highlight certain differences between those PMSC personnel who might reasonably be labelled mercenaries, on the one hand, and the independent mercenaries who fought in postcolonial Africa, on the other. First, unlike freelance mercenaries soliciting business in seedy African bars, modern

¹⁰¹ See Chapter V-I.

PMSCs are registered corporations which operate above ground and which are bound to their home state in various official and unofficial ways.¹⁰² For Zarate, this is crucial since 'state accountability is the key to distinguishing mercenaries from other combatants'.¹⁰³ The second commonly cited difference between PMSC personnel and mercenaries is the legitimacy of their clients. Whereas modern PMSCs claim to work only for legitimate clients such as governments, NGOs, corporations and the UN, '[m]ercenaries will sell their services to the highest bidder and are usually unconcerned about the nature of their clientele'.¹⁰⁴ The mercenaries of the 1960s and 1970s worked largely for ex-colonial powers in Africa, often against national liberation movements and sometimes against other developing countries; essentially, they represented racist, exploitative, colonial interests.¹⁰⁵ The third key distinguishing feature applies only to the combat PMSC personnel of the 1990s: those individuals generally enlisted into their client state's armed forces, and this helped to increase state control and accountability.¹⁰⁶

Whatever the precise degree of overlap between mercenaries and PMSCs, it is clear that the latter category as a whole lies further along the spectrum of military/security activity as it is generally considered more legitimate than the former.

¹⁰² See Percy, *Mercenaries: History of a Norm* (n 3), ch 2.

¹⁰³ Zarate (n 64), 124-125.

¹⁰⁴ Percy, 'Morality and Regulation' (n 55), 14.

¹⁰⁵ See Cassese, (n 29).

¹⁰⁶ See S Dinnen, R May and A Regan (eds), *Challenging the State: The Sandline Affair in Papua New Guinea* (National Centre for Development Studies Canberra 1997); UK Green Paper (n 56), [6]; Zarate (n 64), 124.

C. Volunteers

The next category along the spectrum consists of foreign fighters known as ‘volunteers’ who fight for political, religious or ideological reasons rather than for monetary reward. Perhaps the most well-known actors in this category are the foreigners who fought in the Spanish Civil War for ideological reasons.¹⁰⁷ More recent examples include the foreigners who fought in the *mujahedeen* in Afghanistan and those who fought with the Bosnian forces in the Balkan conflict. Volunteers have generally borne less social stigma than mercenaries because they are motivated by a cause rather than by money, notwithstanding the fact that volunteers (like mercenaries) are external to the conflicts in which they fight and pose problems of control and accountability because they are not permanently integrated into the armed forces of a state party.¹⁰⁸

D. National soldiers integrated into a foreign force

Still further along the spectrum lie individual soldiers who are foreign to a conflict but who are under state control permanently or almost permanently. This category includes members of the French Foreign Legion and the Gurkhas, who are permanently integrated into the armed forces of France and Britain respectively, as well as national soldiers who are on secondment to another force.¹⁰⁹ Although

¹⁰⁷ The Mercenaries Report refers to voluntary service as ‘altruistic voluntary enlistment’, which cannot be considered criminal: see Mercenaries Report (n 41), [75].

¹⁰⁸ Burmester (n 27), 37-41; Thomas and Thomas (n 27); Brownlie (n 27).

¹⁰⁹ During the discussions of the 1970s about mercenaries and international law, states made it clear that they did not consider permanently incorporated soldiers such as the French Foreign Legion and

these actors are not citizens of a state party to the conflict, they are generally regarded as more legitimate than mercenaries. They are assumed to have permanently adopted their employer state's goals and values as their own; indeed, they are employees of the state regardless of whether the state is at war, and after a certain period of service Legionnaires are even offered French citizenship.¹¹⁰ Moreover, compared with volunteers fighting overseas on an ad hoc basis or joining the forces of another state for the duration of a particular conflict, French Legionnaires and Gurkhas operate under tighter and more long-term state control. These permanently integrated foreign fighters can still be controversial, however, as demonstrated in 1982 when Argentina protested to the government of Nepal that a battalion of Gurkha 'mercenaries' was being sent to the Seychelles.¹¹¹

E. National soldiers fighting for their home state

Finally, national soldiers lie at the far end of the spectrum as the most legitimate military actors in international relations today. National soldiers are presumed to be motivated by some sense of patriotism rather than by profit, they fight in the context of the citizen-state military relationship, and they are subject to tight control and accountability mechanisms.

the Gurkhas to be mercenaries: see, eg, *Official Records of the Diplomatic Conference, Geneva (1974-1976)* (n 60), [99]-[100].

¹¹⁰ Thomson (n 3), 91.

¹¹¹ See G Marston, 'UK Materials in International Law' (1982) 53 BYBIL 519, 418.

Having positioned modern PMSCs in the broader military and security context, the next Part critically examines the nature and activities of PMSCs themselves. This provides the final element of background to contextualise the legal analysis in the remainder of this Thesis.

IV. What are PMSCs and what do they do?

A. Terminology

Within the modern private security industry there has been an ongoing debate about terminology, which is linked both to functional considerations about the companies' activities and to normative considerations about the legitimacy of private force *per se*. This Section identifies and explains the principal terminological approaches evident in the literature and outlines the reasons for the approach adopted in this Thesis. When considering the question of terminology, it is important to bear in mind that the precise label given to a company has no legal consequences in itself, and it is preferable to focus upon the substantive analysis of the company's activities in armed conflict.

Some commentators divide the private security sector into two categories of private military companies (PMCs) and private security companies (PSCs).¹¹² This division is problematic, however, as there is no clear definition of the two terms and the line between them is unclear. Companies often perform different services under

¹¹² See, eg, UK Green Paper (n 56); Percy, *Mercenaries: History of a Norm* (n 3); F Schreier and M Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies* (Centre for the Democratic Control of Armed Forces, Geneva 2005).

different contracts. DynCorp and Aegis, for example, provided protective security services in Afghanistan as well as military advisory services in Liberia.¹¹³ Another difficulty with the PMC/PSC division is that in low-intensity conflicts lacking a clear frontline (such as Iraq and Colombia), it can be extremely difficult to distinguish between military and security actors. Private contractors providing mere 'security' can have a significant impact on the local conflict and can be exposed to combat threats.

For these reasons and for general convenience it is preferable to adopt a single term to encompass the entire industry. Some commentators and virtually all industry representatives use the term PSCs to encompass the entire industry.¹¹⁴

Andrew Bearpark, director general of the British Association of Private Security Companies explains:

In the UK, we refer to private security companies rather than private military companies. It better expresses the wide range of services companies are offering, but it also obviously has to do with cultural reservations with the term private military companies, which may imply that services at the front lines in conflicts are included.¹¹⁵

Yet the term PSCs by itself does not adequately convey the military nature of many company services and the fact that even 'security' operations are conducted in the context of an armed conflict, where contractors can easily be drawn into combat.

¹¹³ See K O'Brien, 'What Should and What Should Not Be Regulated?' in Chesterman and Lehardt (eds) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP, Oxford 2007), 38-39.

¹¹⁴ See, eg, Avant, *Market for Force* (n 13); Holmquist (n 70); C Spearin, 'Private Security Companies and Humanitarians: A Corporate Solution to Securing Humanitarian Spaces?' (2001) 8 (1) *Intl Peacekeeping* 20.

¹¹⁵ Pfanner (n 66), 451; see also <<http://www.bapsc.org.uk>> (accessed 16 May 2009).

For these reasons, some commentators prefer to use the term PMCs to encompass the entire industry. The editors of a leading 2007 book explain that they adopt this approach because

semantically the term “military” better captures the nature of these services as it points to the qualitative difference between firms operating in conflict zones in a military environment and “security firms” that primarily guard premises in a stable environment.¹¹⁶

This approach is also unsatisfactory, however, as the term PMCs by itself does not adequately convey the full range of company services and the fact that companies often work for civilian clients instead of militaries.

The final terminological strand in the literature represents a combination of the above approaches. The International Committee of the Red Cross (ICRC) uses the single term ‘private military and security companies’ (PMSCs) to encompass the entire industry but does not distinguish between companies within that category.¹¹⁷ This reflects the traditional definitional approach of international humanitarian law, which focuses not on the label given to a particular group but rather on its actual activities, objectives and internal structures. The UN 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, which was established in 2005 to replace the prior mandate of the UN Special Rapporteur on the use of mercenaries, also adopts

¹¹⁶ S Chesterman and C Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP Oxford 2007), 3; but many of the contributing authors use the term PSCs in their other publications: see, eg, L Dickinson, ‘Accountability of Private Security Contractors under International and Domestic Law’ (2007) 11 (31) ASIL Insight; Avant, *Market for Force* (n 13); J Cockayne, *Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study* (International Peace Academy, New York 2006). Singer refers to ‘private military firms’ (PMFs) instead of PMCs: see Singer, *Corporate Warriors* (n 38).

¹¹⁷ See <www.icrc.org> (accessed 10 June 2009).

the term PMSCs.¹¹⁸ The same terminology appears in the 2008 Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, which was produced by seventeen states (Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the UK, Ukraine, and the US) as a result of an initiative launched jointly by Switzerland and the ICRC.¹¹⁹ Paragraph 9(a) of the Document states:

‘PMSCs’ are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.

This Thesis adopts the same terminological approach, utilising the single term ‘PMSCs’ to encompass the entire industry and then proceeding directly to the substantive analysis of the companies’ activities. The term PMSCs is deliberately vague since the focus of the legal analysis ought to be on the company’s activities rather than its title.

B. General nature of PMSCs

What, then, are PMSCs? Like other corporations, most PMSCs are registered corporate bodies with legal personalities, hierarchical structures, Internet sites and public relations officials. Some are part of larger multinational conglomerates with

¹¹⁸ See, eg, 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 (21 Jan 2009) UN Doc A/HRC/10/14.

¹¹⁹ Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (17 Sept 2008) UN Doc A/63/467-S/2008/636.

extensive economic interests, and their behaviour in one region may affect their reputation worldwide.¹²⁰ As service-orientated businesses in a global industry, PMSCs are generally capital-intensive with limited infrastructure. They utilise a flexible workforce, drawing on databases of individuals in order to assemble a suitable group of employees for each contract. Many PMSC employees are former military or security personnel, including some elite members of the special forces such as the Rangers, Delta Force and SEALs in the US and the Special Air Service in the UK. The American PMSC Blackwater, for example, has a database of more than 20,000 former military personnel ready for deployment and engagement on a short notice anywhere in the world.¹²¹

Most of the PMSCs working in armed conflict are based or incorporated in militarily advanced countries. US-based PMSCs easily constitute the largest share of the global market, with a very high percentage of their revenues coming from US government contracts. In Iraq alone, the US Congressional Budget Office estimates that total spending on private contractor services supporting US operations ranged between \$6 billion and \$10 billion for the period 2003-2007.¹²² UK-based PMSCs constitute the second major group, with most of their revenues coming from private

¹²⁰ EO had close connections with the Branch-Heritage group of energy and mining companies. A director of several of those companies reportedly made the initial introductions leading to EO's employment in Angola and Sierra Leone, and EO was allegedly paid partly in oil and mining concessions: see *Mercenaries Report* (n 41); K O'Brien, 'Freelance Forces: Exploiters of Old or New-Age Peacebrokers?' (Aug 1998) *Jane's Intelligence Rev* 42, 43; H Howe, 'Private Security Forces and African Stability: The Case of Executive Outcomes' (1998) 36 (2) *J Modern African Studies* 307, 309-310.

¹²¹ 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 (9 Jan 2008) UN Doc A/HRC/7/7, [34].

¹²² US Congressional Budget Office (n 83), 15.

clients such as the extractive industries, and Israeli firms are also increasingly significant players in the global industry. Whilst PMSCs from these states clearly dominate the market, there are also a growing number of companies based in Eastern Europe, Latin America, the Middle East, and Africa.¹²³

PMSCs working in foreign conflicts in the 1990s hired mainly nationals of their home state or of other developed (usually western) states foreign to the conflict. For example, EO hired mainly South African nationals for its operations in Angola and Sierra Leone, whilst Military Resources Professional Inc (MPRI) and Sandline hired mainly American and British nationals for their overseas operations. In contrast, foreign PMSCs operating in Iraq and Afghanistan today employ a large number of locals. The British firm Erinys, for example, hired over 14,000 Iraqis to guard Iraq's petroleum infrastructure.¹²⁴ PMSCs today also tend to recruit actively from developing third-states in an attempt to lower their operating costs and thus compete for lucrative contracts on the global market.¹²⁵ According to one UN official, a commonly used business model in the lucrative guarding sector in Afghanistan is the 'colonial model', which utilises foreign managers from developed states with local or developing third-state regular guards. Some PMSC services, however, such as guarding embassies, close protection of expatriate staff, and

¹²³ See Cockayne and others (n 54), 17.

¹²⁴ D Isenberg, 'Challenges of Security Privatisation in Iraq' in A Bryden and M Caparini (eds) *Private Actors and Security Governance* (LIT Verlag, Berlin 2007), 155. This practice has been criticised as it deprives the nascent public forces of skilled personnel and constructs security as a private commodity rather than a public good, and this in turn may undermine the state-building process: see Leander, 'The Market for Force and Public Security' (n 70), 616-617.

¹²⁵ This practice has been criticised as exploitative and destabilising, particularly for war-torn countries which are struggling to move beyond their violent past: see S Hanes, 'Private Security Contractors Look to Africa for Recruits' *Christian Science Monitor* (8 Jan 2008).

security assessments and training, tend to be performed only by staff from the home country of the PMSC or from other similar countries.¹²⁶

PMSC clients include states, non-governmental organisations, international organisations and corporations. States that hire PMSCs range from strong states like the US and the UK to failing states like Sierra Leone in the mid-1990s. Much of the literature tends to focus upon PMSCs working for states and thus overlooks or ignores the large number of PMSCs working for private corporations and humanitarian groups in zones of conflict. Like public workers, non-state groups need to protect their installations and their personnel, and in many cases private security is the only available solution. Many humanitarian organisations—including Save the Children, CARE, the International Rescue Committee, and World Vision—are increasingly turning to private companies for the protective security necessary to deliver humanitarian aid. Likewise, the UN High Commissioner for Refugees, the UN Children’s Fund, the UN Development Programme and the World Food Programme have all used private security services.¹²⁷ As one official in the UN Office for the Coordination of Humanitarian Affairs explained,

where before the only people you’d expect to see occasionally with an armed guard were a high level UN official guarded by the government or UN armed guards, or indeed the occasional journalist wandering around with some thug, nowadays you’ve got a lot of local aid workers walking around with armed individuals taking care of their security and safety.¹²⁸

¹²⁶ L Rimli and S Schmeidl, 'Private Security Companies and Local Populations: An Exploratory Study of Afghanistan and Angola' (Swiss Peace Foundation, Geneva 2007), 16-17.

¹²⁷ See A Stoddard, *The Use of Private Security Providers and Services in Humanitarian Operations* (Overseas Development Institute, London 2008); Spearin (n 114); J Cockayne, *Commercial Security* (n 116); D Avant, 'NGOs, Corporations, and Security Transformation in Africa' (2007) 29 (2) Intl Rel 143.

¹²⁸ Cockayne, *Commercial Security* (n 116), 5.

Even where aid workers and corporations dislike reliance on PMSCs (as is frequently the case), the alternative is often to stay out of the conflict zone altogether. This would prevent humanitarian groups from working where they are most needed, as well as preventing private firms from taking advantage of valuable investment opportunities around the world. It is not surprising, therefore, that many corporations and aid organisations today rely extensively on PMSCs.¹²⁹

C. PMSC services

PMSCs perform a wide variety of tasks, including some that are widely considered core military functions. This Thesis focuses on PMSCs operating in armed conflict, including situations of military occupation, although some companies also operate in other contexts such as post-conflict reconstruction and territorial administration. For analytic purposes it is useful to organise the industry into logical categories rather than simply examining PMSC action on a case-by-case basis. Since a single PMSC often provides different services under different contracts, it is preferable to classify the individual services contained in PMSC contracts, rather than classifying the companies themselves.¹³⁰ Accordingly, this Section develops a typology of the modern private security industry based on the services provided by PMSCs. This aids the legal analysis in the remainder of the Thesis, since the international obligations

¹²⁹ Leander points out that the increasing use of PMSCs by governments, foreign firms, aid organisations and other non-state actors in weak states can perpetuate ‘Swiss cheese’ security coverage—full of holes—where security is covered only for those who have the means to pay for it. The trouble is that those actors tend to be unevenly distributed in space and there is no guarantee that their security needs will lead them to cover the economically and socially weak in the area: see Leander, ‘The Market for Force and Public Security’ (n 70), 617.

¹³⁰ See Avant, *Market for Force* (n 13), 16-22.

on states to control PMSCs depend primarily on the activities performed by the companies in a particular case.

Singer uses a common military analogy to distinguish between PMSC services according to their proximity to the 'tip of the spear' or the tactical battlefield.¹³¹ Those services closest to the tip of the spear are typically the most controversial and, in some cases, dangerous to provide. PMSC personnel engaged in offensive combat will of course be extremely close to the tip of the spear. PMSC personnel providing armed guarding services may also lie relatively close to the tip of the spear, particularly if they guard a military objective in a region that is likely to experience hostile fire. Yet the notion of the 'tip of the spear' encompasses not only the contractors' physical proximity to the frontline, but also their influence on the strategic and tactical environment. PMSC personnel providing high-level advice or training to military forces may be close to the tip of the spear even if they are not physically close to the frontlines of battle. This is especially true if the PMSC provides advice/training in relation to specific aspects of an ongoing conflict. In contrast, the delivery of food to troops may bring PMSC personnel into the physical theatre of the conflict and may even expose them to combat threats, but it has little direct influence on the strategic balance of the conflict and therefore lies further from the tip of the spear.

¹³¹ See Singer, *Corporate Warriors* (n 38), 91, although Singer uses this analogy to classify the PMSCs themselves rather than classifying each individual PMSC contract.

One can apply this analogy to divide PMSC services into four broad categories: (1) offensive combat, (2) military and security expertise, (3) armed security and (4) military support. This provides a useful conceptual framework for the subsequent legal analysis of PMSC activities.

1 Offensive combat

The first category of PMSC contract involves the service at the very ‘tip of the spear’: offensive combat. This encompasses only those individuals who are armed and who are contractually authorised to use their weapons for offensive attacks. Although in practice it can sometimes be difficult to draw the line between offensive and defensive combat, particularly in low-intensity conflicts lacking a clear frontline (such as Iraq and Colombia), there is nonetheless a clear conceptual distinction which has important legal implications.

The offensive combat category includes conventional fighters located close to the frontline, such as ground troops fighting with machine guns or air pilots dropping bombs on enemy targets. It also includes individuals who launch attacks using technologically advanced weapons systems such as the MQ-1 Predator, even if those individuals are located far from the frontline.¹³² Indeed, in modern warfare an individual pushing a button on a distant computer may inflict more lethal damage than an individual pulling the trigger at the frontline, and to describe only the latter

¹³² The Predator is an unmanned aerial vehicle which is remote-controlled by humans. It can serve in a reconnaissance role and it can also carry and use two AGM-114 Hellfire missiles. Where a contractor uses a weapons system such as the Predator solely for surveillance purposes, their activities will fall within the ‘military expertise’ category discussed below.

as offensive combat would be to privilege the more technologically advanced party to the conflict.¹³³

Several PMSCs performed offensive combat operations during the 1990s, the most famous being the operations of South African firm Executive Outcomes (EO) and British firm Sandline in Angola and Sierra Leone, as well as the planned operation of Sandline in Papua New Guinea. Generally speaking, the clients of these companies were governments that had relatively low military capabilities but were faced with civil war or some other immediate, high threat situation. These operations were extremely controversial and sparked vociferous debate about the legitimacy of the private security industry as a whole.

As discussed in Part I of this Chapter, by the end of the 1990s the international community had clearly demonstrated its distaste for private offensive warfare, and as a result no company will offer offensive combat services on the open market today. Yet it is important to remember that a number of companies openly performed lucrative offensive combat contracts in relatively recent times, including EO, Sandline, NFD and Strategic Consultant International, and this extreme end of the private security spectrum could certainly resurface in the future. Moreover, there appears to be a continuing market for private offensive force in the context of *covert* operations. In August 2009 the New York Times reported that the Central Intelligence Agency (CIA) hired a number of Blackwater contractors in 2004 as part

¹³³ The notion of 'offensive combat' in this context is intended to be narrower than the notion of taking 'a direct part in hostilities' for the purposes of IHL: see Protocol I, art 51(3); see also the discussion in Chapter V at text accompanying notes 13-34.

of a secret programme to locate and assassinate top operatives of Al Qaeda.¹³⁴ According to government officials, the CIA did not have a formal contract with Blackwater for the programme, but instead had individual agreements with top company officials. It is unclear whether the CIA had intended the contractors themselves to capture or kill Al Qaeda operatives, or simply to help with training and surveillance in the programme, but in any case this incident demonstrates that the extreme end of the private security industry may continue to exist underground.

In order to illustrate the general nature of PMSC offensive combat services, this discussion now provides an overview of the operations of EO and Sandline in Sierra Leone in the 1990s, as well as the planned operation of Sandline in Papua New Guinea.

Executive Outcomes in Sierra Leone

The EO story began when Eben Barlow, a former assistant commander of the 32nd Battalion of the South African Defence Force and former top official at the Civil Cooperation Bureau in South Africa, founded the company in 1989.¹³⁵ By 1999, EO's webpage advertised strategic and tactical military advisory services, sophisticated military training packages in land, peacekeeping or 'persuasion' services, sea and air

¹³⁴ See M Mazzetti, 'CIA Sought Blackwater's Help to Kill Jihadists' *New York Times* (19 Aug 2009); J Warrick, 'CIA Assassination Program had been Outsourced to Blackwater, Ex-Officials Say' *Los Angeles Times* (20 Aug 2009); E MacAskill, 'CIA Hired Blackwater for Al-Qaida Assassination Programme, Sources Say' *Guardian* (20 Aug 2009). Blackwater has since changed its name to Xe Services LLC: see <<http://xecompany.com>> (accessed 5 Sept 2009).

¹³⁵ The South African military intelligence formed the Civil Cooperation Bureau as a covert assassination and espionage unit to eliminate enemies of the apartheid state: see Rubin (n 65); G Cawthra, 'The Security Forces in Transition' *The Future of Security and Defence in South Africa* (Institute for a Democratic Alternative for South Africa, Mowbray 1998) 1, 2; A Seegers, *The Security Forces and the Transition in South Africa: 1986-1994* (University of Cape Town, Cape Town 1995).

warfare, advice on the selection of weapons systems and acquisition, and paramilitary services.¹³⁶ Drawing on a database of over 2000 former members of the South African Defence Force and the South African Police, EO worked in a number of states including Angola, Sierra Leone, Uganda, Kenya, South Africa, Congo and Indonesia.¹³⁷

EO's operations in Sierra Leone began in March 1995 when, following EO's success in Angola,¹³⁸ the embattled government of Captain Valentine Strasser hired the company to help the national army fight the rebels of the Revolutionary United Front (RUF). The RUF had grown in the 1980s sponsored by Liberian warlord, Charles Taylor, and had waged a campaign of terror against the people of Sierra Leone since 1991.¹³⁹ Although 70 percent of state revenue was being spent fighting the rebels during the early 1990s, the Sierra Leone regime continued to lose ground as the RUF seized valuable mining territories. Sierra Leone's national army consisted of untrained and underpaid soldiers, many of whom were underage and/or addicted to drugs and alcohol, and some of whom even moonlighted as rebel troops.¹⁴⁰ In

¹³⁶ <<http://www.eo.com>> (accessed 14 Jan 1999), cited in Avant, *Market for Force* (n 13), 18.

¹³⁷ See Singer, *Corporate Warriors* (n 38), 115; Y Goulet, 'Mixing Business with Bullets' *Jane's Intelligence Review* (Sept 1997).

¹³⁸ The Angolan government hired EO in 1993 for \$40 million to help its army defeat the rebel movement Unita. EO's involvement helped the Angolan army to regain crucial mining and oil territory and to gain the upper hand over Unita, eventually compelling the Unita leader to sign the UN-brokered Lusaka Protocol in November 1995: see Howe (n 120); T Spicer, *An Unorthodox Soldier: Peace and War and the Sandline Affair* (Mainstream, Edinburgh 1999), 44; J Hooper, *Bloodsong: An Account of Executive Outcomes in Angola* (Collins, London 2002).

¹³⁹ I Abdullah, 'Bush Path to Destruction: The Origin and Character of the Revolutionary United Front/Sierra Leone' (1998) 36 (2) *J Modern African Studies* 203.

¹⁴⁰ Venter (n 65), 67; Rubin (n 65), 49.

early 1995, after attacking two diamond mines that were the last major source of state revenue, the rebels advanced towards the capital Freetown.¹⁴¹

Under the contract of hire, the government delegated significant authority to EO over training, logistics, and command and control of government forces. EO initiated an intensive training programme for government forces, established intelligence and effective radio communications, and assumed operational control over offensives.¹⁴² It also deployed its own battalion-sized unit on the ground, supplemented by artillery, transport and combat helicopters and aircraft, a transport ship and various ancillary specialists.¹⁴³ Soon after their arrival, EO personnel led the army on a counter-offensive and drove the rebels away from Freetown. In early 1996, as the RUF retreated and EO recaptured key territories, the government held parliamentary and presidential elections. The newly-elected President Kabbah negotiated a cease-fire and held peace talks with the RUF. Acknowledging that EO was essentially responsible for their defeat, the RUF leaders demanded the expulsion of the company before they would continue negotiations.¹⁴⁴ The parties finally signed the Abidjan peace agreement on 30 November 1996, and EO departed at the end of January 1997.¹⁴⁵

¹⁴¹ See Van Niekerk (n 44); W Reno, 'Privatising War in Sierra Leone' (1997) 97 *Current History* 610.

¹⁴² See Howe (n 120), 316.

¹⁴³ See Singer, *Corporate Warriors* (n 38), 93.

¹⁴⁴ See A-F Musah, 'A Country Under Siege: State Decay and Corporate Military Intervention in Sierra Leone' in Musah and Fayemi (eds) (n 43), 93-95; J Hooper, 'Peace in Sierra Leone: A Temporary Outcome?' (Feb 1997) *Jane's Intelligence Rev* 91; see also T McCormack, 'The "Sandline Affair": Papua New Guinea Resorts to Mercenarism to End the Bougainville Conflict' (1998) 1 *YBIHL* 292.

¹⁴⁵ See Kinsey (n 37), 73.

Sandline International in Sierra Leone

In May 1997, just six months after the conclusion of the peace agreement in Sierra Leone, the RUF backed a military coup which ousted the new civilian government and forced President Kabbah to flee to Guinea.¹⁴⁶ As Sierra Leone collapsed into chaos once again, the Economic Community of West African States sent a military force (ECOMOG)¹⁴⁷ to maintain law and order and, eventually, to oust the junta responsible for the coup.¹⁴⁸ However, ECOMOG was unable to stabilise the situation or to recapture Freetown, and in July 1997 President Kabbah turned to Sandline for help.¹⁴⁹ Although the precise extent of Sandline's support remains shrouded in mystery, it seems that the company provided the Sierra Leone government with weapons and a wide range of military services including offensive combat, military training and advice.¹⁵⁰ Sandline's operations in support of the countercoup were successful, and by February 1998 ECOMOG troops had driven the Junta away from Freetown. Kabbah returned to power in March 1998.¹⁵¹

The aftermath of Sandline's operations in Sierra Leone proved embarrassing for the UK government as it emerged that Sandline's shipment of weapons to Sierra

¹⁴⁶ See I Douglas, 'Fighting for Diamonds: Private Military Companies in Sierra Leone' in J Cilliers and P Mason (eds) *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies* (Institute for Security Studies, Johannesburg 1990), 188-189; Musah, 'A Country Under Siege' (n 145), 95-96.

¹⁴⁷ The Economic Community of West African States Military Observer Group.

¹⁴⁸ See Douglas (n 146), 188-189; J Hirsch, *Sierra Leone: Diamonds and the Struggle for Democracy* (Lynne Rienner, London 2001), 65.

¹⁴⁹ Reportedly at the suggestion of Peter Penfold, the British High Commissioner to Sierra Leone: see Douglas (n 146), 189.

¹⁵⁰ *ibid*, 190.

¹⁵¹ See Hirsch (n 148), 65-73.

Leone had violated a UN arms embargo.¹⁵² It further transpired that Sandline had fully briefed senior UK officials, including the High Commissioner to Sierra Leone, about its operations in Sierra Leone and had therefore assumed that the contract had governmental approval.¹⁵³ Although a parliamentary inquiry ultimately characterised the so-called 'arms to Africa' affair as a function of governmental incompetence rather than a deliberate violation,¹⁵⁴ the UK government's 'ethical foreign policy' nonetheless lay in tatters. The controversy also tarnished Sandline's business reputation and set back the efforts of other PMSCs to be seen as legitimate actors in international relations.

Sandline International in Papua New Guinea

In addition to its contracts in Africa, in 1997 Sandline concluded a controversial one-year contract with the government of Papua New Guinea (PNG). Under the contract, the company was both to be a 'force multiplier' and to lead the assault against the secessionist Bougainville Revolutionary Army.¹⁵⁵ Sandline sub-contracted most of the work to EO. The contract was approved by the PNG National Security Council, an executive body, with no public discussion or parliamentary notice.¹⁵⁶ When the private troops arrived on the ground, the PNG army mutinied and violent public riots

¹⁵² UNSC Res 1132 (8 Oct 1997) UN Doc S/RES/1132, [6].

¹⁵³ See Douglas (n 146), 186-195.

¹⁵⁴ T Legg and I Ibbs, 'Report of the Sierra Leone Arms Investigation', Return to an Address of the Honourable House of Commons dated 27 July 1998.

¹⁵⁵ See Agreement for the Provision of Military Assistance Between the Independent State of Papua New Guinea and Sandline International (31 Jan 1997), available at <www.c-r.org/our-work/accord/png-bougainville/key-texts14.php> (accessed 30 Aug 2009); see also Mercenaries Report (n 41); M Ashworth, 'PNG's Private Army Spurs Australia into Action' *Independent* (13 Mar 1997) 11; --, 'Papua New Guinea Hires Mercenaries' (n 44).

¹⁵⁶ See Singer, *Corporate Warriors* (n 38), 193.

broke out in support of the army. Australia condemned the proposed operation,¹⁵⁷ with the Australian media branding the contractors ‘mercenaries’, ‘dogs of war’ and ‘assassins’, and several other nations also lodged protests against the contract.¹⁵⁸ The controversy forced the PNG Prime Minister, Sir Julius Chan, to resign, and the PNG government then cancelled the contract and the PMSC personnel quickly left the country.¹⁵⁹

The hostile reaction to the PNG-Sandline contract demonstrated a deep-seated opposition within the international community to the direct involvement of foreign, private actors in civil strife. The various protests lodged by foreign nations in relation to the PNG affair focused on the direct *offensive* role to be played by Sandline soldiers, especially the alleged plan to assassinate the leaders of the Bougainville Revolutionary Army.¹⁶⁰ Of course, PMSCs are only too aware that their survival depends upon the positive perceptions of their home states and of the international community. The controversy surrounding Sandline’s operations in PNG and Sierra Leone marred the company’s business reputation and undermined public perceptions of the private security industry as a whole. As both Sandline and EO disbanded, other PMSCs sought to set themselves apart from those companies by

¹⁵⁷ See Shearer (n 38), 11-12.

¹⁵⁸ See Zarate (n 64), 99.

¹⁵⁹ See Shearer (n 38), 12. Sandline sued the PNG government and the parties went to international arbitration. The panel agreed with Sandline’s submission that a change of regime did not relieve the new PNG government of the previous government’s contractual obligations, notwithstanding the fact that the contract was signed without parliamentary approval. PNG eventually paid the full amount: see --, 'Payout Ends Mercenary War' *Australian* (1 May 1999); --, 'PNG Pays Up to Mercenaries' *BBC News* (1 May 1999).

¹⁶⁰ See Zarate (n 64), 99.

disclaiming any involvement in private offensive combat. Consequently, no company will offer offensive combat services on the open market today.

2 Military & security expertise

Military and security expertise contracts involve the provision of high-level technical or strategic capabilities to military/security forces, including the maintenance of technical weapons systems, the collection and analysis of intelligence, and the provision of military/security advice and training. Whilst these contractors are unarmed and are not authorised to use force, the application of their expertise may nonetheless have an immense strategic impact on the conflict. There is a particularly strong demand for technical support services, as the growing sophistication of military equipment has greatly increased the need for specialist contractors to maintain technical systems. In Iraq, for example, the US has hired a large number of private contractors to maintain complex weapons systems such as the F-117 Nighthawk fighter, the B-2 Spirit bomber and the TOW missile system.¹⁶¹

Many PMSCs provide specialist intelligence services including satellite and aerial reconnaissance and photo interpretation and analysis.¹⁶² Demand for private intelligence services has been particularly strong in the US since the attacks of 11 September 2001. In a report published three days after those attacks, the Senate

¹⁶¹ See P Singer, 'The Private Military Industry and Iraq: What Have We Learned and Where to Next?' (Geneva Centre for the Democratic Control of the Armed Forces, Geneva 2004), 4-5. Where contractors use unmanned aerial vehicles such as the Predator to drop missiles, their activities would fall within the offensive combat category discussed above in Section 1.

¹⁶² See S Chesterman, "'We Can't Spy ... If We Can't Buy!': The Privatization of Intelligence and the Limits of Outsourcing 'Inherently Governmental Functions'" (2008) 19 (5) EJIL 1055.

Select Committee on Intelligence expressly encouraged a 'symbiotic relationship between the Intelligence Community and the private sector',¹⁶³ a policy which has led to a dramatic increase both in dollars spent on intelligence and in the extent of outsourcing in this area.¹⁶⁴ Private contractors known as 'green badgers' reportedly represent the majority of personnel in the Pentagon's Counterintelligence Field Activity unit, the CIA's National Clandestine Service and the National Counterterrorism Center.¹⁶⁵

In some cases PMSCs may even be involved in the interrogation of prisoners. Virginia-based firm CACI notes on its website that it 'assist[s] our government and commercial clients in developing integrated solutions that close gaps between security, intelligence and law enforcement to address complex threats to their security'.¹⁶⁶ Following the 2003 invasion of Iraq, the US government hired CACI to provide several interrogators to work at detention centres in Iraq, including the notorious Abu Ghraib prison. In February 2008, CIA Director Michael Hayden testified before the Senate Select Intelligence Committee and confirmed that the CIA continued to use private contractors at its secret detention facilities.¹⁶⁷

¹⁶³ US Senate Report on Intelligence Authorization Act for Fiscal Year 2002 (14 Sept 2001).

¹⁶⁴ Chesterman, 'We Can't Spy ... If We Can't Buy!' (n 162), 1056.

¹⁶⁵ W Pincus, 'Lawmakers Want More Data on Contracting Out Intelligence' *Washington Post* (7 May 2006); PR Keefe, 'Don't Privatize Our Spies' *New York Times* (25 June 2007).

¹⁶⁶ See <<http://www.caci.com/fcc/isis.shtml>> (accessed 10 August 2009).

¹⁶⁷ Hearing of the Senate Select Committee on Intelligence: Annual Worldwide Threat Assessment (5 Feb 2008) available at <http://www.dnigov/testimonies/20080205_transcriptpdf> (accessed 10 Aug 2009), 26.

Another PMSC service involving a high degree of expertise is mine clearance, which is performed by both specialist de-mining companies such as Minetech and generalist companies such as ArmorGroup and Saracen.¹⁶⁸ For example, the US firm Ronco Consulting Group cleared cluster bombs and other unexploded weapons in Kosovo, as well as mines in Namibia and Mozambique.¹⁶⁹ The Australian Milsearch is the predominant de-mining operator in Indochina.¹⁷⁰ Some de-mining companies also provide mine risk education and consultancy, including the Israeli firm MAAVERIM.¹⁷¹

The final category of military/security expertise contracts involves the provision of advice and training to military/security forces. Client states may be seeking to establish democratic control over the armed forces, to develop policies and procedures for long-term defence planning, to restructure their forces, or otherwise to increase their military/security capabilities. For example, the Coalition Provisional Authority hired Vinnell Corp to train the Iraqi army,¹⁷² Hungary hired the US firm Cubic to help it to restructure its military to meet the standards required to become part of NATO,¹⁷³ and the Indonesian government hired Strategic Communication Laboratories to help it to respond to internal outbreaks of secessionist and religious violence.¹⁷⁴ Perhaps the most prominent military advice and training operation thus

¹⁶⁸ See UK Green Paper (n 56), [10]; Landmine Monitor <<http://www.icbl.org/lm>> (accessed 10 Aug 2009).

¹⁶⁹ See <<http://www.roncoconsulting.com>> (accessed 8 July 2009).

¹⁷⁰ See <<http://www.milsearch.com.au>> (accessed 18 July 2009).

¹⁷¹ Schreier and Caparini (n 112), 25.

¹⁷² See B Daragahi, 'Use of Private Security Firms in Iraq Draws Concerns' *Washington Times* (10 June 2003); D Steele, 'Last Stop Before Iraq' *Army* (1 May 2004), 54.

¹⁷³ D Avant, 'Privatizing Military Training' (2000) 5 (17) *Foreign Policy in Focus*.

¹⁷⁴ Schreier and Caparini (n 112), 23.

far is that of US firm Military Professional Resources Inc (MPRI) to train the Croatian armed forces during the Balkans conflict of the 1990s.

MPRI in Croatia

MPRI has long been one of the leading companies in the military advising and training sector.¹⁷⁵ Most of MPRI's corporate officers are former top-ranked US military leaders, and the company draws on a database of thousands of former military officers to fulfil its contracts. Essentially, this impressive pool of military expertise is MPRI's product.¹⁷⁶ Although MPRI, like other American PMSCs, must compete for its contracts on the open market and must obtain a licence from the US government in order to work for foreign governments, its close ties to the US military and government give it a distinct advantage over its rivals.¹⁷⁷ This arrangement can enable the US government to conduct 'foreign policy by proxy', using MPRI to provide US military expertise overseas in circumstances in which conventional US military assistance programs would not be appropriate for political or tactical reasons.¹⁷⁸

¹⁷⁵ See <<http://www.mpri.com>> (accessed 25 Aug 2009).

¹⁷⁶ See Schreier and Caparini (n 112), 23; M Thompson, 'Generals for Hire' *Time* (15 Jan 1996) 34.

¹⁷⁷ For example, the Colombian government reportedly hired MPRI after a senior US government official recommended the firm to the Colombian Minister of Defence: see Singer, *Corporate Warriors* (n 38), 121.

¹⁷⁸ See K Silverstein, 'Privatising War: How Affairs of States are Outsourced to Private Corporations' *The Nation* (28 July 1997) 4. According to the UK government's 2002 Green Paper, MPRI 'undoubtedly functioned as an instrument of US policy in the Balkans': see UK Green Paper (n 56), [50].

MPRI's most controversial foreign operations were those in the Balkans conflict of the 1990s.¹⁷⁹ In September 1994, with Serbian forces occupying thirty percent of Croatian territory,¹⁸⁰ the Croatian government hired MPRI to provide a 'Democracy Training Assistance Program' which included the provision of advice and training to the Croatian military in the areas of leadership, management and civil-military operations. The US government authorised the contract and deemed it not to be in violation of the existing UN arms embargo, since it did not involve battlefield strategy, tactics or weapons.¹⁸¹ Shortly after MPRI began its programme, Croatian forces enjoyed an unprecedented surge in military success and regained several key territories.¹⁸² In August 1995, Croatian forces launched 'Operation Storm' to recapture the Krajina region, rapidly overpowering the Serbian forces with a devastating offensive and regaining the entire territory within one week in a 'textbook' US-style operation.¹⁸³ For Croatia, the offensive represented a crucial turning point in the war.¹⁸⁴ Although both MPRI and the US government insist that the company limited its programme to general advice and training, many commentators and UN officers believe that MPRI played a direct role in the Croatian

¹⁷⁹ For a detailed account of MPRI's operations in the Balkans, see Avant, *Market for Force* (n 13), 101-113; Singer, *Corporate Warriors* (n 38), 125-130; Shearer (n 38), 56-63.

¹⁸⁰ See R Cohen, 'US Cooling Ties to Croatia after Winking at its Buildup' *New York Times* (28 Oct 1995); A Cowell, 'Conflict in the Balkans' *New York Times* (1 Aug 1995) A6.

¹⁸¹ See R Cohen (n 180).

¹⁸² Cowell (n 180); R Fox, 'Fresh War Clouds Threaten Ceasefire' *Sunday Telegraph* (15 Oct 1995) 26.

¹⁸³ S Power and others, 'The Croatian Army's Friends' *US News and World Report* (21 Aug 1995) 41; C Eagar, 'Invisible US Army Defeats Serbs' *Observer* (5 Nov 1995) 25; Fox (n 182); L Silber and A Little, *Yugoslavia: Death of a Nation* (Penguin Books, New York 1997), 357.

¹⁸⁴ R Cohen (n 180); Zarate (n 64), 108. Although deemed a massive success for Croatia, the offensive violated the UN cease-fire and created 170,000 refugees: see Singer, *Corporate Warriors* (n 38), 126.

offensives, and Croatian forces openly credit the company as the reason for their victory.¹⁸⁵

3 Armed security

Armed security contracts involve the protection of persons or property in zones of armed conflict. Examples include AmorGroup's provision of site security to a large number of mining and petroleum companies,¹⁸⁶ DynCorp's protection of the Afghan president Hamid Karzai, and the provision of site security in Iraq by various PMSCs including Vinnell, Global Risk and Erinys.¹⁸⁷ The protection of the US Embassy in Iraq, together with the associated multitude of diplomats and US personnel travelling through the Green Zone following the 2003 invasion, required a particularly large armed force which was comprised almost exclusively of contractors from Blackwater, DynCorp and Triple Canopy. Some PMSCs also provide border and immigration control. In 2006, for example, Israel privatised both the Sha'ar Ephraim crossing in the northern West Bank and the Erez crossing between Gaza and Israel.¹⁸⁸ Another PMSC activity in this category is the provision of private police;

¹⁸⁵ See, eg, Fox (n 182); Power and others (n 183); --, 'Croatia: Tudjman's New Model Army' *Economist* (11 Nov 1995) 148; R Cohen, (n 180); Silverstein, *Private Warriors* (n 43), 172-173; Singer, *Corporate Warriors* (n 38), 5.

¹⁸⁶ See <<http://www.armorgroup.com>> (accessed 10 Aug 2009). ArmorGroup is now part of the Danish company G4S: see <<http://www.g4s.com>> (accessed 19 Sept 2009).

¹⁸⁷ See, eg, Daragahi; --, 'US Firm to Rebuild Iraqi Army' *BBC News* (26 June 2003); I Traynor, 'The Privatisation of Warfare' *Guardian* (10 Dec 2003); <<http://www.dyn-intl.com/>> (accessed 13 Aug 2009); <<http://www.globalgroup.com>> (accessed 10 Aug 2009); <<http://www.erinys.net>> (accessed 10 Aug 2009).

¹⁸⁸ See --, 'Erez Crossing Will Be Operated by Private Company Starting Thursday' *Haaretz* (18 Jan 2006); Foundation for Middle East Peace, 'Settlement Time Line' (2006) 16 (2) Report on Israeli Settlement in the Occupied Territories 5.

DynCorp, for example, has provided the police in American contributions to several international missions.¹⁸⁹

Whilst these security contractors are generally armed, they are restricted in the types of weapons that they may carry and they are authorised to use force only in limited circumstances including self-defence, the defence of people or property specified in their contracts, and the defence of civilians.¹⁹⁰ Unlike offensive combat operations, armed security operations are not generally designed to shift the strategic landscape of the conflict beyond the immediate situations at hand.¹⁹¹ Nonetheless, armed security guards often work 'in and amongst the most hostile parts of a conflict or post-conflict scenario', and at times it can be extremely difficult to distinguish between national troops and armed security guards.¹⁹² Senator Jack Reed, a member of the US Armed Services committee, has described 'security in a hostile fire area' as 'a classic military mission'.¹⁹³ Moreover, PMSCs often guard facilities or personnel that are themselves strategic centres of gravity and are therefore highly likely to be attacked.

Armed security guards working in this environment may sometimes face combat-like situations. For example, in 2004 a number of Blackwater contractors,

¹⁸⁹ See <<http://www.dyn-intl.com/policemissions/police-missions-home.aspx/>> (accessed 13 Aug 2009).

¹⁹⁰ See US Department of Defense Instruction 3020.41 (3 Oct 2005); Federal Acquisition Regulation 52.225-19(b)(3)(ii); Defense Federal Acquisition Regulation Supplement 252.225-7040(b)(3)(ii).

¹⁹¹ O'Brien, 'What Should and What Should Not Be Regulated?' (n 113), 38.

¹⁹² Michael Battles, co-founder of the PMSC Custer Battles, cited in D Barstow, 'Security Companies: Shadow Soldiers in Iraq' *New York Times* (19 April 2004) A1.

¹⁹³ *ibid.*

hired to guard the US headquarters in Iraq, repelled insurgent attacks in ways that closely resembled combat.¹⁹⁴ In a separate incident four Blackwater contractors were killed and mutilated in Fallujah whilst guarding a convoy.¹⁹⁵ In September 2007, Blackwater contractors were involved in shooting to death seventeen civilians whilst guarding a US State Department motorcade.¹⁹⁶ These incidents illustrate how the traditional line between military and security tasks can easily become blurred on the ground, particularly in low-intensity conflicts where there is no clear frontline. In some cases there may also be a risk of 'mission creep' if private guarding activities assume an offensive character. A September 2009 report of the Project on Government Oversight, an independent watchdog group in the US, cites one example involving ArmorGroup contractors who were hired by the US to guard the US Embassy in Kabul. These private security guards were reportedly sent on a reconnaissance mission outside the Embassy perimeter, taking them beyond the terms of their contract and creating the danger that they could be drawn into a military incident with enemy forces.¹⁹⁷

4 Military support

Military support contracts involve the provision of general support services to military forces in conflict zones. These services include transport, food, laundry, the

¹⁹⁴ See D Priest, 'Private Guards Repel Attack on US Headquarters' *Washington Post* (6 April 2004) A1.

¹⁹⁵ See US Congressional Research Service, 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' (21 June 2007), 9-10; --, 'Americans Mutilated After Iraqi Ambush' *Washington Post* (4 April 2004) A3; J Gettleman, '4 From US Killed in Ambush in Iraq: Mob Drags Bodies' *New York Times* (1 April 2004); JT Mlinarcik, 'Private Military Contractors & Justice: A Look at the Industry, Blackwater & the Fallujah Incident' (2006) 4 *Regent J Intl L* 129.

¹⁹⁶ See S Tavernise, 'US Contractor Banned by Iraq over Shootings' *New York Times* (18 Sept 2007); D Sevastopulo, 'Iraqis Pull Security Contractor's Licence' *Financial Times* (17 Sept 2007).

¹⁹⁷ See POGO report (n 81).

assembly and disassembly of military bases and camps, and the repatriation of bodies. According to one Western diplomat, it takes 10-12 individuals to support each American or British soldier in combat, and this support is increasingly provided by PMSCs.¹⁹⁸

Given the peripheral nature of military support, it is unsurprising that these functions have been the most extensively privatised. Nonetheless, one should not doubt the importance of these capabilities to the success of overall military operations. Military support contractors effectively serve as private 'enablers' to public troops, freeing up national forces to concentrate on the primary business of fighting.¹⁹⁹ Moreover, military support operations must be designed to survive and operate under attack, and at times these contractors may face serious combat threats whilst performing their functions.²⁰⁰

V. Conclusion

Private military actors were a prominent feature of an earlier international system which persisted for around five centuries. However, a combination of functional and normative factors led states gradually to abandon the international marketisation of military activities, and by the nineteenth century state monopoly over force through citizen armies had become the paradigm of international warfare. The emergence and rapid proliferation of PMSCs in the early 1990s challenged that paradigm and

¹⁹⁸ See Rimli and Schmeidl (n 126), 18.

¹⁹⁹ See Singer, *Corporate Warriors* (n 38), 97-98, 137.

²⁰⁰ Avant notes that a number of private contractors died whilst driving through a combat zone under contract to transport fuel to troops: see Avant, *Market for Force* (n 13), 22.

signalled an important shift in the modern understanding of international security. In the past two decades, hundreds of thousands of private contractors have provided military and security services to states, international organisations, corporations and non-governmental organisations around the world. PMSCs' activities have ranged from offensive combat in the 1990s to advice, training, armed security and logistics today. A strong market for military and security services now exists alongside, and intertwined with, national military and police forces.

This private security boom has revived many of the long-standing debates about the utility and legitimacy of private force. Throughout history, three objections consistently arose in relation to private fighters: first, they fight for money rather than for a cause; second, they challenge the democratic relationship between the citizen and the state; and third, they do not operate under adequate state control. Each of these objections contributed to the social stigma attached to private fighters in the international system. Variations of these objections frequently arise in the modern private security debate, particularly in relation to the combat PMSCs of the 1990s, and this has undermined the companies' efforts to establish themselves as legitimate actors in international relations.

Nonetheless, the trend towards the privatisation of security is unlikely to be reversed in the near future, and states and their citizens need to determine for themselves the most effective and appropriate response to the industry. The remainder of this Thesis analyses the international legal aspects of this debate from the perspectives of three key states: the host state, the hiring state and the home

state of a PMSC. The discussion in this Chapter provides the critical historical, normative and factual backdrop to the subsequent legal analysis, and this may ultimately help states to choose the most effective and appropriate means by which they can fulfil their international obligations to control PMSCs in armed conflict.

II. State obligations & state responsibility

This Thesis examines both primary and secondary rules of international law. It identifies the pertinent primary obligations on three categories of state—the hiring state, the home state and the host state of a PMSC—and assesses how particular PMSC misconduct may give rise to the international responsibility of those states for a violation of their obligations.¹ This Chapter lays the general theoretical groundwork for the Thesis by outlining the basic normative structure of the international legal system and critically examining how the law of state responsibility operates within that systemic context.

This Chapter is divided into five Parts. The first Part discusses the nature of international obligations and the general conditions for breach. It identifies the key categories of primary obligation on the hiring state, the host state and the home state of a PMSC, and critically analyses the conceptual differences between each category. Within this conceptual framework, Parts II and III discuss the circumstances in which PMSC activities may give rise to state responsibility. Part IV then outlines the conditions that may justify or excuse states' otherwise wrongful acts, and Part V examines the consequences of state responsibility for the wrongdoing state and for the claimant party. An understanding of this general framework paves the way for the discussion of the specific obligations and

¹ The term 'misconduct' in this context encompasses any inappropriate or harmful PMSC conduct; the term is not intended to denote the illegality of the conduct under international or domestic law.

responsibility of the hiring state, the host state and the home state in the subsequent Chapters of this Thesis.

I. The nature of international obligations & conditions for breach

Every violation by a state of its international obligations entails the international responsibility of that state.² State responsibility is thus the corollary of state obligation under international law. Two elements must be present to establish that a state has violated its international obligations: first, there must be an action or omission that is attributable to the state under international law; and second, that act must constitute a breach of an international obligation of the state.³ These two elements derive from two normatively distinct facets of international law. The question of whether a particular act or omission is internationally wrongful is governed by the *primary* rules of international law, which determine the substantive obligations on states. These rules make up the bulk of international law, both conventional and customary. On the other hand, the question of whether a particular act or omission constitutes an 'act of a state' is governed by the *secondary* rules of international law, which determine the general circumstances in which a state will be considered responsible for wrongful conduct and the legal consequences that flow from such responsibility. As a whole, these secondary rules comprise the law of state responsibility.⁴ The designation of a particular rule as

² ILC Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001) II (2) YBILC, art 1.

³ *ibid*, art 2.

⁴ See J Combacau and D Alland, "'Primary' and 'Secondary' Rules in the Law of State Responsibility: Categorising International Obligations' (1985) 16 Neth YBIL 81.

primary or secondary expresses the distinction between the content of rules and the result of their breach.

The study of state responsibility is inextricably linked to the work of the International Law Commission (ILC), which has been examining the topic since 1953. In 2001 the ILC adopted a complete text of the Articles on Responsibility of States for Internationally Wrongful Acts, together with accompanying Commentaries (ILC Articles). The UN General Assembly took note of the ILC Articles, recommended them to the attention of governments, and annexed them to Resolution 56/83 of 2001.⁵ The General Assembly again commended the Articles in 2004,⁶ and again in 2007 when it noted that the Articles were being extensively referred to in practice.⁷ To a large extent the ILC Articles reflect existing law, whilst in some respects they progressively develop that law.⁸ Although the ILC Articles have not been adopted as a treaty and thus are not binding, they represent the views of a large number of well-recognised publicists and are generally considered to be highly persuasive.⁹

⁵ UNGA Res 56/83 (10 Dec 2001) UN Doc A/RES/56/83.

⁶ UNGA Res 59/35 (2 Dec 2004) UN Doc A/RES/59/35.

⁷ UNGA Res 62/61 (6 Dec 2007) UN Doc A/RES/62/61. The General Assembly deferred once again any decision on whether the Articles should be adopted as a multilateral Convention: see J Crawford and S Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 ICLQ 959.

⁸ This helps the General Assembly to fulfil its task under Article 13 of the UN Charter to 'initiate studies and made recommendations for the purpose of...encouraging the progressive development of international law and its codification'.

⁹ See Report of the Secretary-General, 'Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies' (1 Feb 2007) UN Doc A/62/62; Report of the Secretary-General, 'Responsibility of States for Internationally Wrongful Acts: Comments and Information Received from Governments' (9 Mar 2007) UN Doc A/62/63; UNGA, Sixty-Second Session, 'Responsibility of States for Internationally Wrongful Acts: Summary of Work', UN Doc A/62/100; D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 AJIL 857.

The basic tenet of state responsibility is that a state is only responsible for its *own* acts; it is not responsible for the acts of all its nationals or of all persons within its territory. Indeed, if it were otherwise, the state would effectively be the guarantor of all transactions concluded within its national borders and all acts committed by its citizens abroad. As the state itself is an abstract entity which can only act through its human agents and representatives, the law of state responsibility delineates which persons should be deemed to be acting on behalf of a state, such that their misconduct may give rise to state responsibility.¹⁰

Whilst the general rule is that states are *not* responsible for the acts of private persons, in certain circumstances misconduct by a private actor may give rise to the international responsibility of a state. There are essentially two ways in which this may occur. First, the private actor's misconduct may be directly attributable to the state by virtue of an agency relationship between the state and the private actor, in which case the private actor's misconduct may itself constitute an internationally wrongful act of the state giving rise to state responsibility. Second, irrespective of the question of attribution, the state may incur responsibility if it fails to fulfil a primary obligation to take certain positive action in relation to the private actor. For example, a state may have an obligation to exercise due diligence to prevent particular private misconduct, in which case it may incur responsibility for a failure to take adequate preventive steps. The key question in such cases is not whether the private misconduct is itself attributable to the state, but whether the overall state

¹⁰ See *German Settlers in Poland* (Advisory Opinion) PCIJ Ser B No 6 (1923), 22.

system of administration failed to take adequate steps to prevent that misconduct.¹¹

Whatever the mode of responsibility, a finding of state responsibility does not preclude the responsibility of the private individuals themselves under international or domestic law.¹² The next two Parts of this Chapter examine these two pathways to state responsibility in sequence.

II. The attribution of private misconduct to the state

International law imposes numerous obligations on states requiring them to refrain from committing (through their officials or agents) internationally wrongful acts such as war crimes or violations of human rights. Like national soldiers, PMSC personnel working in zones of armed conflict may engage in wrongful conduct of this nature. In such cases, if the wrongful PMSC conduct is attributable to the hiring state, it will give rise to the responsibility of that state under international law. A crucial question for this Thesis, therefore, is under what circumstances will PMSC conduct be attributable to the hiring state? Chapter III examines this question in detail, but it is useful at this point to identify the three principal situations in which such attribution may occur.

¹¹ See R Jennings and A Watts (eds), *Oppenheim's International Law* (9 edn Longman Harlow 1992), 501; R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford 1994), 153-154.

¹² See ILC Articles, art 58; A Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 ICLQ 615.

Article 4 of the ILC Articles sets out the basic rule governing the core cases of attribution: all acts of state organs are deemed to be acts of the state.¹³ Thus, if a state hires a PMSC and formally enlists the PMSC personnel into the national armed forces, the acts of those individuals will be deemed acts of the hiring state. The practice of the hiring state enlisting PMSC personnel into its national armed forces was common for the combat PMSCs of the 1990s, such as Executive Outcomes and Sandline,¹⁴ but that practice is virtually unheard of today. Even where the hiring state does not formally enrol PMSC personnel into its armed forces, there may be exceptional cases in which the PMSC personnel are so highly integrated into the state's armed forces that they constitute a part of those forces *de facto* for the purposes of state responsibility, as discussed in Chapter III. In reality, however, very few PMSCs will form part of the hiring state's armed forces, and in most cases the attribution of PMSC misconduct to the state will fall to be determined under either Article 5 or Article 8 of the ILC Articles.

Article 5 encompasses PMSC employees who are 'empowered by the law of [the hiring] state to exercise elements of the governmental authority', provided that they are 'acting in that capacity in the particular instance'. As noted in Chapter III of this Thesis, it is generally agreed that a PMSC contracted by a state to engage in offensive combat, interrogations or the operation of a detention centre, for

¹³ ILC Articles, art 4; see also *LaGrand (Germany v US)* (Merits) ICJ Rep 2001, [81]; I Brownlie, *State Responsibility* (Clarendon Press, Oxford 1983), 132-166; Jennings and Watts (eds) (n 11), 539-548.

¹⁴ See S Dinnen, R May and A Regan (eds), *Challenging the State: The Sandline Affair in Papua New Guinea* (National Centre for Development Studies Canberra 1997); JC Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International law, and the New World Disorder' (1998) 34 *Stan J Intl L* 75, 124; UK Foreign Commonwealth Office Green Paper, 'Private Military Companies: Options for Regulation' (Feb 2002), [6].

example, is exercising governmental authority'.¹⁵ The situation is less clear-cut with regard to other PMSC services such as advice and training, intelligence collection and analysis, and guarding and protection services. Chapter III argues that a contextual analysis of these activities points to their inclusion within the notion of 'governmental authority' in Article 5.

Article 8 encompasses PMSC employees who are in fact acting on the instructions or under the direction or control of the hiring state. As the hiring state will rarely instruct a PMSC explicitly to violate international law, it is the second category of state 'direction or control' that is most relevant for present purposes. The controversy surrounding this category is well-known. Commencing with the *Nicaragua* case of 1984, the International Court of Justice (ICJ) has consistently propounded a test of 'effective control', which excludes responsibility in cases where a state exercises overall control over an individual but does not exercise control over the particular act in question.¹⁶ In the *Tadic* case of 1999, in the somewhat different context of individual criminal responsibility, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia rejected the ICJ's 'effective control' test in favour of a more lenient standard of 'overall control' to attribute the acts of an organised armed group to a state.¹⁷ Chapter III critically analyses the requirements for attribution under Article 8 and assesses how this rule applies to the modern private security industry.

¹⁵ See Chapter III, text accompanying notes 75-83.

¹⁶ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)* (Merits) ICJ Rep 1986, [115]; see also the Separate and Concurring Opinion of Judge Ago, [18].

¹⁷ *Prosecutor v Tadic* (Judgment) ICTY-94-1-A (15 July 1999).

III. States' obligations to take positive steps to control PMSCs

In addition to their obligations to refrain from committing wrongful acts such as war crimes, states have a number of obligations to take certain *positive* action prescribed by international law. Within the latter category, it is helpful to make a further distinction between obligations of result and obligations of diligent conduct. This distinction derives from the civil law systems of various states, particularly France, and has been strongly propounded on the international plane by Professor Dupuy.¹⁸ Obligations of result require states to guarantee that they will achieve a particular outcome, irrespective of the means. Obligations of diligent conduct, on the other hand, are 'best efforts' obligations requiring states only to take those measures that are reasonably within their power in order to achieve the desired result.

The ICJ explained the difference between these two categories in the *Genocide* case, in relation to the obligation to prevent genocide in Article 1 of the Genocide Convention.¹⁹ According to the Court,

it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States

¹⁸ Dupuy is highly critical of the formulation adopted by the former special rapporteur Robert Ago: see P-M Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999) 10 EJIL 371; see also J Combacau, 'Obligations de résultat et obligations de comportement: quelques questions et pas de réponse' *Mélanges offerts à P Reuter* (Pedone, Paris 1981); J Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 EJIL 436, 439; R Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 German YBIL 9, 47-48.

¹⁹ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 Dec 1948, entered into force 12 Jan 1951) 78 UNTS 277.

parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible.²⁰

A state that takes all measures reasonably within its power to prevent genocide will thus fulfil its obligation, irrespective of whether genocide ultimately takes place.²¹

The distinction between obligations of result and obligations of diligent conduct provides a useful analytic framework within which to assess states' obligations to control PMSCs, although this classification is not exclusive and does not in itself bear direct consequences for state responsibility.²² The remainder of this Part will examine each category of obligation in turn.

A. Obligations of result

A state that is under an obligation of result is obliged to *guarantee* that a particular act will be performed to the standard required by international law. If the state fails to perform that act to the requisite standard, or otherwise to ensure that the act is so performed, it will be internationally responsible for its failure. These are termed 'obligations of result' because the ultimate question in assessing responsibility is whether or not, in the result, the state has met the requisite standard. The fact that a state has exerted its best efforts and taken all reasonable measures in the circumstances is not enough; the state is judged by its ultimate success or failure.

²⁰ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, (Merits) (26 Feb 2007), [430]; see also ILC Articles, Commentary to art 14, [14].

²¹ See Pisillo-Mazzeschi (n 18), 30.

²² See ILC Articles, Commentary to art 12, [11]; Dupuy (n 18).

The four Geneva Conventions of 1949 (GCI–GCIV) impose a number of obligations of result on state parties.²³ For example, GCIII lays down the standards of treatment that a detaining state must meet in the internment of prisoners of war, and GCIV lays down the requisite standards of treatment for interned civilians during armed conflict. In relation to the latter, Article 89 of GCIV provides:

Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies. Account shall also be taken of the customary diet of the internees.

Internees shall also be given the means by which they can prepare for themselves any additional food in their possession.

Sufficient drinking water shall be supplied to internees. The use of tobacco shall be permitted.

Internees who work shall receive additional rations in proportion to the kind of labour which they perform.

Expectant and nursing mothers and children under fifteen years of age shall be given additional food, in proportion to their physiological needs.

A state might choose to hire a PMSC to work in a prisoner of war or civilian internment camp,²⁴ just as the US outsourced certain activities at Abu Ghraib prison in Iraq to the PMSCs Titan and CACI.²⁵ In such a case, if the company failed to

²³ First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 Aug 1949, entered into force 21 Oct 1950) 75 UNTS 31; Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 Aug 1949, entered into force 21 Oct 1950) 75 UNTS 85; Third Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 Aug 1949, entered into force 21 Oct 1950) 75 UNTS 135; Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 Aug 1949, entered into force 21 Oct 1950) 75 UNTS 287.

²⁴ Although the state could not outsource the overall operation of a prisoner of war camp, since Article 39 of GCIII requires that such camps remain under the immediate authority of an officer of the regular armed forces of the Detaining Power.

²⁵ See GR Fay, 'Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade' (Aug 2004); SL Schooner, 'Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government' (2005) 16 *Stanford L & Pol Rev* 549, 556-557.

provide the prisoners/internees with adequate health care or nutrition, the state would be responsible for its failure to ensure that the relevant standards of treatment were met. Such responsibility would arise regardless of whether the PMSC conduct was attributable to the state under the secondary rules of state responsibility, and regardless of any action the state may have taken to ensure that the PMSC would perform its functions properly.²⁶

That is not to say, however, that the hiring state would automatically be responsible for any violations of IHL committed by the PMSC whilst working at the camp. On the contrary, the hiring state would incur direct responsibility for particularly instances of PMSC misconduct only to the extent that such misconduct was attributable to the state under the rules of state responsibility. The hiring state's obligations of result under IHL are governed by the *primary* rules of international law, whereas the state's responsibility for any PMSC misconduct carried out whilst performing those obligations falls to be assessed under the *secondary* rules of attribution. Article 29 of GCIV highlights this distinction in the context of civilian internees, providing that '[t]he Party to the conflict in whose hands protected persons may be is responsible for the treatment accorded to them *by its agents*'.²⁷

²⁶ See E-C Gillard, 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88 (863) Intl Rev Red Cross 525, 549-550; UCIHL, 'Expert Meeting on Private Military Contractors' (Geneva, Aug 2005), 44-45.

²⁷ Emphasis added; cf the situation relating to prisoners of war under Article 12 of GCIII, which provides that '[p]risoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.'

Like IHL, international human rights law also imposes certain obligations of result on states. For example, the right to a fair trial under Article 6(1) of the European Convention on Human Rights (ECHR) provides that [i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.²⁸ States have a duty to ensure that their legal systems meet this overall standard of fairness, although they have a broad discretion as to the means that they adopt to achieve that end. In the *Colozza* case the European Court of Human Rights (ECtHR) explained the nature of the obligation as follows:

The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of article 6 § 1 in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved.²⁹

The Court thus considered that Article 6(1) imposes an obligation of result.

In short, the hiring state of a PMSC will always be responsible for any failure by the company to fulfil the state's obligations of result under international law, and this provides the state with a legal incentive to ensure that PMSCs fulfil the obligations with which they have been entrusted.

²⁸ European Convention on Human Rights (4 Nov 1950) CETS No 005.

²⁹ *Colozza v Italy* (App no 9024/80) ECHR Ser A no 89 (1985), [30], citing *De Cubber v Belgium* (App no 9186/80) ECHR Ser A no 86 (1984), [35].

B. Obligations of diligent conduct

Obligations of diligent conduct require states to exercise due diligence and employ all reasonable means in order to achieve a specific result, as far as possible. The most pertinent obligations in this category are those that require states to exercise due diligence to *prevent* particular private activities. The Commentaries to the ILC Articles explain that obligations of prevention 'are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur.'³⁰ If a state fails to take the requisite positive steps and the prohibited private activity takes place, the state's failure will constitute an international wrong giving rise to state responsibility. Although it is the prohibited PMSC activity that triggers state responsibility in such cases, it is the state's *own failure* to take adequate preventive measures that in fact constitutes the basis for the state's responsibility, and not the PMSC activity itself.³¹

The *Home Missionary Society Claim* of 1920 illustrates the nature of these obligations. The British administration of the protectorate of Sierra Leone had imposed a tax on the native population, and this led to rioting during which missionaries were killed and property was destroyed. The US brought a claim against Great Britain, alleging that 'in the face of the native danger the British Government wholly failed to take proper steps for the maintenance of order and the

³⁰ ILC Articles, Commentary to art 14, [14].

³¹ See Brownlie (n 13), 150; Jennings and Watts (eds) (n 11), 501.

protection of life and property'. The Tribunal rejected the US's claim, since from the outbreak of the insurrection the British authorities took every measure available for its repression. According to the Tribunal, a government 'cannot be held liable as the insurer of lives and property under the circumstances presented in this case.'³²

Due diligence obligations to prevent private misconduct can play a key role in establishing state responsibility in cases where the misconduct cannot be attributed to a state under the secondary rules of state responsibility. The *Genocide* case illustrates this scenario. The ICJ could not find Serbia responsible for actually committing genocide because there was no agency relationship between the Serbian state and the Bosnian Serb army. Nonetheless, the Court found Serbia responsible for failing to discharge its obligation to prevent genocide under Article 1 of the Genocide Convention.³³ In a similar vein, the host state, the hiring state and the home state of a PMSC all have certain due diligence obligations to prevent company misconduct in armed conflict, and these obligations could provide a pathway to state responsibility quite independent of the attribution of particular PMSC misconduct to a particular state.

This Section outlines in general terms five key steps in the analysis of these preventive obligations. The first step is to identify a pre-existing primary obligation on the state to exercise due diligence to prevent particular private misconduct. Second, having identified such an obligation, what is the requisite mental element?

³² *Home Missionary Society Claim (US v UK)* (1920) 6 RIAA 42.

³³ See *Genocide* case (n 20), [425]-[450].

Third, what positive action will generally be required of the state to meet the due diligence standard? Fourth, what is the necessary causal connection between the state's failure to take action and the private misconduct? Finally, must the claimant show material or moral damage in order to establish responsibility? Whilst the answers to these questions may vary depending upon the particular primary obligation under consideration, it is nonetheless possible to identify the predominant trends in relation to each question.

1. Identifying a due diligence obligation of prevention

Due diligence obligations of prevention have long existed in international law.³⁴ In the *Alabama Claims* arbitrations of 1871, for example, the Tribunal applied a standard of due diligence to find Great Britain liable for failing to prevent individuals from violating British neutrality in the US civil war.³⁵ That obligation was essentially included in the Hague Conventions of 1907.³⁶ Numerous international arbitral tribunals have since applied the due diligence principle in cases of a failure to prevent private misconduct. In the *Youmans* case of 1926, for example, the claim of the US was predicated on the failure of the Mexican Government to exercise due diligence to protect the father of the claimant from the fury of the mob at whose

³⁴ See generally E Borchard, *Diplomatic Protection of Citizens Abroad* (Banks Law Publishing, New York 1928), § 87; P-M Dupuy, 'Due Diligence in the International Law of State Responsibility' *Legal Aspects of Transfrontier Pollution* (OECD, Paris 1977); Pisillo-Mazzeschi (n 18), 30; R Pisillo-Mazzeschi, 'Due diligence' e Responsabilita Internazionale Degli Stati (Giuffrè, Milano 1989); JA Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36 NYU J Intl L & Pol 265; R Barnidge, *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (CUP, Cambridge 2007).

³⁵ *Alabama Claims (US v Britain)* 1871, in relation to the due diligence obligations contained in the Treaty of Washington (8 May 1871); see also JB Moore, *History and Digest of the International Arbitrations to which the US has been a Party* (GPO, Washington 1898), ch LXVIII.

³⁶ Convention Concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 Oct 1907, entered into force 26 Jan 1910) 205 Consol TS 395 (Hague XIII), arts 8 and 25.

hands he was killed, and the failure to take proper steps towards the apprehension and punishment of the persons implicated in the crime.³⁷

Particularly pertinent to the private security industry, human rights law requires states to 'ensure' or 'secure' rights within state jurisdiction,³⁸ and this has been widely interpreted as requiring states to exercise due diligence to prevent, investigate, punish and redress human rights violations by private actors.³⁹ These obligations largely stemmed from the traditional duty of states to 'protect' aliens within state jurisdiction, which Robert Ago explained in the following terms:

Prevention and punishment are simply two aspects of the same obligation to provide protection and have a common aim, namely to discourage potential attackers of protected persons from carrying out such attacks. The system of protection that the State must provide therefore includes not only the adoption of measures to avoid certain acts being committed but also provision for, and application of, sanctions against the authors of acts which the implementation of preventive measures has failed to avert.⁴⁰

More recently, in the 2005 *Congo* case, the ICJ applied a standard of 'vigilance' to the obligation of an occupying power under Article 43 of the Hague Regulations 'to restore, and ensure, as far as possible, public order and safety' in the occupied territory.⁴¹ The Court held that such vigilance (essentially synonymous with due diligence), requires the occupying power to take positive steps 'to secure respect for

³⁷ *Youmans* case (1926) 4 RIAA 110; see also cases in Moore (n 35), 4027-4056.

³⁸ See, eg, ECHR, art 1; International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 Mar 1976) 999 UNTS 171, art 1(2); American Convention on Human Rights (adopted 22 Nov 1969, entered into force 18 July 1978) 1144 UNTS 123, art 1.

³⁹ See, eg, *Velásquez Rodríguez v Honduras*, Merits, Judgment of 29 July 1988, IACtHR Ser C No 4, [148], [172]; *Kaya v Turkey* (App no 22535/93) ECHR 28 Mar 2000, [101], [108]-[109]; UNHRC, General Comment 6, UN Doc A/37/40(1982); General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13(2004), [10].

⁴⁰ R Ago, 'Fourth Report on State Responsibility' (1972) II YBILC, 71.

⁴¹ *Case Concerning Armed Activities in the Territory of the Congo (DRC v Uganda)* (Merits) ICJ Rep 2005, [178]-[179].

the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.’⁴²

The language of a particular obligation provides clues as to whether a due diligence standard of conduct applies.⁴³ Best efforts obligations requiring a state to use ‘all means at its disposal’⁴⁴ or ‘to employ all means reasonably available’⁴⁵ to prevent a particular activity clearly involve the due diligence principle, as does an obligation to take safeguards that are ‘as satisfactory as possible’.⁴⁶ Obligations not to ‘allow’ or ‘tolerate’ certain private activities have also been interpreted as entailing a due diligence duty to prevent and punish the private activities in question. Examples include the obligation on neutral states not to allow their territory to be used as a base of hostile operations by belligerents,⁴⁷ and the obligation on all states not to tolerate violent interventions into other states.⁴⁸ Likewise, the ICJ’s statement in the *Corfu Channel* case that every state has an obligation ‘not to allow knowingly its territory to be used for acts contrary to the rights of other states’ signified a due diligence assessment based on knowledge.⁴⁹ In that case, Albania’s knowledge of the mines in its territorial waters gave rise to an

⁴² *ibid*, [178].

⁴³ For a discussion of the importance of language in identifying due diligence obligations, see Barnidge (n 34), 114-115.

⁴⁴ Hague XIII (n 36), arts 8 and 25.

⁴⁵ *Genocide case* (n 20), [430].

⁴⁶ *Lake Lanoux (Spain v France)* (1957) 24 ILR 123.

⁴⁷ Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 Oct 1907, entered into force 26 Jan 1910) 205 Consol TS 299, arts 4, 5 and 6.

⁴⁸ UNGA Res 2625 (XXV) (24 Oct 1970) UN Doc A/8028, [2].

⁴⁹ *Corfu Channel (UK v Albania)* (Merits) ICJ Rep 1949, 22; see also Barnidge (n 34), 114-115; Brownlie (n 13), 42-44, 181-182.

obligation to take certain measures to prevent the mines from causing harm to the vessels of other states, namely, to notify shipping generally of the existence of the minefield and to warn the approaching British ships of the imminent danger. Albania's failure to take those measures gave rise to its international responsibility for the damage caused to UK vessels by the explosion of the mines.⁵⁰

The above survey illustrates the wide range of due diligence obligations in international law and the types of language that generally denote an obligation of this nature. This provides a useful frame of reference for identifying the due diligence obligations on the host state, the hiring state and the home state of a PMSC to prevent company misconduct in armed conflict.

2. Mental element

Having identified a due diligence obligation to prevent a particular private activity, it is necessary to ascertain the mental element that the obligation entails. In other words, what degree of state *knowledge* of the prohibited activity, or of the likelihood that the activity will occur, must exist before the obligation of prevention will arise? The law of state responsibility does not require fault before an act or omission may be characterised as internationally wrongful.⁵¹ Nonetheless, the relevant primary

⁵⁰ *Corfu Channel* (n 49), 20-22.

⁵¹ See ILC Articles, arts 2 and 12, Commentary to arts 2, [3], [10]. For many years there was a major debate about whether international law has a general requirement of fault: see Brownlie (n 13), 37-48; Higgins (n 11), 159-161. It now appears to be settled that international responsibility is neither based on fault nor independent of fault; rather, the requisite degree of fault will always depend on the primary rule in question.

obligation may require a certain degree of fault as a necessary condition for responsibility *in relation to that particular obligation*.

A preventive obligation will usually arise where the state actually knows that the prohibited activity is occurring or that there is a real and immediate risk that the activity will occur. At the other end of the spectrum, international law will not generally impose responsibility on a state for failing to prevent covert or unforeseeable activities of which the state was not aware and which could not have been discovered through diligent detection. But what about cases where the state *ought* to have known that the prohibited activity was occurring, or ought to have foreseen that the activity would occur in the near future? It would appear incongruous if a state could avoid responsibility by claiming its lack of knowledge if it could have discovered the prohibited activity through diligent detection. Even so, it is not possible to state a general rule and it will always be necessary to examine the primary obligation in question in order to determine the requisite mental element.

In *Corfu Channel* the ICJ based its finding of responsibility on the obligation of every state 'not to allow *knowingly* its territory to be used for acts contrary to the rights of other states.'⁵² The Court was careful to state that the mere fact of the control exercised by a state over its territory does not, by itself, lead to the conclusion that the state knew or ought to have known of a prohibited activity carried out within that territory. Nonetheless, the Court made it clear that territorial

⁵² *Corfu Channel* (n 49), 22 (emphasis added); see also *Lighthouses Arbitration (France v Greece)* (1956) 12 RIAA 217; *In re Rizzo* (1955) 12 ILR 317.

control will have an important bearing on the methods of proof available to the victim state to establish the knowledge of the territorial state. As the victim state will often be unable to produce direct evidence of facts giving rise to responsibility, the Court stated that it should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.⁵³ After examining the evidence in the case, the Court concluded that Albania must have known about the laying of the minefields in Albanian territorial waters, and the Court went on to identify the specific obligations that arose from that knowledge.⁵⁴ Although in the circumstances the Court was able to impute actual knowledge of the mines to Albania, it did not exclude the possibility that an obligation of prevention could arise in other circumstances on the basis of what a state *ought* to have known.

According to the ECtHR in *Keenan v UK*, in assessing responsibility for a failure to protect life under Article 2, the Court employs a test of ‘foreseeability of the event’: the state is responsible if the authorities ‘knew or ought to have known’ of the risk to the life of a person, and yet they failed to take measures which, ‘judged reasonably’, might have prevented the occurrence of the lethal event.⁵⁵ Likewise, in *Kilic v Turkey* the Court found that Article 2 had been violated on the basis of a lack of measures which might have avoided a foreseeable risk.⁵⁶ The Court found that

⁵³ *Corfu Channel* (n 49), 18.

⁵⁴ *ibid*, 22. Brownlie notes that the principles in *Corfu Channel* also apply to cases where the harm to another state occurs beyond the boundaries of the state harbouring the source of danger, provided that liability is based on a failure to control rather than on actual control or complicity: see Brownlie (n 13), 182. This analysis has important implications for the home state of a PMSC, as discussed in Ch VI of this Thesis.

⁵⁵ *Keenan v UK* (App no 27229/95) ECHR 3 April 2001, [89], quoting *Osman v UK* (App no 23452/94) ECHR 28 Oct 1998, [116].

⁵⁶ *Kilic v Turkey* (App no 22492/93) ECHR 28 Mar 2000, [65]-[68].

Turkey had failed to take adequate measures to protect the life of the applicant's brother, a journalist who was working in south-eastern Turkey for a newspaper voicing Kurdish opinions and who was found shot dead on his way home from work. According to the Court, the victim's death was predictable due to the situation in the south-eastern region where security forces were accused of eliminating alleged supporters of the Kurdistan Workers' Party.⁵⁷ In a similar vein, in the *Genocide* case the ICJ held that the obligation to prevent genocide applies wherever a state is aware, or should normally be aware, of a serious risk that genocide will occur.⁵⁸ The ILC's Commentary to its 2001 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities couch the mental element in analogous terms: 'The degree of harm itself should be foreseeable and the State must know or should have known that the given activity has the risk of significant harm.'⁵⁹

Thus, whilst the law of state responsibility imposes no general requirement of fault, primary obligations of prevention frequently entail some degree of state knowledge or constructive knowledge of the prohibited activity before demanding positive state action.

⁵⁷ *ibid*, [65]-[68]; see also B Conforti, 'State Responsibility for Breach of Positive Obligations' in M Fitzmaurice and D Sarooshi (eds) *Issues of State Responsibility before International Judicial Institutions* (Hart, Oxford 2004).

⁵⁸ *Genocide* case (n 20), [431]; see also the cases in Moore (n 35), 4027-4056, in which the tribunal held the state responsible for a failure to prevent certain activities on its territory which the state *ought* to have discovered through diligent investigation.

⁵⁹ ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities with Commentaries (2001) II (2) YBILC, Commentary to art 3, [18].

3. Positive action to discharge the obligation

What exactly does the 'due diligence' standard require and how much positive action can reasonably be expected of a state in a particular case? Clearly the notion of due diligence refers to an international standard of behaviour, which is not to be determined solely by a state's own national law or practice. Thus in the *Alabama Claims* arbitrations the Tribunal rejected the UK's proposed definition of due diligence as 'such care as Governments *ordinarily* employ in their domestic concerns'.⁶⁰ Nonetheless, the due diligence principle contains a strong element of subjectivity. As Pisillo-Mazzeschi explains, whilst the due diligence principle references itself against an objective international standard, it 'undoubtedly' has 'an elastic and relative nature'.⁶¹ Barnidge similarly describes due diligence as a 'flexible reasonableness standard adaptable to the particular facts and circumstances'.⁶²

Although the requirements of due diligence must always be assessed by reference to the particular primary obligation in question, generally speaking states will need to undertake two distinct forms of action to fulfil a preventive obligation. First, states will need to equip themselves in advance with the general *means* to prevent, detect, restrain and punish the prohibited activities. This may require the enactment of legislation or regulations and the establishment of effective administrative and judicial apparatus. Second, states will need to *use* that apparatus diligently in order to prevent particular prohibited activities and to detect,

⁶⁰ *Alabama Claims*, 612 (emphasis added).

⁶¹ Pisillo-Mazzeschi, 'The Due Diligence Rule' (n 18), 44.

⁶² Barnidge (n 34), 138.

investigate and punish such activities where they occur or are about to occur.⁶³ The investigation and punishment of offenders serves a critical preventive function by reinforcing the state's legislation and deterring potential future wrongdoers.

A violation of a state's preventive obligation may result either from broad inadequacies in the state system or from the failure of state agents to use that system diligently to prevent or punish prohibited activities in a particular case.⁶⁴ Thus, where a wrongful activity occurs, the state cannot escape liability simply because it had previously failed to enact laws to enable its administrative and judicial authorities to prevent or suppress that activity.⁶⁵ In *Alabama Claims*, for example, Britain could not plead the insufficiency of its neutrality legislation to escape liability to the US for the violation by private individuals of British neutrality.⁶⁶

Whilst these observations provide guidance as to the general content of the due diligence principle, a number of factors may alter the precise demands of due diligence in a particular case. Three variables are particularly important: first, the capacity of the state to influence the private individual in question; second, the

⁶³ In human rights law, states have an explicit obligation to enact legislative and other measures to protect human rights: see, eg, American Convention, art 2; ICCPR, art 2. In international environmental law, see ILC Draft Articles on Transboundary Harm (n 59), Commentary to art 3, [10]. More generally, see Pisillo-Mazzeschi, 'The Due Diligence Rule' (n 18), 26-30; Borchard (n 34), § 86; UNGA Res 60/147 (16 Dec 2005) UN Doc A/RES/60/147, [2]-[3].

⁶⁴ See *Noyes* (1933) 6 RIAA 308, 311; WE Hall, *International Law* (8 edn, Clarendon Press, Oxford 1924), 641-2; *Kennedy* (1927) 4 RIAA 194, 198.

⁶⁵ See H Lauterpacht, 'Revolutionary Activities by Private Persons against Foreign States' (1928) 22 AJIL 105, 128; Borchard (n 34), § 86.

⁶⁶ *Alabama Claims*; see also *Baldwin (US) v Mexico* (11 April 1838) in Moore (n 35), 2623; *Noyes* (n 64), 311; *Kennedy* (n 64), 198; Hall (n 64), 641-2.

resources available to the state to perform its obligations; and finally, the risk that the individual's activities will give rise to a violation of IHL.

Capacity to influence the private actor

A key consideration in assessing the requirements of due diligence is the extent to which the state is able to influence the private individual in question. The due diligence standard becomes more demanding as the relationship between the state and the individual becomes closer and the potential for state influence over the individual's activities increases. In the *Genocide* case, for example, the ICJ noted that the measures required to discharge the obligation to prevent genocide depend largely on the state's 'capacity to influence effectively the action of persons likely to commit, or already committing, genocide.'⁶⁷ Conversely, a state will not incur responsibility for a failure to take preventive action if it in fact lacks the capacity to influence potential perpetrators effectively.

A state's capacity to influence a particular PMSC in armed conflict may derive from the state's exercise of control over the territory in which the company is based or incorporated (in the case of the home state) or the territory in which the company operates (in the case of the host state). Alternatively, a state's capacity to influence a PMSC may derive from some special relationship between the state and the company, as in the case of the hiring state which has a clear means of influencing company behaviour through the contract of hire. Where a state falls into two or

⁶⁷ *Genocide* case (n 20), [430] (emphasis added).

even three of these categories (home state, host state, hiring state) in relation to the same PMSC, its capacity to influence the company will be particularly strong.

Resources available to the state

A related consideration is the extent of the resources that are available to the state to perform its preventive obligation. Hence in the *Genocide* case the ICJ emphasised that the obligation to prevent genocide requires each state to employ all means that are 'reasonably available' and 'within its power', so as to prevent genocide so far as possible.⁶⁸ Similarly in the *Hostages* case, in finding that Iran was responsible for failing to protect the American diplomats, the Court stated that the authorities 'were fully aware of their obligations...*had the means at their disposal* to perform their obligations; [and] completely failed to comply with these obligations'.⁶⁹ In international environmental law, it is well-accepted that the measures expected of states with highly evolved systems and structures of governance may differ from those expected of states that are not so well-placed, although 'a State's economic level cannot be used to dispense the State from its obligation'.⁷⁰

Risk of violation

The final variable is the risk that the private activities will take place. A state will generally need to take more vigorous preventive measures where there is a greater

⁶⁸ *ibid*, [430].

⁶⁹ *US Diplomatic and Consular Staff in Tehran (US v Iran)* (Merits) ICJ Rep 1980, [68] (emphasis added).

⁷⁰ ILC Draft Articles on Transboundary Harm (n 59), Commentary to art 3, [13]; see also [12], [17]; Report of the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc A/CONF151/26/Rev1, vol I: Resolutions adopted by the Conference, Res 1, Annex I.

risk of violations, at least where the state is aware or ought to be aware of that increased risk. Where a particular situation gives rise to a serious risk of violations of the law, a state may need to exercise special diligence and devise special methods of prevention to target that situation. This reflects the general position put forward by the US and accepted by the Tribunal in *Alabama Claims* that the requisite standard of due diligence is that which is proportional to the degree of risk in the particular case.⁷¹

Courts will generally be unwilling to find that a state has violated its due diligence obligation of prevention where there was an unsubstantiated risk of harm, or a real but remote risk of harm. One example of an unsubstantiated risk is the ECtHR case of *LCB v UK*.⁷² The applicant claimed that she had developed leukaemia during her childhood, due both to her father's exposure to radiation and to the failure of authorities in the UK to warn her parents of the possible risks for the health of their subsequently conceived children. The Court rejected the claim, stating:

Having examined the expert evidence submitted to it, the Court is not satisfied that it has been established that there is a causal link between the exposure of a father to radiation and leukaemia in a child subsequently conceived...The Court could not reasonably hold, therefore, that, in the late 1960s, the United Kingdom authorities could or should, on the basis of this unsubstantiated link, have taken action in respect of the applicant.⁷³

⁷¹ *Alabama Claims*, 572-573, 613; see also ILC Draft Articles on Transboundary Harm (n 59), Commentary to art 3, [11]; M Sibert, *Traité de droit international public* (Dalloz, Paris 1951), vol I, 317.

⁷² *LCB v UK* (App no 23413/94) ECHR 9 June 1998.

⁷³ *ibid*, [39].

An example of harm that is too remote is the case of *Tugar v Italy*, in which the European Commission of Human Rights declared inadmissible the claim of an Iraqi national who stepped on a mine while clearing a minefield in the Chowman Valley in Iraq after the first Gulf war. The severely injured applicant contended that, since Italy was the state that had permitted the sale of mines to Iraq without adopting any controls or establishing an effective arms transfer licensing system, it had failed to take adequate preventive measures against the risk of an 'indiscriminate' use of such arms. The Commission stated:

There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible 'indiscriminate' use thereof in a third country, the latter's action constituting the direct and decisive cause of the accident which the applicant suffered.⁷⁴

In these circumstances, Italy could not reasonably have been expected to take positive preventive action in response to such a remote risk of harm.

4. Causation

Where the state has the requisite knowledge of the private activity and yet fails to take diligent preventive steps, will the mere occurrence of that activity give rise to state responsibility? Or must there also be a causal nexus between the state's failure to take preventive steps and the subsequent occurrence of the prohibited private activity?

The answer to this question depends on the particular primary rule under consideration, and not upon the secondary rules of state responsibility. This is

⁷⁴ *Tugar v Italy* (App no 22869/93) Decision 22869 (18 Oct 1995) DR, vol 83A, 29.

presumably why causation is not discussed in Part I of the ILC Articles dealing with ‘the internationally wrongful act of a State’. The Commentary to an earlier draft of the ILC Articles stated in Article 23, which was expressly devoted to the breach of an obligation to prevent a given event, that the internationally wrongful event must have occurred ‘because the State has failed to prevent it by its conduct’, and that ‘for there to be a breach of the obligation, a certain causal link—indirect, of course, not direct—must exist between the occurrence of the event and the conduct adopted in the matter by the organs of the State.’⁷⁵ Article 23 was not included in the final version of the ILC Articles, and the only reference to causation is now in Article 31 and its Commentary dealing with reparation: the responsible state is under an obligation to make full reparation only for the injury ‘caused by’ the internationally wrongful act. The notion of causation in Article 31 parallels that found in domestic tort law. This is clearly different from the notion of causation presently under discussion, which pertains to the structure of the internationally wrongful act itself, like the parallel concept in domestic criminal law.⁷⁶

These two distinct notions of causation are evident in the ICJ’s judgment in the *Genocide* case. The Court stated that responsibility for a failure to prevent genocide is incurred ‘if the State manifestly failed to take all measures to prevent genocide which were within its power, and which *might have contributed* to preventing the genocide.’⁷⁷ The Court explained that

⁷⁵ R Ago, ‘Seventh Report on State Responsibility’ (1978) II(2) YBILC, Commentary to art 23, [6].

⁷⁶ See Conforti (n 57), 136.

⁷⁷ *Genocide* case (n 20), [430] (emphasis added).

it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. *As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question*, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result averting the commission of genocide which the efforts of only one State were insufficient to produce.⁷⁸

This notion of causation corresponds to the structure of the internationally wrongful act—that is, to the content of the primary obligation to prevent genocide. Later in the judgment, in assessing the claim for reparation, the Court examined whether and to what extent the alleged injury was the consequence of wrongful conduct by the respondent, such that the respondent should be required to make reparation for the injury. In this context, ‘the question whether the genocide would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession, becomes directly relevant’.⁷⁹ This notion of causation corresponds to Article 31 of the ILC Articles.

The Court’s ‘might have contributed’ test for causation could provide a useful model for the assessment of other obligations of prevention in international law. Indeed, the ECtHR has adopted a similar test in relation to the protection of the right to life. Article 2 of the ECHR requires member states not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within their jurisdiction. The ECtHR stated in the *Keenan* case:

⁷⁸ *ibid*, [430] (emphasis added).

⁷⁹ *ibid*, [462].

For a positive obligation to arise, it must be established...that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, *might have been expected to avoid that risk*.⁸⁰

For other obligations, it may be necessary to establish a more direct causal relationship between the state's omission and the wrongful private conduct in order to establish a violation. One must always examine the precise content of the primary obligation under consideration in order to identify the requisite causal relationship.

5. Damage

There is no general requirement that the victim state show material or moral damage in order to establish state responsibility. In many cases, the legal injury is deemed inherent in the wrongdoing state's breach of its international obligation towards the claimant state. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another state party to point to any specific damage caused by that failure.⁸¹ In other cases, the particular primary obligation in question may require the claimant state to prove damage in order to establish responsibility. For example, states may be held liable for the environmental damage caused by their failure to prevent certain private activities on state territory, in which case the existence of damage is a crucial component of the internationally wrongful act itself. The relevance of damage in assessing breach depends on the primary rule in question, and not on the secondary

⁸⁰ *Keenan v UK* (n 55), [89] (quoting *Osman v UK* (n 55), [116]) (emphasis added).

⁸¹ See ILC Articles, Commentary to art 2, [9].

rules of state responsibility, although in any case damage will frequently be taken into account when assessing the modalities and quantum of reparation.

IV. Circumstances precluding wrongfulness

In certain limited circumstances, a state that has engaged in internationally wrongful conduct may be able to rely on some defence or excuse to absolve itself of international responsibility. Part One, Chapter V of the ILC Articles catalogues six such ‘circumstances precluding wrongfulness’: consent,⁸² self-defence,⁸³ countermeasures,⁸⁴ *force majeure*,⁸⁵ distress⁸⁶ and necessity.⁸⁷ This list is not exhaustive, as specific defences or excuses may be recognised for particular obligations. Article 26 makes it clear that a state cannot rely on any of these circumstances if such reliance would conflict with a peremptory norm of general international law.

These circumstances will only justify or excuse the otherwise wrongful act for as long as they continue to exist. For example, if State A takes countermeasures in response to a breach of obligations by State B owed to State A, and State B then recommences performance of its obligations, State A must terminate its

⁸² *ibid*, art 20.

⁸³ *ibid*, art 21.

⁸⁴ *ibid*, art 22.

⁸⁵ *ibid*, art 23.

⁸⁶ *ibid*, art 24.

⁸⁷ *ibid*, art 25.

countermeasures; if it does not, it will incur responsibility for the period after State B resumed performance of its obligations.⁸⁸

V. Consequences of state responsibility

Finally, turning to the consequences of state responsibility, in general the commission of an internationally wrongful act of a state gives rise to certain secondary obligations on the part of the wrongdoing state. These are codified in Part Two, Chapter I of the ILC Articles. Article 30 identifies two principal legal consequences of an internationally wrongful act, namely, the wrongdoing state's obligation to cease the wrongful conduct and its obligation to make full reparation for the injury caused by that act.⁸⁹

The obligation of reparation is the automatic corollary of a state's responsibility.⁹⁰ In essence, the law attempts to restore, as far as possible, the situation that existed prior to the state's failure to fulfil its obligation.⁹¹ The Permanent Court of International Justice explained this principle in the following terms:

The essential principle contained in the actual notion of an illegal act...is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award,

⁸⁸ *ibid*, art 27(a); see also arts 52(3)(a) and 53.

⁸⁹ *ibid*, arts 30 and 31.

⁹⁰ *Factory at Chorzów* (Merits) PCIJ Ser A No 17 (1927), 29; *Spanish Zone of Morocco Claims (Spain v Great Britain)* (1925) 2 RIAA 615, 641; *SS Wimbledon* PCIJ Ser A No 1 (1923), 3; ILC Articles, Commentary to Article 31, [4].

⁹¹ See comments of UN special rapporteur (1987) UN Doc.A/CN.4/405, p 17 [55]; *Factory at Chorzów*, 47-48.

if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁹²

Where a court has jurisdiction to determine a dispute, it will generally also have jurisdiction to determine the nature and extent of reparation.⁹³ Restitution in kind is the primary method of providing reparation, since it aims to re-establish the situation that existed before the commission of the wrongful act.⁹⁴ Insofar as the damage is not made good by restitution, the wrongdoing state is under an obligation to provide compensation. The basic requirement is that compensation should cover any ‘financially assessable damage’ flowing from the breach,⁹⁵ and this may be supplemented by interest.⁹⁶

Although international tribunals are gradually developing the international law of remedies, many international disputes retain a distinctly symbolic element.⁹⁷ Frequently the claimant will seek non-monetary compensation, known as ‘satisfaction’, such as ‘an acknowledgment of the breach, an expression of regret, an apology or another appropriate modality’.⁹⁸ In many cases before international tribunals, an authoritative finding of the breach will be held to be sufficient satisfaction.⁹⁹ Such a finding serves to clarify the precise contours of the international obligation, and this then feeds back into the internal political processes

⁹² *ibid*, 47.

⁹³ See, eg, Statute of the International Court of Justice, art 36.

⁹⁴ For a detailed discussion of the forms and functions of reparation, see Brownlie (n 13), ch XIII.

⁹⁵ ILC Articles, art 36.

⁹⁶ *ibid*, art 38.

⁹⁷ See Evans, *International Law* (2 edn, OUP, Oxford 2006), 472.

⁹⁸ ILC Articles, art 27(2).

⁹⁹ See D Shelton, *Remedies in International Human Rights Law* (OUP, Oxford 1999), 199-213.

of states where it can then shape domestic laws and policies in accordance with international law.

Specialist treaties may also provide for specific forms of redress or other legal consequences.¹⁰⁰ In human rights law, for example, in addition to an obligation of 'substantive' reparation (restitution, compensation, satisfaction and guarantees of non-repetition), a 'procedural' obligation of reparation may arise. This constitutes an obligation on the wrongdoing state, owed to other states, to give the injured individual an effective domestic remedy against the violation.¹⁰¹

The responsible state is only liable for injury that is 'caused by' its internationally wrongful act.¹⁰² There must therefore be a causal link between the internationally wrongful act and the injury, and the injury must not be too 'remote' or 'consequential' to be the subject of reparation. In some cases the injury may be attributable to a combination of causes, or to one of several concurrently operating causes, only one of which is to be ascribed to the responsible state. Nonetheless, the responsible state may be held responsible for the totality of the injury, provided that it is not too remote to be the subject of reparation.¹⁰³ In the *Hostages* case, for example, although the initial seizure of the hostages by Iranian students was not attributable to Iran, the Court held that Iran was fully liable for the hostages' ordeal

¹⁰⁰ See ILC Articles, Introduction to Part II, [2].

¹⁰¹ See, eg, ECHR, art 13; American Convention, art 25; ICCPR, art 2(3); see also R Pisillo-Mazzeschi, 'International Obligations to Provide for Reparation Claims' in A Randelzhofer and C Tomuschat (eds) *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (Martinus Nijhoff Publishers, London 1999), 155-156.

¹⁰² ILC Articles, art 31.

¹⁰³ See *ibid*, Commentary to art 31, [10], [12]-[13].

from the moment of its failure to protect them.¹⁰⁴ Similarly, in *Corfu Channel* the Court did not find that Albania had laid the mines that damaged the British ships, but instead found Albania responsible for its failure to warn the UK of the presence of the mines. Nonetheless, the UK recovered the full amount of its claim against Albania.¹⁰⁵

In addition to the consequences outlined above, certain serious breaches of peremptory norms of general international law (*jus cogens*) give rise to an obligation on all other states to refrain from recognising as lawful the situation thereby created or from rendering aid or assistance in maintaining it.¹⁰⁶ States must also cooperate to bring the serious breach to an end ‘through any lawful means’. A breach is serious if it involves a ‘gross or systematic failure by the responsible state to fulfil’ such an obligation.¹⁰⁷

VI. Conclusion

The hiring state, the host state and the home state of a PMSC have a range of international obligations which indirectly encourage and, in some cases, directly oblige them to take positive steps to control company behaviour in armed conflict. Where a PMSC engages in inappropriate or harmful behaviour or otherwise fails to act in accordance with the standard required by international law, in certain

¹⁰⁴ *Hostages case* (n 69), [60]-[68].

¹⁰⁵ See *Corfu Channel (Merits)* (n 49); *Corfu Channel (Assessment of Amount of Compensation)* ICJ Rep 1949, 244, 250.

¹⁰⁶ See ILC Articles, art 41(2).

¹⁰⁷ *ibid*, art 40(2).

circumstances that PMSC misconduct may lead to the international responsibility of any or all of these three categories of states. Some instances of PMSC misconduct may be directly attributable to the hiring state, such that the misconduct itself is deemed to be an act of the state giving rise to its responsibility under international law. Moreover, irrespective of the attributability of the PMSC misconduct itself, in certain circumstances it may indirectly give rise to the responsibility of the hiring state, the host state and/or the home state for a failure to fulfil a primary obligation to prevent, investigate, punish or redress.

The remainder of this Thesis utilises the general framework set out in this Chapter in order to examine the specific obligations on the hiring state, the host state and the home state of a PMSC. A clear understanding of these obligations may assist in the determination of state responsibility following an allegation of PMSC misconduct, either by facilitating formal dispute resolution proceedings or, more commonly, by providing a legal framework within which states can resolve their disputes diplomatically through negotiation. More generally, the analysis in this Thesis may encourage and assist states to develop their internal laws and policies on private security in accordance with international standards.

III. The attribution of PMSC conduct to the hiring state

PMSCs today often work in zones of armed conflict alongside and in conjunction with the armed forces of their hiring state, performing many of the same functions in the context of the same overall mission. Like national soldiers, PMSC personnel may engage in inappropriate or harmful conduct which is inconsistent with the primary obligations of their hiring state; they may commit war crimes, for example, or violate human rights. Yet it will generally be more difficult to establish the responsibility of the hiring state for violations committed by a PMSC employee than it would be if a national soldier of that state were to engage in the same conduct. This discrepancy could provide an incentive for states to outsource their military and security activities in order to reduce the risk that they will incur responsibility for violations of international law in armed conflict.¹

States *cannot* simply outsource their international responsibility by conducting their military and security functions through private contractors rather than regular soldiers. On the contrary, this Chapter argues that the traditional law of state responsibility is sufficiently broad and flexible to accommodate the majority of PMSC activities performed for a state in armed conflict. This Chapter critically analyses each of the three principal ways in which PMSC conduct may be attributed to the hiring state under the secondary rules of state responsibility. Part I examines the

¹ See C Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 (5) EJIL 989; University Centre for International Humanitarian Law (UCIHL), 'Expert Meeting on Private Military Contractors' (Geneva, Aug 2005), 20-22.

rare case in which a PMSC is so highly integrated into the hiring state's armed forces that it is deemed to form part of those forces for the purposes of state responsibility. Part II then assesses the more common scenario in which a PMSC is empowered by the law of the hiring state to exercise elements of governmental authority. Finally, Part III considers attribution based on the hiring state's instructions, direction or control. A close analysis of these rules reveals that a large proportion of PMSC activities in armed conflict will fall within one of these three categories.

I. PMSCs forming part of the armed forces

In rare cases a PMSC may be so highly integrated into the armed forces of its hiring state that it actually forms part of those forces for the purposes of state responsibility. Such a finding would be highly significant for the hiring state, as it is much easier to establish state responsibility for acts of state organs than for acts of private individuals. This Part identifies the circumstances in which a PMSC will form part of the hiring state's armed forces and discusses the attribution of PMSC conduct in such cases, both in international and in non-international armed conflict.

A. Definition of the armed forces

1. International armed conflicts

Traditionally, IHL relied upon states' domestic definitions of their armed forces in order to prescribe the rights and obligations associated with membership thereof. Article 4A(1) of GCIII reflects this approach. Article 43 of Protocol I, on the other hand, provides an *international* definition of the armed forces, which focuses upon

the factual circumstances of an individual's participation in the conflict and not upon their legal status under domestic law.

Article 4A of the Third Geneva Convention

Article 4A of GCIII identifies one category of individuals entitled to prisoner of war status, namely, '[m]embers 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'. The term 'armed forces' in this provision encompasses only those individuals who form part of the armed forces *de jure* under the domestic law of the state in question. The ICRC Commentary explains that the reference to 'militias or volunteer corps forming part of such armed forces' refers to groups that form part of the armed forces under domestic law but are nonetheless 'quite distinct from the army as such'. Although the reference to such groups was strictly speaking 'probably not essential', since 'these were covered by the expression "armed forces"', for the sake of clarity the drafters chose to maintain this reference as it appears in the Hague Regulations.²

Article 4A(2) identifies a second category of individuals also entitled to prisoner of war status, namely, '[m]embers of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a Party' who fulfil the following four 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.

² J Pictet (ed), *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC Geneva 1960), 52.

Thus, under Article 4A there are two ways in which a PMSC employee could qualify as a combatant entitled to prisoner of war status: he or she may be formally incorporated into the armed forces of the hiring state (Article 4A(1)) or, in the absence of such *de jure* incorporation, he or she may fulfil the criteria *de facto* set out in Article 4A(2). Article 4A has nothing to say, however, on the criteria for membership of a state's armed forces *per se*.

Article 43 of Protocol I

In contrast to Article 4A of GCIII, Article 43 of Protocol I lays down an international definition of the 'armed forces' which is not dependent upon domestic law. Given that 168 states have ratified Protocol I, Article 43 will be applicable in a large proportion of international conflicts.³ This definition is central to the assessment of state responsibility in such conflicts because Article 91 of Protocol I provides a special rule of attribution for the conduct of a state's 'armed forces', as discussed below in Section B. Given that Article 91 was adopted after Article 43, one must assume that the relevant definition of the armed forces for the purpose of Article 91 is that contained in Article 43; in other words, the acts of PMSC personnel who fall within Article 43 will be attributable to the hiring state pursuant to Article 91.⁴

³ For the list of state parties see <<http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P>> (accessed 1 Sept 2009).

⁴ See T Kamenov, 'The Origin of State and Entity Responsibility for Violations of International Humanitarian Law in Armed Conflicts' in F Kalshoven and Y Sandoz (eds) *Implementation of International Humanitarian Law* (Martinus Nijhoff, Dordrecht 1989), 174-176.

Article 43(1) provides:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

Article 43(2) then provides that all members of the armed forces so defined (other than medical personnel and chaplains) are combatants.

Article 43 effectively abolishes the distinction between regular and irregular forces in Article 4A of GCIII and brings all combatants within the general category of the 'armed forces'. The definition of the armed forces in Article 43(1) is considerably broader than the definition of combatants in Article 4A of GCIII, since the former does *not* stipulate that individuals must wear a fixed distinctive sign, carry their arms openly and comply with the laws and customs of war (criteria (b) – (d) of Article 4A(2)). These three requirements continue to attach to the armed forces as a whole and must therefore be enforced through the state's 'internal disciplinary system', and (b) and (c) are incorporated into Article 44 as potential bases for forfeiting prisoner of war status.⁵ These criteria do not, however, form part of the definition of the armed forces in Article 43(1). The second sentence of Article 43(1) is an additional rule applicable to the armed forces as defined in the first sentence, rather than a component of the definition of the armed forces *per se*; this is clear from the

⁵ Article 44 specifies that any combatant who falls into the power of an adverse party shall be a prisoner of war. It goes on to specify that combatants must 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 fail to do so, they forfeit their right to prisoner of war status.

use of the word ‘such’ at the beginning of the second sentence. The result of this formulation is that some PMSC personnel may form part of the armed forces under Protocol I even though they do not qualify as combatants under GCIII.⁶

Thus, there are two situations in which PMSC personnel hired by a state to work in armed conflict could fall within hiring state’s armed forces under international law: first, the PMSC personnel may be incorporated *de jure* by the hiring state into its regular armed forces; or second, the PMSC personnel may fall within those forces *de facto* because they qualify as members of organised armed forces, groups or units under a command responsible to the hiring state within Article 43 of Protocol I.

Essentially the same interpretation appears in the 2008 Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, which was produced by seventeen states as a result of an initiative launched jointly by Switzerland and the ICRC.⁷ Part One of the Document, which sets out the existing international obligations of states, PMSCs and their personnel under international law, provides that PMSC violations of international law are attributable to the hiring state where the companies or their personnel are (*inter alia*) ‘incorporated by the State into its regular armed forces in accordance with its domestic legislation’ or ‘members of organised armed forces, groups or units under a command responsible

⁶ See Y Sandoz, C Swinarski and B Zimmermann (eds), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC Geneva 1987), [1659]-[1681].

⁷ Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (17 Sept 2008) UN Doc A/63/467-S/2008/636.

to the State'.⁸ The Document is highly significant not only because it has triggered considerable discussion and support,⁹ but also because it represents a clear expression of *opinio juris* of the states involved in its drafting (Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the UK, Ukraine and the US), a list which includes many of the states most affected by PMSC activity.¹⁰

Membership de jure of the hiring state's armed forces

A PMSC would certainly fall within Article 43 if the hiring state incorporated the company formally into its armed forces. Most countries have formal procedures for enlistment with which PMSCs would need to comply in order to acquire *de jure* membership of the armed forces, although some states have minimal procedures and might even permit individuals to become members of the armed forces merely by joining in the fighting.¹¹ A state hiring a foreign PMSC for combat or armed security might choose to incorporate the company into its armed forces in order to bring the contractors within the military chain of command, whilst also ensuring that they fall outside the definition of a mercenary in Article 47 of Protocol I. Indeed, the government of Sierra Leone incorporated Executive Outcomes personnel into its

⁸ *ibid*, Part I, [7].

⁹ See, eg, European Commission for Democracy through Law, 'Report on Private Military and Security Firms and Erosion of the State Monopoly on the Use of Force' (Venice, 12-13 June 2009), available at <http://www.venice.coe.int/docs/2009/CDL-AD%282009%29038-e.asp> (accessed 21 Sept 2009), [65].

¹⁰ For a discussion of the significance of the Montreux Document, see J Cockayne, 'Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document' (2009) 13 (3) *J Conflict & Security L* 401; J del Prado, 'Private Military and Security Companies and the UN Working Group on the Use of Mercenaries' (2009) 13 (3) *J Conflict & Security L* 429, 441-449.

¹¹ Schmitt notes that this was the case for the Taliban in Afghanistan: see M Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2004-2005) 5 *Chicago J Intl L* 511, 524.

armed forces before they fought in the civil war in 1995-1996, just as the Papua New Guinea government incorporated Sandline personnel into its national forces as 'special constables' in 1997.¹² This practice, however, is virtually unheard of today.

A small number of commentators maintain that formal incorporation into a state's armed forces is the only way in which a group such as a PMSC could form part of those forces for the purposes of IHL. Those advancing this interpretation sometimes point to the requirement in Article 43(3) of Protocol I that a state notify the other parties to the conflict whenever it 'incorporates a paramilitary or armed law enforcement agency into its armed forces', arguing that this implies an obligation on the state to incorporate such groups formally into its armed forces.¹³ However, an examination of the drafting history of Article 43(3) reveals that this argument is erroneous. The ICRC Commentary makes it clear that this provision was directed at domestic police forces, and was designed to ensure that there is no confusion between combatants in the armed forces and state officials performing internal lawkeeping functions.¹⁴ Where a state has converted the *de jure* status of the latter to that of the former, it has an obligation to notify the adverse party 'so that there is no confusion on its part'. This obligation applies only in relation to *de jure* state organs that can be equated with domestic police forces; it does not apply

¹² S Dinnen, R May and A Regan (eds), *Challenging the State: The Sandline Affair in Papua New Guinea* (National Centre for Development Studies Canberra 1997); JC Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International law, and the New World Disorder' (1998) 34 *Stan J Intl L* 75, 124; UK Foreign Commonwealth Office Green Paper, 'Private Military Companies: Options for Regulation' (Feb 2002), [6].

¹³ See, eg, ICRC, 'Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities' (Geneva, Oct 2005), 77; UCIHL Expert Meeting (n 1), 11-12.

¹⁴ ICRC Commentary to the Additional Protocols (n 6), [1682].

more generally to groups (such as PMSCs) that constitute private entities under the domestic law of the state.

Membership de facto of the hiring state's armed forces

According to the Commentary by Bothe *et al*, Article 43(1) was intended to include any organised group that in fact 'acts on behalf of the party to the conflict in some manner', so long as 'that party is responsible for the group's operations'.¹⁵ This leaves open the possibility that a PMSC could form part of the hiring state's armed forces by virtue of its *de facto* incorporation. The recognition of *de facto* state organs in international law is not unique to Article 43; on the contrary, the ICJ acknowledged in the *Nicaragua* and *Genocide* cases that groups may be treated as state organs under the general law of state responsibility even where they are not classified as such under domestic law.¹⁶ States are not free to decide entirely subjectively who forms part of their armed forces under international law.

The key criterion in Article 43 is that the group be 'under a command responsible' to that state. The ICRC Commentary explains that '[a]ll armed forces, groups and units are necessarily structured and have a hierarchy, as they are

¹⁵ M Bothe, KJ Partsch and WA Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff, The Hague 1982), 234. During the drafting of Protocol I, many developing countries argued for this definition because they did not have substantial regular armed forces and had to rely largely on guerrilla troops: see ICRC Commentary to the Additional Protocols (n 6), [1672]; J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, vol I: Rules* (CUP, Cambridge 2005), Rule 4, 14-16.

¹⁶ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)* (Merits) ICJ Rep 1986, [109]-[110]; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, (Merits) (26 Feb 2007), [396]-[397]. The recognition of *de facto* state organs under customary international law is discussed below at text accompanying notes 41-40.

subordinate to a command which is responsible to one of the Parties to the conflict for their operations.¹⁷ The Commentary adds that in general ‘the exercise of such responsibility implies the exercise of effective control over subordinates’, referring to Article 87 which governs the duty of commanders to prevent, suppress and report breaches of IHL committed by members of the armed forces under their command.¹⁸ States have an obligation under Article 87(2) ‘to require that...commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.’

The ICTY Appeals Chamber has likewise emphasised the need for state control in assessing whether a group in fact forms part of a state’s armed forces. In the *Tadic* case of 1999, the ICTY Appeals Chamber developed its test of ‘overall control’ in relation to the rule of attribution in Article 8 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles),¹⁹ as applied to ‘an organised and hierarchically structured group’ such as a military unit or armed bands of irregulars.²⁰ The Appeals Chamber noted that this test is also ‘indispensable for determining when individuals who, formally speaking, are not military officials of a State may nevertheless be regarded as forming part of the armed forces of such a State’.²¹

¹⁷ ICRC Commentary to the Additional Protocols (n 6), [1672].

¹⁸ *ibid*, [1672], n 20.

¹⁹ ILC Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001) II (2) YBILC.

²⁰ *Prosecutor v Tadic* (Appeal Judgment) ICTY-94-1-A (15 July 1999), [120], discussed in Part III-B of this Chapter.

²¹ *ibid*, [98], n 117.

Article 43 does not specifically require ‘military’ command, leaving open the possibility of command by civilian officials. Thus, although PMSCs generally fall outside the military chain of command and control, in theory they could still fulfil the requirement of responsible command if they were acting within a hierarchical structure that was answerable to the hiring state. For a PMSC to fulfil this criterion, government officials (civilian or military) would need to exercise control over the company’s operations, as well as taking measures to prevent, suppress and report breaches of IHL committed by the company in the field. The terms of the PMSC’s contract could provide some indicia that the company was acting within a hierarchical system of control and accountability, particularly if the contract included provisions specifying oversight by a particular government official, accompanied by regular reporting requirements and consequences for violation such as contractual termination, monetary penalties and exclusion from future contracts. One factor complicating this analysis is the complex web of subcontracting arrangements that is common in the private security industry. A 2006 directive of the US Department of Defense requires ‘contractors to institute and implement effective programs to prevent violations of the law of war by their employees *and subcontractors*, including law of war training and dissemination’.²² Yet the reality is that the more convoluted the contractual relationship between the state and the company, the more difficult it will be to establish responsible command within Article 43(1).

²² US Department of Defense Directive 2311.01 E (9 May 2006), [5.11.9] (emphasis added).

An examination of recent US practice suggests that the oversight and disciplinary arrangements for PMSCs hired by US government departments would generally fail to meet the threshold for Article 43(1). For example, according to an official report into the Abu Ghraib prisoner abuse scandal (the Fay Report), in 2003-2004 in Iraq a small number of contracting officers were responsible for administering and monitoring numerous PMSC contracts involving 100 or more PMSC employees, sometimes in several locations. These contracting officers 'do well to keep up with the paper work, and simply have no time to actively monitor contractor performance'.²³ In some cases the control relationship between the US and the PMSCs was even reversed, with contractors supervising public personnel rather than the other way around.²⁴

The US Department of Defense has since attempted to improve these practices and has published a range of policy documents with a view to increasing state control and accountability within the private security industry.²⁵ Serious problems have nonetheless persisted. An August 2008 report of Congress explains the general supervisory arrangements for contractors in the field, noting that the civilian contracting officer who is designated to administer and monitor a particular PMSC contract

²³ GR Fay, 'Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade' (Aug 2004), 50-52.

²⁴ *ibid*, 51. A similar reversal in the supervisory relationship was reported in relation to Blackwater operations in Najaf in 2004: see --, 'Contractors in Combat: Firefight from a Rooftop in Iraq' *Virginia Pilot* (25 July 2006); J Scahill, *Blackwater* (Serpent's Tail, London 2007), 123.

²⁵ See, eg, US Department of Defense Instruction 3020.41 (3 Oct 2005); US Department of Defense Directive 2311.01 E (9 May 2006).

is not always colocated with the military commander or the contractor personnel and may not even be within the theater of operations. The contracting officer may not have access to the place of performance if that place is remote or dangerous or if it covers a large geographic area. Instead, he or she may rely on a technical representative, usually a military officer on the staff of the military unit being supported and colocated with the contractor. The technical representative interacts frequently, sometimes daily, with the contractor about details of performance but not about the scope or size of the contract.²⁶

In some cases, the military commander may have some authority over the PMSC by virtue of 'a task-order arrangement', which enables the commander to add new tasks to an existing contract within overall resource bounds.²⁷ But the contractors still remain outside the military chain of command and control, and the contractual instrument provides little flexibility to adjust to rapid changes in government objectives or practical conditions on the ground.

In some cases even broad governmental oversight of PMSC contracts with the US is lacking. For example, a June 2009 Senate report on the ArmorGroup-State Department contract to guard the US Embassy in Kabul describes the contract as 'a case study of how mismanagement and lack of oversight can result in poor performance'.²⁸ The report details numerous deficiencies in ArmorGroup's performance including a severe, ongoing security guard shortage, the provision of substandard equipment, inadequate English language skills and security training amongst guards, and overworking of guards resulting in chronic sleep deprivation.

²⁶ US Congressional Budget Office, 'Contractors' Support of US Operations in Iraq' (Aug 2008), available at <<http://www.cbo.gov/ftpdocs/96xx/doc9688/08-12-IraqContractors.pdf>> (accessed 14 Sept 2009), 20 (references omitted).

²⁷ *ibid*, 20.

²⁸ Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Contracting Oversight, 'New Information about the Guard Force Contract at the US Embassy in Kabul' (June 2009), available at <<http://mccaskill.senate.gov/pdf/061009/StaffAnalysis.pdf>> (accessed 14 Sept 2009), 9.

These contractual violations continued throughout 2007 and 2008 despite the issuance of almost one written warning per month from the US State Department, jeopardising the security of the Embassy and demonstrating the Department's chronic inability to compel contractual compliance. Nonetheless, the State Department renewed AmorGroup's contract in June 2009, with the option to extend it until 2012.²⁹ Further reports in September 2009 detailed lewd behaviour and sexual misconduct by the AmorGroup contractors and supervisors at their living quarters at a base in Kabul, pointing to a pervasive breakdown of discipline amongst the guard force and further emphasising the inability of the State Department to control private security contractors in the field.³⁰

International conflicts not governed by Protocol I

Protocol I has been ratified by 168 states, but a number of states including the US and Israel are not parties thereto. In international conflicts not governed by Protocol I, such as the conflict in Afghanistan in 2001, customary international law will dictate whether a PMSC forms part of the hiring state's armed forces.

²⁹ See Local Guard Services Kabul, Afghanistan, Contract No S-AQMPD-07-C0054, ss B.3 and B.4, details available at <http://www.usaspending.gov/fpds/fpds.php?agencyID=STATE%20Department%20of&modNumber=M019&transactionNumber=0&IDVAgencyID=&IDVPIID=&PIID=SAQMPD07C0054&fiscal_year=2009&fromITSearch=true> (accessed 15 Sept 2009); see also G Thompson and M Landler, 'Company Kept Kabul Security Contract Despite Record' *New York Times* (11 Sept 2009).

³⁰ See Project on Government Oversight Letter to Secretary of State Hillary Clinton regarding US Embassy in Kabul (1 Sept 2009), available at <<http://www.pogo.org/pogo-files/letters/contract-oversight/co-gp-20090901.html>> (accessed 13 Sept 2009); A Cole, 'Firm Fires US Embassy Guards in Kabul' *Wall Street Journal* (5 Sept 2009); D Alexander, 'US Says 16 Guards Removed In Afghan Embassy Scandal' *New York Times* (10 Sept 2009); --, 'Embassy Guard Photos Evoke Abu Ghraib Comparison' *New York Times* (14 Sept 2009).

Much of Protocol I is considered to be reflective of customary law. For example, Article 91 reproduces Article 3 of the Hague Convention Concerning the Laws and Customs of War on Land of 1907,³¹ which reflects the customary rule.³² The ICRC also classifies Article 43(1) as essentially reflective of customary law, noting that it mirrors the definitions in many military manuals and ‘is supported by official statements and reported practice’, including practice of states not, or not at the time, party to Protocol I.³³ The ICRC’s recent study on customary IHL notes that the definition in Article 43(1)

is now generally applied to all forms of armed groups who belong to a party to an armed conflict to determine whether they constitute armed forces. It is therefore no longer necessary to distinguish between regular and irregular armed forces. All those fulfilling the conditions in Article 43 of Additional Protocol I are armed forces.³⁴

Many commentators question whether the process of assimilation of regular and irregular armed forces, as exemplified by Protocol I, has in fact reached the level of customary law as the ICRC asserts. In the ‘practice’ section of the ICRC study, most of the military manuals cited are those of states parties to Protocol I, and even some of those still contain references to the conditions for militias and resistance movements laid down by the Hague Regulations and GCIII. Of the non-parties’ manuals cited, only the Indonesian air force manual and the US naval handbook seem to accord with Article 43(1).³⁵ What’s more, it is well known that the US and

³¹ Convention Respecting the Laws and Customs of War on Land (adopted 18 Oct 1907, entered into force 26 Jan 1910) 205 Consol TS 277.

³² See *Case Concerning Armed Activities in the Territory of the Congo (DRC v Uganda)* (Merits) ICJ Rep 2005, [214].

³³ Henckaerts and Doswald-Beck (n 15), vol I, Rule 4, 14.

³⁴ *ibid*, vol I, Rule 4, 16.

³⁵ J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, vol II: Practice* (CUP, Cambridge 2005), part I, 88-97; see also A Rogers, ‘Combatant Status’ in E Wilmshurst and S

Israel continue to object to the Protocol's relaxation of the criteria for lawful combatancy.³⁶ These objections relate less to Article 43's definition of the armed forces *per se* than to Article 44's removal of the requirement that a combatant comply with IHL and distinguish him- or herself from the population at all times in order to retain status as a combatant. Even so, it might be somewhat unrealistic to insist upon a customary definition of the armed forces on the basis of a provision that is not recognised by the world's major military power, at least in the absence of evidence of widespread consensus amongst other states not party to Protocol I.³⁷

Given the uncertainty surrounding the customary status of Article 43(1), in international conflicts not governed by Protocol I, it will be necessary to examine the domestic law of the relevant state in order to delineate membership of the state's armed forces for the purpose of attribution. In rare cases, individuals who are not *de jure* members of the armed forces under domestic law may nonetheless be deemed *de facto* members of those forces under customary international law. Essentially the same analysis applies in this context as in non-international armed conflicts, to which this discussion now turns.

Breau (eds) *Perspectives on the ICRC's Study on Customary International Humanitarian Law* (BIICL, Cambridge 2007), 110.

³⁶ For the US position on Protocol I, see Memorandum for Mr John McNeill, Assistant General Counsel (International), Memorandum for Mr John H McNeill, Assistant General Counsel (International), '1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications' (8 May 1969); Agora, 'The US Decision Not to Ratify Protocol I to the Geneva Conventions in the Protection of War Victims' (1987) 81 AJIL 912; Parks, 'Remarks, Customary Law and Additional Protocol I to the Geneva Conventions for Protection of War Victims' (1987) 81 ASIL Proc 27.

³⁷ See ICRC, 'Report of the First Expert Meeting on the Notion of Direct Participation in Hostilities' (Geneva, Sept 2003), 77; Schmitt (n 11), 527, n 65.

2. Non-international armed conflicts

A government fighting rebel forces within its territory may choose to hire a local or foreign PMSC to help maintain authority within state territory, or it may request a foreign state to hire a PMSC to assist in defeating the insurgents. In each case, the company's activities will be governed both by the domestic law of the warring state and by the rules of IHL applicable in non-international armed conflicts—most importantly Common Article 3 of the Geneva Conventions and, for those states that are parties thereto, Additional Protocol II to the Geneva Conventions (Protocol II).³⁸

On the other hand, where a foreign state acts sends a PMSC to support the *insurgents* in the non-international conflict, rather than supporting the government, this may trigger the application of the more detailed rules of IHL governing international conflicts.³⁹ The regime of IHL governing non-international armed conflicts may still be applicable in relation to certain hostilities, since the conflict may be 'mixed' in the sense that an international conflict may be taking place alongside a non-international conflict in the same state.⁴⁰ One must therefore assess the status of the particular hostilities under consideration in order to determine which regime of IHL applies.

³⁸ Second Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 Dec 1987) 1125 UNTS 609.

³⁹ Such action may also constitute an unlawful intervention into the internal affairs of the warring state: see Chapter VI-II of this Thesis.

⁴⁰ See *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72 (2 Oct 1995).

In non-international armed conflicts, a state's armed forces are defined by reference to the same general rules that define the other organs of the state. The starting point will always be the domestic law of the state in question. Article 4 of the ILC Articles makes this clear by providing in paragraph two that a state organ 'includes any person or entity which has that status in accordance with the internal law of the State'. Yet domestic law by itself is not sufficient to identify all state organs for the purposes of state responsibility. The notion of a 'state organ' under general international law encompasses 'all the individual or collective entities which make up the organisation of the state and act on its behalf'.⁴¹ There may be some entities falling within this description which are not classified as state organs under the domestic law of the state. The use of the term 'includes' in Article 4(2) leaves open the possibility that such entities might nonetheless be characterised as state organs under international law. As the Commentary to Article 4(2) explains, 'a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.'⁴²

The ICJ considered the issue of *de facto* state organs in the *Nicaragua* case, holding that a person, group or entity that does not have the status of a state organ under domestic law may nonetheless be equated with a state organ if its relationship with the state is one of 'complete dependence' on the one side and control on the

⁴¹ ILC Articles, Commentary to art 4, [1].

⁴² *ibid*, Commentary to art 4, [11].

other.⁴³ On the facts, however, the Court found that the Nicaraguan *contras* were not completely dependent on the US.

The ICJ reiterated this principle in the *Genocide* case of 2006, making it clear that there are two categories of attribution based on the *de facto* status or conduct of a private actor: Article 4 encapsulates private actors (persons, groups or entities) that in fact *constitute* a state organ, whereas Article 8 encapsulates private actors that act under the instructions, direction or control of the hiring state in a particular instance.⁴⁴ The test governing the former category is considerably more stringent than that governing the latter. According to the Court, an entity that does not have the status of a state organ under the internal law of the state may nonetheless be equated to a *de facto* organ if its relationship with the state is one of ‘complete dependence’. The Court emphasised the ‘exceptional’ nature of this situation: the entity must be ‘merely the instrument’ of the state, such that its supposed independence is ‘purely fictitious’.⁴⁵

Whilst it is possible to envisage exceptional cases in which a PMSC’s supposed independence is merely fictitious,⁴⁶ most companies would fail this stringent test by virtue of *inter alia* their independent corporate structure and the fact that they

⁴³ *Nicaragua* (n 16), [109]-[110].

⁴⁴ *Genocide* case (n 16), [396]-[397]. This followed statements by the ICTY Appeals Chamber in the *Tadic* appeal judgment of 1999 (n 20) (at [106]-[114]) that the ICJ’s notions of ‘complete dependence’ and ‘effective control’ in *Nicaragua* were simply spelling out the requirements of the same test under Article 8 of the ILC Articles.

⁴⁵ *Genocide* case (n 16), [391]-[393].

⁴⁶ Hoppe cites the example of Air America in Vietnam, which was an ‘air proprietary’ operated by the CIA during the Cold War: see C Hoppe, *State Responsibility for Violations of International Humanitarian Law Committed by Individuals Providing Coercive Services under a Contract with a State* (Centre for Studies and Research of The Hague Academy of International Law, 2008), 15.

generally have at least some autonomy in planning and performing their operations. One might reach a different conclusion, however, by focusing on the particular team of contractors that is actually performing the contract in question, rather than focusing on the PMSC as a whole. This would appear to be consistent with the ICJ's reference to 'persons, groups or entities' as potential units of analysis.⁴⁷ Chapter I of this Thesis explained that many PMSCs are global entities which recruit a unique team of personnel for each contract from an international database of names. Many contractors do not even enter the hiring state of the PMSC, but travel straight from their own home state to the host state with the sole purpose of performing their contract, lacking any personal interest in the conflict over and above financial gain. Hoppe distinguishes this scenario from that of the Nicaraguan *contras*, which the ICJ noted were not 'created' by the US, but instead had a prior existence and independent cause which the US simply exploited for its own purposes.⁴⁸ The Court explicitly identified this lack of state 'creation' as a relevant factor in rejecting the *de facto* organ status of the *contras*.⁴⁹ Similarly, in the *Congo* case, the ICJ was unable to find that Uganda had created the rebel group under consideration, and this was highly pertinent to the Court's conclusion that the rebels were not an organ of the state.⁵⁰ Against this background, the fact that the contract between the PMSC and the hiring state effectively leads to the 'creation' of a new team of contractors appears significant, and in some cases this unique sub-unit of a PMSC might even qualify as a *de facto* state organ as defined by the ICJ.

⁴⁷ See *ibid*, 15-17.

⁴⁸ *ibid*, 15-16.

⁴⁹ *Nicaragua* (n 16), [107]-[108].

⁵⁰ *Congo* case (n 32), [158]-[160].

B. Attributing acts of the armed forces to the state

1. International armed conflicts

In international armed conflicts, the chief provision governing the attribution of conduct of the armed forces is Article 91 of Protocol I, which provides:

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.

This essentially reproduces Article 3 of Hague IV, which reflects the customary rule.⁵¹

In the *Congo* case, the ICJ applied Article 91 not only to violations of Hague IV and Protocol I committed by the Ugandan armed forces, but also to violations of other rules of IHL and human rights law (HRL).⁵² One could equally apply this rule to hold the hiring state responsible for any violations of IHL and HRL committed by PMSC personnel forming part of the state's armed forces.⁵³

The rule in Article 91 applies to *all* acts committed by persons forming part of a state's armed forces, whereas the general rule governing the attribution of conduct of state organs in Article 4 of the ILC Articles applies only to acts committed by state organs acting 'in that capacity'.⁵⁴ In this sense, Article 91 provides a more specific interpretation of the general rule, applicable to the particular situation of the armed forces in an international armed conflict. Stated otherwise, Article 91 provides specific instructions as to the requirements of the general rule in this particular

⁵¹ See *ibid*, [214].

⁵² *ibid*, [214]-[220].

⁵³ See Hoppe, 'Passing the Buck' (n 1), 1005.

⁵⁴ See ILC Articles, Commentary to Article 4, [13]; see also Article 7.

circumstance—such instructions being that all persons forming part of a state’s armed forces are deemed to be acting in an official capacity for the entire period of their deployment in the international conflict zone. When viewed in this way, Article 91 can be described as a *lex specialis* rule of attribution—*lex specialis* in this context referring to a principle of more specific interpretation rather than a principle to solve conflicts of norms.⁵⁵

The view that international law provides a special rule of attribution for soldiers in an international armed conflict has been authoritatively advanced by some members of the International Law Commission. In discussing ‘cases in which the armed forces of several countries had committed acts unrelated to military operations’, Reuter stated in 1975 that ‘[i]t was now a principle of codified international law that States were responsible for all acts of their armed forces.’⁵⁶ In a similar vein, Ago stated that Article 3 of Hague IV ‘made provision for a veritable guarantee covering all damage that might be caused by armed forces, whether they had acted as organs or as private persons’.⁵⁷ According to Ago, the ‘very specialized’ nature of Hague IV meant that Article 3 ‘could not provide a basis for the drafting of’ the general rule of attribution for acts of state organs—the general rule which

⁵⁵ See generally M Koskeniemi, ‘Study on the Function and Scope of the Lex Specialis Rule and the Question of “Self Contained Regimes”’ (2004) UN Doc ILC(LVI)/SG/FIL/CRD.1 and Add.1 UN Doc ILC(LVI)/SG/FIL/CRD.1 and Add.1, 4; ILC Study Group on Fragmentation of International Law ‘Difficulties arising from Diversification and Expansion of International Law’ (29 July 2005) UN Doc A/CN.4/L.676, 6, [2.5.1]; see also the discussion in Ch IV-II(B) of this Thesis.

⁵⁶ Report to the General Assembly (1975) II YBILC, 7 [5].

⁵⁷ ILC, 1306th Meeting, 9 May 1975, ‘State Responsibility’ (1975) I YBILC, 16 [4].

eventually became Article 4 of the ILC Articles.⁵⁸ The ICJ hinted at a similarly broad view of Article 3 in the *Congo* case:

In the Court's view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda. The contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances, is therefore without merit.⁵⁹

The ICTY Appeals Chamber also noted in its *Tadic* judgment of 1999 that the view that Article 91 of Protocol I encapsulates a special regime of state responsibility applicable to the armed forces in international conflicts 'has been forcefully advocated in the legal literature.'⁶⁰

It follows from this conception that *all* the acts of PMSC personnel forming part of their hiring state's armed forces in an international armed conflict will be attributable to that state pursuant to Article 91. There will be no need to establish that the particular contractor was acting 'in that capacity' at the relevant time.

2. Non-international armed conflicts

Where a PMSC forms part of the hiring state's armed forces in a non-international conflict—either because the state has incorporated the company *de jure* into its armed forces or because the company qualifies as a *de facto* state organ under the 'complete dependence' test established by the ICJ—attribution falls to be assessed under the general rules of state responsibility reflected in the ILC Articles.

⁵⁸ *ibid.*

⁵⁹ *Congo* case (n 32), [213]; see also F Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (1991) 40 ICLQ 827, 838; ILC, '1306th Meeting, 9 May 1975: State Responsibility' (1975) I YBILC, 16 [4].

⁶⁰ *Tadic* appeal judgment (n 20), [98], n 117.

Article 4 provides the basic rule of attribution: the conduct of any state organ shall be considered an act of that state under international law. The ILC Commentary makes it clear that this rule encompasses only those acts of state organs that are committed 'in that capacity'.⁶¹ Generally speaking, state officials will be acting in that capacity if they are using the means and powers pertaining to the exercise of their official functions, such that they are 'cloaked with governmental authority' when they engage in the conduct in question.⁶² On the other hand, state officials will not be acting in that capacity if their conduct 'has no connection with the official function' and is, in fact, merely the conduct of private individuals.⁶³

Much will turn on how broadly the notion of an individual acting 'in that capacity' is construed in a particular situation. Unlike members of the armed forces in an international armed conflict, it is difficult to argue that members of the armed forces in a non-international conflict should be deemed to be acting in that capacity at all times. Since most of these soldiers will be fighting in their own country, their presence in the conflict zone will not be due to their status and functions as state officials, and there will clearly be times when they are out of uniform and are not in any way using the means and powers pertaining to the exercise of their official functions. In such cases they should be treated as acting in a purely private capacity, such that their conduct is not attributable to the state pursuant to Article 4.

⁶¹ ILC Articles, Commentary to Article 4, [13]; see also *Youmans* case (1926) 4 RIAA 110; *Caire* case (1929) 5 RIAA 516; *Velásquez Rodríguez v Honduras*, Merits, Judgment of 29 July 1988, IACtHR Ser C No 4, [170]; I Brownlie, *State Responsibility* (Clarendon Press, Oxford 1983), 145.

⁶² *Petrolane Inc v Iran* (1991) 27 Iran-USCTR 64, 92.

⁶³ *Caire* case (n 61), 531; see also ILC Articles, Commentary to art 7, [7]; Brownlie (n 61), 145-150.

It is important to note that Article 4 covers all acts carried out by state organs when they are functioning in their official capacity, even if they acting *ultra vires* their authority or in contravention of their instructions at the relevant time.⁶⁴ In the *Mallén* case, for example, whereas an act of private revenge by an off-duty American officer was not attributed to the US, a second act of private revenge which took place when the officer was in some sense on duty was held to be attributable to the US.⁶⁵ Similarly, in the *Caire* case two Mexican officers murdered a French national after he refused to give them a sum of money. The French-Mexican Claims Commission held that the actions of the two men involved the responsibility of Mexico, since ‘they acted under cover of their status as officers and used means placed at their disposal on account of that status’.⁶⁶

If this rule were not in place, it would be virtually impossible for the claimant state to succeed in proving the responsibility of the defendant state.⁶⁷ The US-Mexican General Claims Commission recognised this difficulty in the *Youmans* Case:

Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience to some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts.⁶⁸

Since a contract of hire will not generally authorise PMSC personnel to breach IHL or HRL, contractors who transgress in this way will usually be acting *ultra vires* the

⁶⁴ See ILC Articles, Commentary to art 4, [13].

⁶⁵ *Mallén* case (1925) 4 RIAA 173.

⁶⁶ *Caire* case (n 61), 531.

⁶⁷ See ILC Articles, Commentary to art 10, [19].

⁶⁸ *Youmans* case (n 61), 116; see also *Congo* case (n 32), [214], [243], in relation to *ultra vires* acts of the armed forces.

contract or in contravention of its terms. Nonetheless, the hiring state will incur responsibility pursuant to Article 4 unless the contractors' conduct was so far removed from their functions as part of the armed forces that it should be equated to the conduct of private individuals.

II. PMSCs empowered by law to exercise governmental authority

Even where a PMSC is not a state organ, its conduct may be attributable to the hiring state if it has been authorised by the law of that state to exercise elements of governmental authority. Article 5 of the ILC Articles thus provides:

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.⁶⁹

Like the rule in Article 4, this rule applies regardless of whether the entity committing the act has exceeded its authority or contravened its instructions.⁷⁰

Article 5 is intended to encompass quasi-state entities which exercise elements of governmental authority in place of state organs, as well as former state corporations which have been privatised but which retain certain public functions.⁷¹

The ILC Commentary observes that 'in special cases' the principle may also extend to private companies,

provided that in each case the entity is empowered by the law of the state to exercise functions of a public character normally exercised by state organs, and the

⁶⁹ ILC Articles, Commentary to art 5, [1].

⁷⁰ *ibid*, art 7.

⁷¹ *ibid*, Commentary to art 5, [1].

conduct of the entity relates to the exercise of the governmental authority concerned.⁷²

Prima facie this would appear to be well-suited to the situation where a state outsources traditionally public functions such as the military, the police and the operation of detention centres to PMSCs.

The jurisprudence of the Iran-US Claims Tribunal illustrates the application of this norm. In *Hyatt International Corporation v Iran* the Tribunal attributed to Iran certain conduct, namely the expropriation of contract rights, carried out by a non-state charity group (the Foundation for the Oppressed). The Tribunal stated:

In view of the circumstances of its establishment and mode of governance, and in view of the functions it fulfils, the Tribunal concludes that the Bonyad Mostazafan, or Foundation for the Oppressed, has been and continues to be an instrumentality controlled by the Government of the Islamic Republic of Iran.⁷³

In contrast, in *Schering Corporation v Iran* the Tribunal did not consider the acts of a Workers' Council at the claimant company to be attributable to Iran, since

[t]he constitution and regulatory framework for the creation of Worker's Councils do not indicate that the Councils were to have other duties than basically representing the workers' interest *vis-à-vis* the management of companies and institutions and to cooperate with the management. That the formation of the Councils was initiated by the State does not in itself imply that the councils were to function as part of the State machinery.⁷⁴

There are three requirements for the attribution of a wrongful PMSC act to the hiring state pursuant to Article 5. First, the PMSC operation in the course of which the wrongful act takes place must constitute the exercise of governmental authority.

⁷² *ibid*, Commentary to art 5, [2]; see also R Ago, 'Fourth Report on State Responsibility' (1972) II YBILC, [191].

⁷³ *Hyatt International Corporation v Iran* (1985) 9 Iran-USCTR 72, 94.

⁷⁴ *Schering Corporation v Iran* (1984) 5 Iran-USCTR 361, 370.

Second, the PMSC must be ‘empowered by the law of the state’ to exercise that authority. Third, the contractor must in fact be acting in the exercise of governmental authority, rather than in a purely private capacity, when he or she commits the wrongful act. Each of these criteria will now be addressed in turn.

A. What constitutes ‘governmental authority’?

The basic criterion in Article 5 is that the activity must involve an exercise of governmental authority. There is no international consensus as to the precise scope of ‘governmental authority’. Indeed, the very concept requires value judgments which themselves rest on political assumptions about the proper sphere of state activity, and this ‘depends on the particular society in question, its history and traditions.’⁷⁵

Nonetheless, certain functions appear to be commonly regarded as intrinsically ‘public’ in nature, meaning that their performance by a PMSC necessarily entails the exercise of governmental authority. The Commentary cites several such functions including policing,⁷⁶ immigration and quarantine, detention and discipline pursuant to a judicial sentence or to prison regulations, and the identification of property for seizure.⁷⁷ These categories would encompass, for example, the DynCorp employees hired by the US as police in post-conflict Bosnia, the PMSC personnel hired by Israel as armed border guards at the Erez and Sha’ar Ephraim crossings, and the CACI

⁷⁵ ILC Articles, Commentary to art 5, [6].

⁷⁶ *ibid*, Commentary to art 5, [4], [5].

⁷⁷ *ibid*, Commentary to art 5, [2].

employees hired by the US as prison guards and interrogators in Iraq.⁷⁸ In fact, the Commentary specifically states that ‘private security firms’ contracted by the government to act as prison guards would fall within Article 5.⁷⁹ The Iran-US Claims Tribunal has also classified detention⁸⁰ and the seizure of property⁸¹ by para-statal forces as exercises of governmental powers by those forces. In addition, it is generally agreed that core military activities such as combat and interrogation entail the exercise of governmental authority.⁸²

Whilst there is widespread agreement that certain PMSC activities—such as offensive combat, policing, detention and immigration—entail the exercise of governmental authority within Article 5, the status of other activities—such as military advice and training, intelligence and armed security—is less clear-cut. Instinctively, it might seem that these activities would entail governmental authority when performed for a state in armed conflict. Yet such instinctive classifications tend to rely primarily on the fact that the activities have historically been carried out by the state, and this becomes increasingly unsatisfactory as more and more functions are privatised.⁸³ In the absence of an exhaustive list of state functions under international law, it is necessary to develop a general analytical framework to facilitate the distinction between those activities that entail governmental authority and those that do not.

⁷⁸ See Chapter I-IV of this Thesis.

⁷⁹ ILC Articles, Commentary to art 5, [2].

⁸⁰ *Rankin v Iran* (1987) 17 Iran-USCTR 135; *Yeager v Iran* (1987) 17 Iran-USCTR 92.

⁸¹ *Hyatt International Corporation v Iran* (n 73).

⁸² See, eg, UCIHL Expert Meeting (n 1), 16-18; Hoppe, *State Responsibility* (n 47), 18-19.

⁸³ See UCIHL Expert Meeting (n 1), 16-17.

1. Private person test

A useful starting point in assessing whether a particular activity is inherently governmental is to ask whether the activity is one that a private individual could perform without the government's permission. In the present context, one might simply ask whether the activity is one that a PMSC could lawfully perform pursuant to a contract with a private client rather than a state. This resembles the criterion used in some civil law countries to divide competence between the civil and administrative courts.⁸⁴ Private persons could not lawfully engage in offensive combat, for example, pursuant to a contract with another private party; but they could certainly prepare food or do laundry. Equally, private persons could not lawfully contract with another private party to run a detention centre or interrogate prisoners; but they could contract to act as armed guards at an oilfield in a conflict zone. A PMSC could not lawfully provide strategic military advice and training to non-state forces in an armed conflict, and it would be unable to perform many of the activities necessary to collect and analyse intelligence for a private party without violating privacy laws. The fact that a PMSC could not lawfully perform an activity for a private party tends to indicate that the activity is inherently 'public' in nature and that it therefore entails governmental authority.

However, this test does not necessarily work the other way—that is, the mere fact that a PMSC could lawfully perform an activity for a private party does not, in itself, exclude the possibility that the activity may entail governmental authority. For

⁸⁴ A similar test is frequently utilised in the law of state immunity to distinguish between those state acts that involve sovereign authority and those state acts that do not, as discussed below.

example, the provision of armed security to a military convoy or a senior political figure (such as DynCorp's protection of Hamid Karzai) may well entail governmental authority, notwithstanding the fact that a PMSC could lawfully provide armed security to a private company operating in a conflict zone. The 'private person' test is therefore helpful but insufficient by itself to delimit the concept of governmental authority for the purpose of Article 5.

2. ILC guidelines

The ILC Commentary to Article 5 provides further guidance by identifying, in addition to the content of the power in question, three factors which may assist in determining whether particular powers involve the exercise of governmental authority: first, the way the powers are conferred on an entity; second, the purposes for which the powers are to be exercised; and third, the extent to which the entity is accountable to the government for the exercise of the powers.⁸⁵

In relation to the first factor, one might instinctively assume that a state would be more likely to confer governmental authority on a private entity via statute rather than contract or executive order. Whilst this may be the case in some systems, recent practice shows that many states empower private entities to perform clearly 'public' functions—such as the operation of domestic prisons and the interrogation of prisoners in armed conflict—simply by concluding a contract with the entity in question. This is certainly true for the states that most commonly hire PMSCs, particularly the US. In some situations a government may be even *more* likely to use

⁸⁵ ILC Articles, Commentary to art 5, [6].

contractual mechanisms to confer public powers in order to evade the scrutiny of the legislature, in which case the rationale for the attribution of PMSC misconduct to the state would be particularly strong. The first factor identified by the ILC is therefore of little use in assessing whether PMSC activities entail governmental authority.

The third factor identified by the ILC is more useful. The Commentary refers not simply to the existence of *legal* accountability mechanisms, but more generally to ‘the extent to which the entity is accountable to government’ for the exercise of the powers in question.⁸⁶ This requires a broader analysis of the relationship between the PMSC and the government, including reporting duties and other oversight mechanisms.⁸⁷ Where the contract of hire includes provisions for monitoring PMSC activities and consequences for errant behaviour, this might provide some support for a finding that the company was exercising governmental authority. However, the absence of effective accountability mechanisms should not exclude the attribution of PMSC conduct to the state pursuant to Article 5, since it is precisely in those cases where the government authorises a PMSC to carry out a particular function, and yet fails to hold that PMSC accountable for its actions, that the rationale for the attribution of PMSC misconduct to the state is strongest.⁸⁸ A state should not benefit from its own failure to ensure that adequate oversight mechanisms are in place when it hires a PMSC in armed conflict.

⁸⁶ *ibid.*

⁸⁷ See Hoppe, *State Responsibility* (n 47), 22.

⁸⁸ See C Lehnardt, 'Private Military Companies and State Responsibility' in S Chesterman and C Lehnardt (eds) *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (OUP, Oxford 2007), 145.

The second factor, the purposes for which the powers are to be exercised, is the most useful in assessing whether PMSC activities entail governmental authority. This criterion endeavours to capture the notion that governmental authority involves some attempt to fulfil the sovereign objectives of the government, which undoubtedly include, in the words of the preamble to the US Constitution, to 'provide for the common defense'.

The inclusion of 'purpose' as a relevant factor brings to mind the long-standing debate in the law of state immunity about the appropriate way to identify state activities that are immune from the jurisdiction of another state.⁸⁹ In that context, international law distinguishes between the acts of a state in its sovereign capacity (*acta jure imperii*), which are immune from jurisdiction, and acts that are performed in a private capacity (*acta jure gestionis*), which are not immune. The former category includes foreign and military affairs, the enactment of legislation, the exercise of police power and the administration of justice. The latter category, on the other hand, is often described in terms of 'acts that a private person may perform', particularly in civil law countries which are able to apply by analogy the criterion for allocating competence between the civil and administrative domestic

⁸⁹ See generally J Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' (1983) 54 BYIL 74; H Fox, *The Law of State Immunity* (OUP, Oxford 2002); C Schreuer, *State Immunity: Some Recent Developments* (Grotius, Cambridge 1988); M Sornarajah, 'Problems in Applying the Restrictive Theory of Sovereign Immunity' (1982) 31 ICLQ 661; P Trooboff, 'Foreign State Immunity - Emerging Consensus of Principles' (1986) 200 Recueil des cours 235.

courts.⁹⁰ The largest and most important component of the 'private acts' category comprises the commercial activities of states.⁹¹

One of the principal justifications for this 'restrictive' theory of immunity is that certain disputes involving the sovereign functions of states should be settled on the international plane, whereas other disputes involving the private or commercial functions of states are more appropriately decided in municipal courts.⁹² Thus, like the classification of an activity as one involving governmental authority for the purpose of Article 5, the classification of an activity as one involving governmental authority for the purpose of state immunity signifies that it should be assessed on the international judicial plane under the law of state responsibility. Although there is no requirement that the criteria for classifying the relevant activity in each context be exactly the same, it is in the interests of logic and consistency that similar considerations should apply to both analyses. It is therefore helpful for present purposes to examine the criteria used to distinguish between public and private acts in the law of state immunity.

⁹⁰ See, eg, *Banque Camerounaise de Développement v Société des Etablissement Rolber* (1987) RCDIP 76, 773 (French Court of Cassation); European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) CETS No 074, art 7; *I Congreso del Partido* [1983] 1 AC 244, 262 (Lord Wilberforce); US House of Representatives Report No 94-1487 (1976) 15 ILM 1398, 1406, discussing the US Foreign Sovereign Immunities Act 1976, s 1605.

⁹¹ See, eg, European Convention on State Immunity, art 7; US Foreign Sovereign Immunities Act 1976, s 1605; UK State Immunity Act 1978, s 3; I Sinclair, 'The Law of Sovereign Immunity: Recent Developments' (1980) 167 (ii) *Recueil des Cours* 113, 121-134, 146-196; UN Legislative Series, *Materials on Jurisdictional Immunities of States and their Property* (ST/LEG/SER.B/20, 1982).

⁹² See I Brownlie, *Principles of Public International Law* (7 edn, Clarendon Press, Oxford 2008), 327-329; J Crawford, 'Execution of Judgments and Foreign Sovereign Immunity' (1981) 75 *AJIL* 820, 856-858; Crawford, 'Immune Transactions' (n 89), 75; Australian Law Reform Commission Report No 24, 'Foreign State Immunity' (1984), [40].

Before one can classify a particular activity for the purpose of state immunity, it is necessary to *identify* the activity with precision—that is, to isolate the specific facts that are relevant to the classification of the activity as public or private.⁹³ In fact, the classification of a particular activity will frequently turn on how that activity is initially defined. Any activity can be defined broadly, such as ‘hiring a security guard’, or narrowly, such as ‘hiring an armed security guard to defend a US military convoy in a conflict zone’. Whilst both are accurate descriptions, the latter clearly identifies additional information which is legally relevant. The initial task of identification is often said to require one to ‘distinguish’ between the nature and purpose of the activity, and to concentrate only on the former; for if one focuses on purpose, virtually all state transactions can ultimately be traced back to the public interest. Yet it is not possible to draw a clear-cut distinction between the nature and purpose of a particular act. Commentators often point out, for example, that signing a legally binding contract can be described simply as signing paper unless one considers the purpose of the act. It is clearly necessary to consider the whole context of the claim against the state.

The twentieth century jurisprudence in the field of state immunity illustrates these difficulties. Although the earliest cases accepted immunity as a plea wherever it was shown that the act was performed for a sovereign purpose,⁹⁴ that approach proved over-inclusive and courts instead began to focus on the nature of the act in

⁹³ See Crawford, 'Immune Transactions' (n 89), 94-99; Schreuer (n 89), 15-22.

⁹⁴ See, eg, *Berizzi Bros v SS Pesaro* 271 US 562 (1925).

order to distinguish between the public and private spheres of state action.⁹⁵ In the House of Lords case of *I Congreso del Partido*, Lord Wilberforce agreed with the Federal Constitutional Court of Germany that in distinguishing between public and private acts 'one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity'.⁹⁶ Yet Lord Wilberforce also stressed that the nature of the act must not be viewed in isolation. On the contrary, the court 'must consider the whole context in which the claim against the State is made',⁹⁷ in which case 'the purpose...is not decisive but it may throw some light upon the nature of what was done'.⁹⁸ The ILC adopted a similar approach in its 1991 Draft Articles on Jurisdictional Immunities of States and their Property,⁹⁹ which formed the basis for the 2004 UN International Convention on Jurisdictional Immunities of States and their Property.¹⁰⁰

English courts have applied Lord Wilberforce's contextual approach in deciding a number of state immunity cases, both under the State Immunity Act 1978 and under the common law. Two cases are particularly pertinent to this discussion. First, in *Littrell v US (No 2)* the plaintiff, a US citizen, claimed damages for personal injuries arising from medical treatment he had received at a US military hospital in the UK

⁹⁵ See, eg, *United Arab Republic v Mrs X*, Swiss Fed Trib (10 Feb 1960) 65 ILR 385; *Holubek v US Government* (10 Feb 1961) 40 ILR 73 (Austrian Supreme Court); *Empire of Iran* (30 April 1963) 45 ILR 57 (German Federal Constitutional Court). This approach is also expressly laid out in the US Foreign Sovereign Immunities Act 1976, s 1603(d).

⁹⁶ *I Congreso del Partido* (n 90), 263 (Lord Wilberforce), quoting from *Empire of Iran* (n 95), 80.

⁹⁷ *Ibid*, 267.

⁹⁸ *Ibid*, 272.

⁹⁹ ILC Draft Articles on Jurisdictional Immunities of States and their Property, with Commentaries (1991) 30 ILM 1554, art 2(2).

¹⁰⁰ UN Convention on Jurisdictional Immunities of States and their Property (adopted 2 Dec 2004) 44 ILM 803, UN Doc A/RES/59/38.

whilst a serving member of the US Air Force.¹⁰¹ The Court of Appeal upheld a plea of immunity at common law, the case falling outside the scope of the State Immunity Act 1978 by virtue of s 16(2). Lord Hoffmann stated:

The context in which the act took place was the maintenance by the United States of a unit of the United States Air Force in the United Kingdom. This looks about as imperial an activity as could be imagined. But it would be facile to regard this context as determinative of the question. Acts done within that context range from arrangements concerning the flights of the bombers - plainly *jure imperii* - to ordering milk for the base from a local dairy or careless driving by off-duty airmen on the roads of Suffolk. Both of the latter would seem to me to be *jure gestionis*, fairly within an area of private law activity. I do not think that there is a single test or 'bright line' by which cases on either side can be distinguished. Rather, there are a number of factors which may characterise the act as nearer to or further from the central military activity...Some acts are wholly military in character, some almost entirely private or commercial and some in between.¹⁰²

Second, the House of Lords applied *Littrell* in the 2000 case of *Holland v Lampen-Wolfe*.¹⁰³ The plaintiff was a US national who as part of her employment at an American university was seconded to give lectures in international relations at a US military base in England. The defendant, also a US national, worked as an education services officer at the base, and in that capacity he wrote a memorandum concerning the plaintiff's conduct as a lecturer. The plaintiff claimed that the defendant's memorandum was defamatory. The House of Lords upheld a plea of immunity at common law. Lord Hope stated:

In the present case the context is all important. The overall context was that of the provision of educational services to military personnel and their families stationed on a U.S. base overseas. The maintenance of the base itself was plainly a sovereign activity... But that is not enough to determine the issue. At first sight, the writing of a memorandum by a civilian educational services officer in relation to an educational programme provided by civilian staff employed by a university seems far removed from the kind of act that would ordinarily be characterised as something done *iure imperii*. But regard must be had to the place where the

¹⁰¹ *Littrell v US (No 2)* [1995] 1 WLR 82.

¹⁰² *ibid*, 94-95.

¹⁰³ *Holland v Lampen-Wolfe* [2000] 1 WLR 1573.

programme was being provided and to the persons by whom it was being provided and who it was designed to benefit...The whole activity was designed as part of the process of maintaining forces and associated civilians on the base by U.S. personnel to serve the needs of the U.S. military authorities...On these facts the acts of the respondent seem to me to fall well within the area of sovereign activity.¹⁰⁴

One can apply similar considerations to the question of whether PMSCs providing military or security services to a state are exercising governmental authority within Article 5. Certain PMSC activities which may not necessarily be governmental in nature when viewed in isolation— such as advice, training and armed security—may in fact entail governmental authority when viewed in their overall context. Relevant factors include the location of the PMSC activity (an armed conflict zone), the persons whom the activity is provided to benefit (national military/security forces or senior government officials) and, as noted in the ILC Articles, the overall purpose of the act.

The application of this logic to armed guarding services, for example, clearly indicates that PMSC personnel who guard *military* persons or objects in armed conflict are exercising governmental authority, the assumption being that such contractors have been hired to repel military attacks by enemy forces. But what about the protection of *civilian* officials of the hiring state, such as high-level politicians or diplomats? The Blackwater employees involved in the shooting of seventeen Iraqi civilians in September 2007, for example, were defending a US State Department motorcade at the time of the incident;¹⁰⁵ were they exercising

¹⁰⁴ *ibid*, 1577.

¹⁰⁵ See S Tavernise, 'US Contractor Banned by Iraq over Shootings' *New York Times* (18 Sept 2007); D Sevastopulo, 'Iraqis Pull Security Contractor's Licence' *Financial Times* (17 Sept 2007).

governmental authority for the purposes of Article 5? A consideration of the overall context of their activities suggests that the answer would be in the affirmative. On the other hand, a PMSC that is hired by a state to guard the installations or personnel of a private company in a conflict zone would be unlikely to fall within Article 5, since the purpose of the activities is to protect civilian employees of a private firm rather than to protect a high-level government official visiting the theatre of conflict on state business.¹⁰⁶

3. US policy with respect to ‘inherently governmental’ functions

Many aspects of the above legal analysis resemble the attempts of the US Department of Defense (DoD) to determine which military and security functions are appropriate for outsourcing as a matter of government policy. The overarching US policy is that tasks that are ‘inherently governmental’ shall be performed by government personnel.¹⁰⁷ An inherently governmental function is defined as a ‘function that is so intimately related to the public interest as to require performance by Federal Government employees’.¹⁰⁸ This includes all activities that ‘require the exercise of substantial discretion in applying government authority and/or in making decisions for the government.’¹⁰⁹ A 2006 DoD Instruction classifies certain military activities as inherently governmental *per se*, including combat operations, interrogations to the extent that they entail substantial discretion,¹¹⁰ and

¹⁰⁶ See Hoppe, *State Responsibility* (n 47), 21-22.

¹⁰⁷ See Public Law 110-417, s 832, Sense of Congress on Performance by Private Security Contractors of Certain Functions in an Area of Combat Operations.

¹⁰⁸ Federal Activities Inventory Reform Act of 1998 31 USC 501, s 5.

¹⁰⁹ Office of Management and Budget Circular No A-76 (Revised), ‘Performance of Commercial Activities’ (29 May 2003), Attachment A: Inventory Process, B(1).

¹¹⁰ US Department of Defense Instruction 1100.22, ‘Guidance for Determining Workforce Mix’ (7 Sept 2006), E2.1.

activities that require ‘military-unique knowledge and skills’ such as the administration of US military correctional facilities, the provision of military advice and training, and the direction and control of intelligence operations.¹¹¹

The DoD Instruction recognises that protective security services may be inherently governmental in certain circumstances, but emphasises that a fact-specific analysis will be required in each case. The DoD Instruction explains:

Security is IG [inherently governmental] if it involves unpredictable international or uncontrolled, high threat situations where success depends on how operations are handled and there is a potential of binding the United States to a course of action when alternative courses of action exist.¹¹²

This includes ‘security operations that are performed in highly hazardous public areas where the risks are uncertain’, since such operations ‘could require deadly force that is more likely to be initiated by US forces than occur in self defense.’¹¹³

Security is not inherently governmental, on the other hand, if it does not require the exercise of substantial discretion; examples include the security of buildings in secure compounds in hostile environments and security for ‘other than uniquely military functions’.¹¹⁴ It follows that PMSC contracts

shall be used cautiously in contingency operations where major combat operations are ongoing or imminent. In these situations, contract security services will not be authorized to guard US or coalition military supply routes, military facilities, military personnel, or military property except as specifically authorized by the geographic Combatant Commander (non-delegable).¹¹⁵

¹¹¹ *ibid*, E2.5.

¹¹² *ibid*, E2.1.4.1.

¹¹³ *ibid*, E2.1.4.1.4.

¹¹⁴ *ibid*, E2.1.4.

¹¹⁵ US Department of Defense Instruction 3020.41, 6.3.5.2.

Of course, the domestic policy question of the appropriateness of outsourcing particular functions to PMSCs is distinct from the international legal question of attribution. Nonetheless, an examination of US DoD policy serves to illustrate the importance of context in assessing whether a particular PMSC activity entails governmental authority, and one can apply a similar approach to the assessment of attribution pursuant to Article 5.

B. What constitutes ‘the law of the state’?

Section A has argued that a large proportion of PMSC activities in the context of an armed conflict will entail the exercise of governmental authority for the purposes of Article 5. That is not sufficient in itself, however, to attribute contractor misconduct to the hiring state pursuant to Article 5. In addition, the contractor must be ‘empowered by the law of the state’ to exercise governmental authority, in the sense that such authority must have been conferred on the PMSC pursuant to some internal *legal* framework of the hiring state. This is not to suggest that the law must dictate every aspect of the PMSC’s activities; on the contrary, the exercise of governmental authority by the PMSC may well involve an independent discretion or power to act.¹¹⁶ This criterion is thus distinct from the criterion in Article 8 (discussed below in Part III) that the contractor must in fact be acting on the instructions or under the direction or control of the hiring state when he or she engages in the misconduct in question.

¹¹⁶ See ILC Articles, Commentary to art 5, [7].

Empowerment by law would clearly encompass the situation where a state enacts legislation specifically identifying and authorising a particular PMSC to exercise governmental authority. Such a situation would fit well with the example given in the ILC Commentaries of private entities that ‘have delegated to them certain powers’ entailing governmental authority.¹¹⁷

Yet the wording of Article 5 suggests that the provision is not limited to the legislative delegation of a power to a particular private entity. Since the PMSC must be ‘empowered by *the* law of the state’, rather than *a* law of the state, it would seem that the hiring state need not enact a specific law empowering a specific PMSC to undertake functions entailing governmental authority. Instead, Article 5 would in all likelihood be satisfied if the state established a general legislative or other legal framework empowering a government agency to delegate its powers to a private company, and the agency then contracted with a particular PMSC to perform certain activities.¹¹⁸ Such a situation would fit well with the example given in the Commentaries of ‘private security firms *contracted* to act as prison guards’ to exercise ‘powers of detention and discipline’.¹¹⁹

Under this analysis, Article 5 would also apply to situations where the contract of hire authorised the PMSC to subcontract other companies to perform all or part of

¹¹⁷ *ibid*, Commentary to art 5, [2].

¹¹⁸ See UCIHL Expert Meeting (n 1), 18.

¹¹⁹ ILC Articles, Commentary to art 5, [2] (emphasis added).

the work, provided that the subcontracted company exercised governmental authority pursuant to the subcontract.¹²⁰

C. When is a PMSC employee ‘acting in that capacity’?

The third criterion for attribution pursuant to Article 5 is that the private contractor must in fact be acting in the exercise of governmental authority, rather than in a purely private capacity, when he or she engages in the relevant misconduct.¹²¹ Similar considerations apply to this analysis as to the analysis of whether a contractor who is part of the hiring state’s armed forces is acting ‘in that capacity’ for the purposes of Article 4 of the ILC Articles, as discussed above in Part I, although the notion of acting ‘in that capacity’ will generally be broader for contractors who form part of the state’s armed forces. In short, PMSC misconduct will only be attributable to the hiring state pursuant to Article 5 if the contractors are using the means and powers pertaining to the exercise of public power and are thus ‘cloaked with governmental authority’ at the relevant time.¹²² On the other hand, contractors’ misconduct will not be attributable if it ‘has no connection with the official function’ and is, in fact, merely the conduct of private individuals.¹²³

¹²⁰ See UCIHL Expert Meeting (n 1), 20.

¹²¹ See ILC Articles, Commentary to art 7, 10; *Youmans case* (n 61); *Caire case* (n 61); *Velásquez Rodríguez* (n 61), [170]; *Royal Holland Lloyd v US* (1931) 73 Ct Cl 722; Brownlie, *State Responsibility* (n 61), 145.

¹²² *Petrolane Inc v Iran* (n 62), 92.

¹²³ See *Caire case* (n 61), 531; ILC Articles, Commentary to art 7, [7]; Brownlie, *State Responsibility* (n 61), 145-150.

If a contractor raped a civilian woman outside a pub, for example, while he was off-duty and out of uniform, that would not generally be attributable to the hiring state pursuant to Article 5. The contractor's misconduct would probably be deemed a purely private activity of an individual who happened to be a PMSC employee, rather than an act of the state. If, on the other hand, an off-duty armed security contractor shot a civilian woman whilst he was walking home from his shift, still in uniform and carrying his state-issued weapon, the shooting would in all likelihood be attributable to the hiring state. Everything will turn on the specific circumstances surrounding the contractor's misconduct in the particular case.

Article 5 encompasses all acts committed by PMSC personnel whilst they are exercising governmental authority, even those acts that are *ultra vires* the contract of hire or in contravention of the contractual terms.¹²⁴ As discussed above in Part I, if this rule were not in place it would be virtually impossible for the claimant state to succeed in proving the responsibility of the hiring state pursuant to Article 5, since PMSC misconduct will rarely be authorised by the hiring state and may even be explicitly prohibited.¹²⁵ The contract authorising CACI to conduct interrogations at Abu Ghraib, for example, would not have authorised contractors to abuse the detainees; indeed, it may even have contained provisions expressly requiring the humane treatment of detainees. Nonetheless, the contractors' conduct would have been attributable to the US, as the contractors were clearly using the means and

¹²⁴ ILC Articles, Commentary to art 4, [13].

¹²⁵ See *ibid*, Commentary to art 10, [19]; *Youmans* case (n 61), 116.

powers pertaining to their functions as prison guards and interrogators at the time of the offending conduct.

This discussion has shown that in many cases PMSC misconduct in armed conflict will be attributable to the hiring state pursuant to Article 5. This rule is therefore central to the analysis of state responsibility in the private security context. Some contractor misconduct, however, may fall outside the scope of Article 5 for one of two reasons: either the contractor engages in the misconduct whilst off-duty and thus not acting 'in that capacity' at the relevant time, or the contractor engages in the misconduct whilst performing an activity that does not entail governmental authority. In such cases, it may still be possible to attribute the misconduct to the hiring state pursuant to the rule in Article 8 of the ILC Articles if the wrongdoing contractor is in fact acting under the state's instructions, direction or control.

III. PMSCs acting under state instructions, direction or control

International law has long recognised that the conduct of a private person who is in fact acting on behalf of a state may be attributed to that state for the purpose of state responsibility. One early example is the *Zafiro* case, in which the Great Britain-US Arbitral Tribunal held the US responsible for looting by the civilian crew of a private ship, in circumstances in which the ship was being used as a supply vessel by American naval forces in the Spanish-American war.¹²⁶ In attributing the civilian conduct to the US, the Tribunal emphasised that the captain and crew were in fact

¹²⁶ *Zafiro* (1925) 4 RIAA 160.

under the command of a US naval officer who had come on board to control and direct the movements of the ship. The Mexico-US General Claims Commission applied the same rule in the *Stephens* case, which involved a killing committed by a member of an auxiliary of the Mexican forces. The Commission found that the killing was attributable to Mexico, stating that 'it is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were 'acting for' Mexico.'¹²⁷

This principle of attribution *de facto* is reflected in Article 8 of the ILC Articles:

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 rule identifies two situations in which PMSC misconduct will be attributable to the hiring state: first, where the PMSC is acting on the instructions of the state; and second, where the PMSC is acting under the direction or control of the state. In either case, the particular PMSC conduct that is said to constitute an internationally wrongful act must fall within the scope of the state's instructions, direction or control.¹²⁸

¹²⁷ *Stephens* (1927) Mexico-US General Claims Commission.

¹²⁸ See ILC Articles, Commentary to art 8, [8]. This contrasts with Article 5, which encompasses *all* acts performed by PMSC contractors whilst exercising governmental authority, even if they are acting *ultra vires* their contractual authority.

A. State instructions

In the rare case that a state hired a PMSC and actually instructed it to violate international law, the attribution of PMSC misconduct would be relatively straightforward. The state could incorporate such instructions into the terms of the contract of hire, for example, or it could issue the instructions to PMSCs in the field via an authorised contracting officer.¹²⁹ In either case, the hiring state would not need to exercise any particular level of practical control over the PMSC after the instructions had been given for the misconduct to fall within Article 8.

According to the ICJ in the *Genocide* case, for a state's instructions to fall within Article 8, they must have been given 'in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.'¹³⁰ It is not clear from the Court's judgment how narrowly the notion of an 'operation' is to be construed. If a state hired a PMSC to perform interrogations at a detention centre, for example, and included a term in the contract instructing the company to use particular interrogation procedures which amounted to torture or ill-treatment, it would seem that such a scenario should fall within Article 8. It would be too restrictive to require the state to issue a specific instruction detailing the interrogation procedure for each detainee. The same logic would apply to other

¹²⁹ The US has contracting officers in the field to administer the contracts and act as the 'the liaison between the commander and the defense contractor for directing or controlling contractor performance because commanders have no direct contractual relationship with the defense contractor': see US Department of Defense Instruction 3020.41, [6.3.3].

¹³⁰ *Genocide* case (n 16), [400].

situations in which a state hired a PMSC to perform a narrowly defined activity (such as protective security) in a particular area for a reasonably limited period of time. On the other hand, if the PMSC contract covered a broader range of activities (such as the combat contracts of Executive Outcomes and Sandline in Sierra Leone and Angola), it might be necessary to distinguish between different 'operations' carried out pursuant to the same contract.

Another key question is how specific the instructions must be in order to fall within Article 8. Must there be a specific order directing *how* the particular wrongful act is to be performed, or will a general instruction suffice? Logic suggests the latter, provided that the order authorises wrongful conduct. Hoppe gives the example of a command to a contractor to 'get the prisoner to talk by any means necessary' as being sufficient to satisfy Article 8, since the order effectively authorises violations of IHL and HRL even though it does not specify precisely how the interrogation should take place.¹³¹ Likewise, an instruction to a private security guard to shoot anyone who comes near the protected object would effectively authorise a violation, since it authorises the contractor to shoot indiscriminately without prior warning and without considering whether the person might be an innocent civilian.

In August 2009 the New York Times reported that the Central Intelligence Agency (CIA) hired a number of individual Blackwater contractors in 2004 as part of a

¹³¹ Hoppe, *State Responsibility* (n 47), 24.

secret programme to locate and assassinate top operatives of Al Qaeda.¹³² It is unclear whether the CIA hired the contractors themselves to capture or kill Qaeda operatives, or simply to help with training and surveillance in the programme; if the former, this would certainly fall within the scope of state ‘instructions’ for the purposes of Article 8.

A more common scenario would be where a state gave overly vague or ambiguous instructions which, although not unlawful on their face, conveyed a lack of concern as to how the instructions were carried out and which could even be interpreted as implicitly authorising a violation. The ILC Commentary to Article 8 attempts to provide guidance for situations where a state has authorised a particular act and the private actor then engages in ‘actions going beyond the scope of the authorization’. The Commentary states:

Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way.¹³³

The notion of conduct that is ‘really incidental to’ the mission does little to clarify the situation in relation to overly vague or ambiguous instructions. For example, an instruction to a security guard to shoot anyone who approaches looking ‘suspicious’ might be interpreted as an implicit authorisation to shoot indiscriminately and

¹³² See M Mazzetti, ‘CIA Sought Blackwater’s Help to Kill Jihadists’ *New York Times* (19 Aug 2009); J Warrick, ‘CIA Assassination Program had been Outsourced to Blackwater, Ex-Officials Say’ *Los Angeles Times* (20 Aug 2009); E MacAskill, ‘CIA Hired Blackwater for Al-Qaida Assassination Programme, Sources Say’ *Guardian* (20 Aug 2009).

¹³³ ILC Articles, Commentary to art 8, [8].

without warning, but it might equally be interpreted as an instruction to shoot only those individuals who look like combatants. Is a civilian shooting really incidental to the security mission in these circumstances? PMSC shootings are certainly not uncommon in the context of 'defensive' security operations. For example, according to a Report of the US House of Representatives Committee on Oversight and Governmental Reform, Blackwater security guards were involved in an average of 1.4 shooting incidents per week between 2005 and 2007, firing the first shots in over 80% of the incidents and in some cases killing apparently innocent civilians, despite the fact that their contracts only authorised the 'defensive' use of force.¹³⁴

The best way for the hiring state to avoid responsibility under this rule would be to include in the contract of hire detailed rules complying with IHL, and to ensure that government representatives give clear and lawful instructions to PMSCs in the field. Having taken such action, the hiring state would not incur responsibility if a contractor then carried out those instructions in an unlawful way.

B. State direction or control

Where no specific instructions exist but the hiring state is nonetheless linked to the PMSC actions through its actual direction or control of PMSC behaviour in the field, the question of attribution may be even more complex.

¹³⁴ US House of Representatives Committee on Oversight and Governmental Reform, 'Additional Information about Blackwater USA' (1 Oct 2007), 1-2.

The ICJ considered this rule of attribution in the *Nicaragua* case, in assessing whether violations of IHL committed by various individuals during the Nicaraguan civil war were attributable to the US. For the purpose of assessing US responsibility, the Court distinguished between three categories of individuals. First, the acts of members of the US government administration (such as CIA operatives) and members of the US armed forces were undoubtedly attributable to the US. Second, certain acts of Latin-American operatives (the UCLAs) were also attributable to the US, either because the UCLAs had been given specific instructions by US agents or officials and had acted under their supervision,¹³⁵ or because US agents had ‘participated in the planning, direction and support’ of specific operations.¹³⁶ Third, and crucially for the present analysis, was the category of the *contras* (the rebels fighting against the Nicaraguan government). The Court rejected Nicaragua’s claim that all the conduct of the *contras* was attributable to the US by reason of its control over them:

United States participation, even if preponderant or decisive, in the financing, organising, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua.¹³⁷

According to the Court, for the violations of IHL committed by the *contras* to be attributed to the US, it was necessary to show that the US had ‘effective control of

¹³⁵ *Nicaragua* (n 16), [75]-[80].

¹³⁶ *ibid*, [86].

¹³⁷ *ibid*, [115].

the military or paramilitary operations in the course of which the alleged violations were committed'.¹³⁸

In the *Tadic* case of 1999, the ICTY Appeals Chamber considered the issue of *de facto* state agents in a different context. The Appeals Chamber had to determine whether Bosnian Serb forces were in fact acting on behalf of the Federal Republic of Yugoslavia (FRY), such that the armed conflict was international in character and the more extensive rules of IHL applied. The Chamber dismissed the *Nicaragua* test of effective control and instead established a more flexible threshold of control which can vary according to the circumstances of the case.¹³⁹ In relation to an organised and hierarchically structured group, such as a militia, the Chamber considered that a more lenient standard of 'overall control' is appropriate. This standard goes beyond the mere financing and equipping of the forces and also involves 'participation in the planning and supervision of military operations', but it does not require the issuance of specific orders or instructions relating to individual military actions.¹⁴⁰

In his Separate and Dissenting Opinion in *Tadic*, Judge Shahabuddeen was highly critical of the majority's approach, emphasising the different contexts of the two decisions: *Nicaragua* had dealt with state responsibility whereas *Tadic* was dealing with individual criminal responsibility. Judge Shahabuddeen noted that the relevant question was not whether the FRY was responsible for breaches of IHL committed by the Bosnian Serb militia, but the separate question of whether the FRY had used

¹³⁸ *ibid*, [115] (emphasis added); see also the Separate and Concurring Opinion of Judge Ago, [18].

¹³⁹ *Tadic* appeal judgment (n 16), [117].

¹⁴⁰ *ibid*, [145].

force through the militia against Bosnia-Herzegovina.¹⁴¹ The Commentaries to the ILC Articles favour the ICJ's test of effective control, and appear to agree with Judge Shahabuddeen that the *Tadic* case involved a different question from that in issue in *Nicaragua*.¹⁴²

Judge Shahabuddeen's view is highly persuasive when considered within the framework of primary and secondary rules of international law. There is no compelling reason why the same test must apply to, on the one hand, the question of whether a state is acting through a private individual for the purpose of ascertaining the applicable rules of IHL and, on the other hand, the question of whether a state is acting through a private individual for the purpose of establishing state responsibility. The former is determined by the primary rules of international law, which govern the substantive obligations on states, whereas the latter is determined by the secondary rules of international law, which govern the circumstances in which states will be considered responsible for wrongful conduct and the legal consequences flowing from that responsibility.¹⁴³

The *Nicaragua* decision itself demonstrates the conceptual difference between the primary rules governing a state's use of force through private individuals and the secondary rules governing the attribution of private conduct to the state. The ICJ held that violations of IHL committed by the *contras* were not attributable to the US because the latter did not have effective control over the former. By contrast, the

¹⁴¹ *ibid*, Separate Opinion of Judge Shahabuddeen, [17].

¹⁴² ILC Articles, Commentary to art 8, [5].

¹⁴³ For a detailed discussion of this distinction, see Chapter II of this Thesis.

Court answered in the affirmative the question of whether the US had used force through the *contras*, effectively establishing a less stringent imputability test for the primary rule on the use of force than that which applies under the secondary rules of attribution.¹⁴⁴ The ICJ established an even higher threshold in relation to the question of when a state is acting through a private individual in launching an ‘armed attack’ giving rise to a right of self-defence in the victim state.¹⁴⁵ The requisite degree of imputability may therefore vary between different primary rules as well as between primary rules and secondary rules.

Since the *Tadic* decision of 1999, the ICJ has twice reaffirmed its effective control test: in the *Congo* case of 2005¹⁴⁶ and the *Genocide* case of 2007.¹⁴⁷ In the latter case, the Court stated:

It must however be shown that this “effective control” was exercised ... in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.¹⁴⁸

Although the decisions of the ICJ are binding only on the parties to the case at hand, in practice enormous weight is accorded to the settled jurisprudence of the Court, to the extent that the *Genocide* case can be taken virtually to have settled the matter.

The application of the ICJ’s effective control test to PMSCs raises essentially the same question that arises in relation to state instructions, namely how broadly the

¹⁴⁴ *Nicaragua* (n 16), [228].

¹⁴⁵ *ibid*, [195].

¹⁴⁶ *Congo* case (n 32), [160].

¹⁴⁷ *Genocide* case (n 16), [399].

¹⁴⁸ *ibid*, [401].

notion of an 'operation' is to be understood in the private security context. As argued above, a single PMSC contract for the performance of a particular activity (such as protective security) in a particular area for a reasonably limited period of time should be construed as one operation for the purposes of Article 8. The crucial issue will be whether the state exercises effective control over that PMSC activity during the relevant time.

It is clear from *Nicaragua* that a hiring state's general structural control over a PMSC (by financing, organising, training, supplying and equipping the company) and over the prospective selection and planning of the company's operations would not suffice to establish attribution pursuant to Article 8, even if such control were 'preponderant or decisive'.¹⁴⁹ Most PMSCs are in any case independent entities with their own corporate structures and the ability to enter into contracts with different clients, with the result that these factors would be less significant for a PMSC than for an armed group such as the *contras*. Yet the elements of control identified by the Court would be highly significant if exercised over a single PMSC *operation*, rather than over the company itself. The hiring state will generally have a preponderant or decisive role in selecting, financing, organising and planning the particular PMSC operation to be performed under the contract, and in some cases the state will also supply and equip the contractors for the operation. The contract will ordinarily set out the specific goals of the operation, and in some cases it may also detail how the contractors must be trained, as well as identifying any specific

¹⁴⁹ *Nicaragua* (n 16), [115].

weapons or equipment that must be supplied by the company itself. Any failure on the part of the company to comply with these terms may result in contractual penalties and even termination. When viewed in this way, it would seem that a detailed contract of hire would go a long way towards fulfilling the 'effective control' threshold.

On the other hand, where the contract of hire is relatively broad in its scope and/or gives the company a high degree of discretion in planning, organising and performing its activities, it will be necessary to focus on the other mechanisms available to the hiring state to control PMSC conduct in the field. These mechanisms will also be crucial if one adopts a narrower view of the notion of an 'operation' than that propounded in this Chapter. As discussed in Part I of this Chapter, PMSC contracts with the US generally identify a government official (the 'contracting officer') who is responsible for administering and monitoring the contract in the field. If the contracting officer is unable to be within the theatre of operations, he or she has a military representative in the field who interacts frequently, sometimes daily, with the contractor about the details of performance.¹⁵⁰ In some cases, the military commander in the field may also have some authority over the PMSC by virtue of 'a task-order arrangement' which enables him or her to add new tasks to an existing contract within overall resource bounds.¹⁵¹ These arrangements for state control in the field, if implemented effectively, combined with the control exercised

¹⁵⁰ See US Congressional Budget Office, 'Contractors' Support of US Operations in Iraq' (n 26), 20.

¹⁵¹ *ibid*, 20.

through the contract itself, would seem sufficient to fulfil the ICJ's test of effective control for the purpose of Article 8.

IV. Conclusion

The recent boom in private security raises the concern that states may be able to evade responsibility for violations of international law, such as war crimes and human rights abuses, simply by performing their military and security policy through private companies rather than public forces. This Chapter has demonstrated that such concerns are overstated, since a large proportion of PMSC activities performed for a state in armed conflict will in fact be attributable to the hiring state under international law.

Occasionally, PMSC personnel may be so closely integrated into the hiring state's armed forces that they actually form part of those forces for the purposes of state responsibility. In most cases, however, PMSC personnel retain their independent status as private actors contracted by the hiring state, and attribution falls to be determined pursuant to Article 5 or Article 8 of the ILC Articles. The former provision applies to contractors who are exercising governmental authority when they engage in the relevant contact. This encompasses a large proportion of PMSC activities performed for a state in the overall context of an armed conflict, most clearly those activities that entail the threat or use of violence or coercion and those activities that entail the application of military expertise. Even where PMSC misconduct falls outside the scope of Article 5, it will frequently be attributable to the hiring state

pursuant to Article 8 by virtue of the factual relationship of control between the state and the company.

This Chapter has demonstrated that a flexible and fact-specific interpretation of the rules of attribution serves to minimise the accountability gap which may arise between states that hire PMSCs and states that act through their national armed forces. The risk of incurring legal responsibility for PMSC misconduct provides a significant incentive to states to consider carefully the functions that they outsource to PMSCs and to take active steps to control PMSC behaviour in the field. The fact remains, however, that some PMSC misconduct may fall outside the scope of the rules of attribution, and in the fog of war it may in any event be difficult to prove attributability to the requisite standard. In such cases, the hiring state might still incur responsibility if it has failed to fulfil some primary obligation to take positive steps to control the PMSC, as discussed in Chapter V of this Thesis. In short, states that choose to outsource their military and security activities to PMSCs cannot simply disclaim responsibility when their private proxies engage in inappropriate or harmful behaviour in the field.

IV. Obligations of the host state

International law imposes a number of obligations on states to take positive steps to prevent, investigate, punish and redress private misconduct in their territory. These obligations derive from the fundamental principle of state sovereignty: since every sovereign state is presumed to exercise exclusive control over its territory, it is also presumed to possess some capacity to control private acts committed in that territory in order to ensure that they accord with international law. It follows that the host state of a PMSC—that is, the state in which the company operates—will be obliged to take certain active measures to control company behaviour in armed conflict. This Chapter critically analyses the pertinent obligations on the host state under international humanitarian law (IHL), examined in Part I, and under human rights law (HRL), examined in Part II.

In reality, of course, a state in whose territory an armed conflict is taking place will often lack the capacity to exercise extensive control over PMSCs operating in that conflict. The state may have lost control over all or some of its territory, for example, or it may simply lack the resources and/or institutional capacity to control company behaviour. Where this is the case, the international obligations of the company's hiring state and home state—often highly developed states such as the US and the UK—may assume particular importance, as discussed in Chapters V and VI of this Thesis. Nonetheless, this does not relieve the host state of its obligation to take those measures that are reasonably within its power in the circumstances. The obligations discussed in this Chapter generally entail a due diligence standard of

conduct, which is sufficiently flexible to take account of the difficulties facing a state engaged in an armed conflict in its territory.

Where the host state fails to take the necessary steps to control PMSC activity and a company engages in conduct that is inconsistent with the relevant norms of international law, in certain circumstances the state may incur responsibility for a failure to fulfil its international obligations. This provides an important pathway to state responsibility which is *not* dependent on the direct attribution of particular PMSC misconduct to a state. More generally, the host state's obligations under IHL and HRL could play an important standard-setting role by mandating a baseline level of positive action for all states in whose territory PMSCs operate in armed conflict.

I. International humanitarian law

As the international legal framework specially tailored to armed conflict, IHL provides the obvious starting point for any consideration of the host state's obligations to control PMSCs in this context. This Part considers three norms of IHL which are particularly pertinent to PMSCs: the obligation to ensure respect for IHL in all circumstances, the obligation to protect the civilian population, and the obligation to suppress or repress violations of IHL.

A. Obligation to ensure respect for IHL

Article 1 common to the four Geneva Conventions and Protocol I (Common Article 1) establishes a general obligation on all states 'to respect and to ensure respect' for IHL 'in all circumstances'. The phrase 'and to ensure respect' indicates that this

provision goes beyond a mere obligation to refrain from violating IHL, and requires states to take *positive* steps to promote compliance with IHL. Whilst in many cases the general obligation to ensure respect for IHL will overlap with more specific obligations of the host state under IHL and HRL, Common Article 1 may nonetheless play an important role as a residual obligation, filling in the gaps between those more specific rules and establishing a baseline standard of conduct for all states in whose territory an international or non-international armed conflict is taking place. The broad scope and universal applicability of Common Article 1 distinguish it from other pertinent rules of international law and certainly justify further analysis.

This Section first considers the general nature and scope of Common Article 1, arguing that it constitutes a concrete legal obligation and not merely a statement of aspiration. The discussion then assesses the application of Common Article 1 to private actors such as PMSCs, the positive measures the host state should take to fulfil the obligation, and the circumstances in which the host state could incur responsibility for a violation of its terms.

1. Nature and scope of Common Article 1

The phrase ‘in all circumstances’ indicates that Common Article 1 is unconditional and not constrained by the requirement of reciprocity.¹ The obligation applies not only to international conflicts, but also to non-international conflicts insofar as they fall within Common Article 3. Thus, in the *Nicaragua* case the ICJ characterised the

¹ See *Prosecutor v Kupreskic* ICTY (Judgment) IT-95-16-T (14 Jan 2000), [517]; J Pictet (ed), *Commentary, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (ICRC Geneva 1958), 15.

conflict as non-international, and then went on to find that the US had violated Common Article 1 by virtue of its 'encouragement' of private actors engaged in the conflict to act in violation of Common Article 3.² The Court further noted that the obligation to ensure respect for IHL 'does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression'.³

Irrespective of Common Article 1, states must clearly ensure that any PMSC personnel who are acting as state agents respect the substantive rules of IHL.⁴ This is a corollary of the general rules of state responsibility, according to which a state incurs responsibility for the acts of its armed forces and other persons or groups in fact acting on its instructions or under its direction or control. If Common Article 1 were limited to a duty to ensure respect for IHL by state agents, it would effectively be redundant as a legal obligation. Such an interpretation would be contrary to one of the fundamental principles of treaty interpretation, namely, the principle of effectiveness (*effet utile*) which requires that a treaty be interpreted 'in such a way that a reason and a meaning can be attributed to every word in the text',⁵ so as to avoid a reading 'that would result in reducing whole clauses or paragraphs to redundancy or inutility.'⁶

² *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)* (Merits) ICJ Rep 1986, [219]–[220], [250]; see also *Prosecutor v Delalic* (Appeals Judgment) IT-96-21-A (20 Feb 2001) (*Celebici* case), [164].

³ *Nicaragua*, [220].

⁴ See J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, vol I: Rules* (CUP, Cambridge 2005), rule 139.

⁵ *Anglo-Iranian Oil Co (UK v Iran)* (Jurisdiction) (1952) ICJ Rep 93, 105.

⁶ WTO, *US: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (20 May 1996) WTO Doc WT/DS2/AB/R, 23; see also *Corfu Channel (UK v Albania)* (Merits) ICJ Rep 1949,

One could perhaps argue that Common Article 1 was intended to be an aspirational statement rather than an independent obligation carrying real legal weight;⁷ but the use of the word 'undertake' in Article 1 goes against this interpretation. As the ICJ explained in the *Genocide case* in relation to the obligation to prevent and punish genocide in Article 1 of the Genocide Convention,⁸ the ordinary meaning of the word 'undertake' is 'to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties...It is not merely hortatory or purposive.'⁹

The ICRC has long taken the position that the phrase 'and to ensure respect' in Common Article 1 is *not* redundant, but was included in order to 'emphasize and strengthen the responsibility of the Contracting Parties.'¹⁰ The ICRC's 1960 Commentary to the Geneva Conventions explains the nature of the obligation in the following terms:

The proper working of the system of protection provided by the Conventions demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally.¹¹

124; *Territorial Dispute Case (Libyan Arab Jamahiriya v Chad)* (Merits) ICJ Rep 1994, 24; R Jennings and A Watts (eds), *Oppenheim's International Law* (9 edn Longman Harlow 1992), 1280-1281. This principle is one corollary of the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 Jan 1980) 1155 UNTS 331.

⁷ See University Centre for International Humanitarian Law (UCIHL), 'Expert Meeting on Private Military Contractors' (Geneva, Aug 2005), 43.

⁸ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 Dec 1948, entered into force 12 Jan 1951) 78 UNTS 277.

⁹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, (Merits) (26 Feb 2007), [162].

¹⁰ J Pictet (ed), *Commentary to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC Geneva 1952), 16.

¹¹ J Pictet (ed), *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC Geneva 1960), 18. Some commentators have argued that the drafters did not intend Common

In fact, in the decades since 1949 this provision has been widely interpreted as imposing an obligation on all states to take positive steps to ensure that the rules of IHL are respected by all.¹² Perhaps the earliest significant illustration of this broad approach emanated from the 1968 Tehran Conference on Human Rights, at which delegates passed a resolution affirming that every state has an obligation to use all means at its disposal to promote respect for IHL by all, particularly by other states.¹³ A more recent example is Security Council Resolution 681 of 1990 concerning the Arab territories occupied by Israel, which calls upon the contracting parties to GCIV ‘to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with Article 1 thereof’.¹⁴ The General Assembly has adopted several resolutions to the same effect in relation to the Arab-Israeli conflict.¹⁵ Other international organisations have likewise called upon their member states to respect and ensure respect for IHL, in particular the Council of Europe, NATO, the Organization of African Unity and the Organization of American States.¹⁶ More generally, in Resolution 60/47 of 2005 the General Assembly considered the scope of the obligation to ensure respect for IHL and concluded that it entails, *inter alia*, a duty to take positive measures to prevent violations, to investigate violations

Article 1 to impose an obligation on states not party to the conflict (third states) to take action to ensure that states party to the conflict ensure respect for IHL. The debate about third states is not relevant to the host state, but it is discussed in Chapter V in relation to the hiring state.

¹² For a comprehensive review of the state practice see J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, vol II: Practice* (CUP, Cambridge 2005), 3289 *et seq.*

¹³ Res XXIII, International Conference on Human Rights, Tehran (12 May 1968), adopted with no opposing votes.

¹⁴ UNSC Res 681 (20 Dec 1990) UN Doc S/RES/681, [5].

¹⁵ See, eg, UNGA Res 32/91 A (13 Dec 1977) UN Doc A/RES/32/91; UNGA Res 37/123 A (16 Dec 1982) UN Doc A/RES/37/123; UNGA Res 38/180 A (19 Dec 1983) UN Doc A/RES/38/180; UNGA Res 43/21 (3 Nov 1988) UN Doc A/RES/43/21.

¹⁶ See Henckaerts and Doswald-Beck, *Customary IHL I* (n 4), 510.

and punish perpetrators, and to provide victims with access to justice and effective remedies.¹⁷ The Resolution emphasises that the ‘basic principles’ contained therein ‘do not entail new international or domestic legal obligations’, but simply ‘identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations’.¹⁸

The ICJ discussed the duty to ensure respect for IHL in its advisory opinion in the *Wall* case of 2004.¹⁹ Considering Israel’s actions in the occupied Palestinian territories under GCIV, the Court noted that all states party to the Convention have an obligation ‘to ensure compliance by Israel with international humanitarian law as embodied in that Convention.’²⁰ The Court recalled Common Article 1 and concluded on that basis that every state party, ‘whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.’

The above survey illustrates a general trend towards a broad and dynamic interpretation of Common Article 1, obliging all states to take reasonable steps within their power to promote compliance with IHL. Rule 144 of the ICRC’s 2005 study on customary international law reflects this trend, affirming in relation to international armed conflicts that ‘[s]tates may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert

¹⁷ UNGA Res 60/147 (16 Dec 2005) UN Doc A/RES/60/147, [3].

¹⁸ *ibid*, p 3.

¹⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Rep 2004.

²⁰ *ibid*, [163].

their influence, to the degree possible, to stop violations of international humanitarian law.²¹ Considerable doctrinal literature supports the view that this is a norm of customary international law applicable in both international and non-international armed conflicts.²²

2. Ensuring respect for IHL by private actors

Crucially for the host state of a PMSC, the obligation to ensure respect for IHL extends to ensuring respect *by private actors* (such as PMSCs) involved in armed conflict. As Fleck explains, the obligation applies to all states 'in their relations to state and non-state parties to the conflict.'²³ This aspect of the obligation in Common Article 1 is reflected in the 2008 Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (the Montreux

²¹ Henckaerts and Doswald-Beck, *Customary IHL I* (n 4), 509.

²² See, eg, A Duquesne, 'La responsabilité solidaire des états aux termes de l'article 1 des Conventions de Genève' (1966) 15 *Annales de Droit International Médical* 83, 83; L Boisson de Chazournes and L Condorelli, 'Quelques remarques à propos de l'obligation des Etats de "respecter et faire respecter" le droit international humanitaire en toutes circonstances' in C Swinarski (ed) *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (ICRC/Martinus Nijhoff, Geneva/The Hague 1984); H-P Gasser, 'Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations' in H Fox and M Meyer (eds) *Effecting Compliance* (BIICL, London 1993); U Palwankar, 'Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law' (1994) 298 *Intl Rev Red Cross* 9; F Azzam, 'The Duty of Third States to Implement and Enforce International Humanitarian Law' (1997) 66 *Nordic J Intl L* 55; A Roberts, 'Implementation of the Laws of War in Late 20th Century Conflicts' (1998) 29 (2) *Security Dialogue* 137, 142; L Boisson de Chazournes and L Condorelli, 'Common Article 1 of the Geneva Conventions revisited: Protecting Collective Interests' (2000) 837 *Intl Rev Red Cross* 67; B Kessler, 'Die Durchsetzung der Genfer Abkommen von 1949 in nicht-internationalen bewaffneten Konflikten auf Grundlage ihres gemeinsamen Art. 1' (2001) 132 *Veröffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel* 26, 26; B Kessler, 'The Duty to "Ensure Respect" under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts' (2001) 44 *German YBIL* 498; D Fleck, 'International Accountability for Violations of the *Ius in Bello*: The Impact of the ICRC Study on Customary International Humanitarian Law' (2006) 11 *J Conflict & Security L* 182, 182.

²³ Fleck (n 22), 181-182 (emphasis added); see also Kessler, 'Die Durchsetzung der Genfer Abkommen' (n 22), 195.

Document), which states clearly that host states 'have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs operating on their territory'.²⁴ The Montreux Document was produced by seventeen states (Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the UK, Ukraine and the US) as a result of an initiative launched jointly by Switzerland and the ICRC. Part I of the Document sets out the understanding of the drafting states of the existing obligations of states, PMSCs and their personnel under international law in relation to PMSCs in armed conflict, whilst Part II identifies 73 'good practices' for states dealing with PMSCs. The Document has attracted considerable support²⁵ and provides a clear expression of *opinio juris* of the seventeen states involved in its drafting, many of which are particularly affected by PMSC activity.²⁶

Ensuring respect for IHL by PMSCs would logically require the host state to take positive measures to prevent and punish any PMSC violations of which it is aware or ought to be aware. It is important to note, however, that no court to date has found a state responsible for a mere failure to take positive action to ensure respect for IHL by private actors. In *Nicaragua* the US incurred responsibility for a violation of Common Article 1 on the basis of its 'encouragement' of the rebel *contras* to act in

²⁴ Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (17 Sept 2008) UN Doc A/63/467-S/2008/636, Part I, [9].

²⁵ See, eg, European Commission for Democracy through Law, 'Report on Private Military and Security Firms and Erosion of the State Monopoly on the Use of Force' (Venice, 12-13 June 2009), available at <<http://www.venice.coe.int/docs/2009/CDL-AD%282009%29038-e.asp>> (accessed 21 Sept 2009), [65].

²⁶ See J Cockayne, 'Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document' (2009) 13 (3) J Conflict & Security L 401.

violation of Common Article 3. As there was sufficient evidence to prove that the US had actively supported the prohibited activities of the *contras*, the Court did not need to consider whether a state's mere failure to take positive action to prevent and punish those activities could constitute a violation of Common Article 1.²⁷ Nonetheless, the Court did not exclude the possibility of state responsibility on this basis, and in principle it is difficult to see how a state that failed to take such positive action could fulfil its obligation under Common Article 1 'to ensure that the requirements of the [Geneva Conventions] are complied with.'²⁸

The obligation to ensure that private actors respect IHL in Common Article 1 shares a number of common features with the obligation to prevent and punish genocide in Article 1 of the Genocide Convention. In the *Genocide* case, Serbia's obligation to prevent genocide was crucial as it provided a mechanism to establish Serbia's responsibility even though the ICJ could not attribute the genocide itself to the state.²⁹ Likewise, where a PMSC employee violates IHL in armed conflict, the obligation to ensure respect for IHL could provide a pathway to state responsibility that is not dependent on the attribution of the PMSC misconduct to a particular state. This broadens the state responsibility analysis from a mere consideration of the agency relationship between the hiring state and the company, discussed in Chapter III of this Thesis, to a consideration of whether the host state took adequate measures to prevent or punish PMSC violations in its territory. Moreover, as Common Article 1 is *not* territorially limited—revealing another similarity with the

²⁷ See *Nicaragua* (n 2), [220], [255].

²⁸ *Wall* advisory opinion (n 19), [158].

²⁹ See *Genocide* case (n 9), [425]-[450].

obligation to prevent and punish genocide³⁰—it may also oblige other states (such as the hiring state and the home state) to take positive steps to control PMSCs, as discussed in Chapters V and VI.

Whilst Common Article 1 is not territorially limited and binds all states ‘in all circumstances’, common sense suggests that a state must have some capacity to influence a PMSC before the state will be required to take concrete action directed towards that particular company.³¹ Conversely, a state will not incur responsibility for a failure to take positive action to ensure respect for IHL by a PMSC unless the state actually had some capacity to exert effective influence over that company. The requirement that a state have the ‘capacity to influence effectively’ a PMSC thus serves as a *de facto* precondition to the state’s positive obligation to ensure respect for IHL by that company. This provides the crucial link between, on the one hand, the universal and somewhat vague obligation in Common Article 1 and, on the other hand, the need for particular states to take concrete action in relation to particular PMSCs. A similar approach is evident in the ICJ’s reasoning in the *Genocide* case in relation to the obligation to prevent genocide. The Court noted that the measures required to discharge the obligation depend largely on the state’s ‘capacity to influence effectively the action of persons likely to commit, or already committing,

³⁰ *ibid*, [183].

³¹ For a similar point in relation to the obligation to ensure respect by other states, see Kessler, 'The Duty to 'Ensure Respect'' (n 22), 505; Kessler, 'Die Durchsetzung der Genfer Abkommen' (n 22), 118; N Levrat, 'Les conséquences de l'engagement pris par le HPC de "faire respecter" les conventions humanitaires' in F Kalshoven and Y Sandoz (eds) *Implementation of International Humanitarian Law* (Martinus Nijhoff, Dordrecht 1989), 279; Gasser (n 22), 28.

genocide.’³² The corollary of the Court’s reasoning is that a state will not incur responsibility for a failure to take preventive action directed towards particular individuals if the state in fact lacked the capacity to influence those individuals effectively.

Ordinarily, the host state of a PMSC will be presumed to possess some capacity to influence the company by virtue of the state’s sovereignty and control over the territory in which the company operates. This gives rise to an obligation on the host state under Common Article 1 to take positive steps to prevent and punish PMSC violations of IHL. In many situations of armed conflict, however, the host state will lack the capacity to exert effective influence over PMSCs operating in its territory. Formal occupation represents the extreme case of this loss of host state control, since an occupying power by definition exercises a high degree of control over the occupied territory. The Montreux Document thus provides that ‘[i]n situations of occupation, the obligations of [Host] States are limited to areas in which they are able to exercise effective control.’³³ Even in cases falling short of formal occupation, the host state may have lost control over parts of its territory or the situation may be so unstable that it is difficult to determine which party exercises control at a particular time. In the *Al-Skeini* case of 2007, for example, the House of Lords noted the large number of British troops deployed in southern Iraq in 2003 and described the situation as ‘fluid’, although it ultimately concluded that the UK did not exercise

³² *Genocide* case (n 9), [430].

³³ Montreux Document (n 24), Part I, [13].

effective overall control over the territory in question.³⁴ Since the host state's obligation to ensure PMSC compliance with IHL is dependent on the state's capacity to influence PMSC behaviour effectively, it requires a fact-specific analysis of the territorial control exercised by the host state in each case.

Where the host state does in fact have the capacity to exert effective influence over a PMSC operating in its territory, the next step is to identify the positive measures the state should take in order to discharge its Common Article 1 obligation.

3. Positive action to discharge the obligation

The wording of the duty 'to ensure respect' in Common Article 1 suggests that it entails an obligation of a due diligence nature.³⁵ This aspect of the duty to ensure respect is reflected in Rule 144 of the ICRC's study on customary IHL, quoted above, which provides that states 'must exert their influence, *to the degree possible*, to stop violations of international humanitarian law.'³⁶ Due diligence obligations are certainly not foreign to IHL. For example, Article 77(2) of Protocol I obliges states to 'take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities', and Article 86(2) provides for penal or disciplinary responsibility of superior officers if they 'did not take all feasible

³⁴ *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26.

³⁵ For a discussion of the importance of language in identifying due diligence obligations, see Chapter II, text accompanying notes 43-50.

³⁶ Henckaerts and Doswald-Beck, *Customary IHL I* (n 4), 509 (emphasis added).

measures within their power to prevent or repress' certain breaches of IHL by their subordinates.

A more explicit reference to the due diligence principle appears in the 1987 ICRC Commentary to Article 91 of Protocol I. This Article restates the customary rule that '[a] Party to the conflict which violates the provisions of the Conventions of this Protocol shall, if the case demands, be liable to pay compensation.' The ICRC Commentary notes that Article 91 reflects the general principle of international law that the conduct of any state organ constitutes an act of state, provided that the organ acted in its official capacity. The Commentary then states:

As regards damages which may be caused by private individuals, i.e., by persons who are not members of the armed forces (nor of any other organ of the State), legal writings and case-law show that the responsibility of the State is involved if it has not taken such preventive or repressive measures as could reasonably be expected to have been taken in the circumstances. In other words, *responsibility is incurred if the Party to the conflict has not acted with due diligence to prevent such acts from taking place, or to ensure their repression once they have taken place.*³⁷

It is difficult to see how the due diligence obligation asserted by the ICRC could derive solely from Article 91, since that provision sets out solely a secondary rule of attribution. The primary rule in Common Article 1 provides a far more convincing basis for a general due diligence obligation of this nature, requiring the host state to exert its best efforts and take all measures reasonably within its power to prevent and punish violations of IHL by PMSCs in its territory.

³⁷ Y Sandoz, C Swinarski and B Zimmermann (eds), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC Geneva 1987), [3660] (emphasis added). In support of this contention, the ICRC cites a 1951 work by Marcel Sibert which states that the government 'doit exercer *toute la diligence nécessaire*, soit pour empêcher ces faits de se produire, soit pour assurer leur répression s'ils se sont produits': M Sibert, *Traité de droit international public* (Dalloz, Paris 1951), vol I, 317 (emphasis in the original).

Chapter II of this Thesis explained that due diligence constitutes a ‘flexible reasonableness standard adaptable to the particular facts and circumstances’,³⁸ and it identified three factors which may affect the extent of positive action required of a state in a particular case: the capacity of the state to influence the PMSC, the resources available to the state to perform its obligations, and the risk that the company’s activities will give rise to a violation of IHL.³⁹ The requirements of due diligence become more demanding as these factors increase.

In relation to the specific measures required to discharge the obligation, paragraph 9 of Part I of the Montreux Document provides that the host state is obliged to

- a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;
- b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
- c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.

These are characterised as concrete obligations implicit in the host state’s general obligation to ensure respect for IHL. Part II of the Montreux Document then sets out a number of illustrative ‘good practices’ which provide guidance and assistance to the host state seeking to fulfil these obligations. Whilst generally speaking a host state’s failure to implement any one of these practices will not, in itself, constitute a

³⁸ R Barnidge, *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (CUP, Cambridge 2007), 138.

³⁹ See Chapter II, text accompanying notes 60-74.

violation of Common Article 1, taken as a whole these practices provide a useful 'check list' to ensure that the state has in fact discharged its obligation.⁴⁰ The diligent use of this check list will also help the host state to comply with any applicable obligations under HRL, as discussed below in Part II.

Regarding the host state's obligation to 'take appropriate measures to prevent' violations of IHL, identified in paragraph 9(b) set out above, Part II of the Montreux Document recommends the development of a licensing scheme for PMSCs wishing to operate in state territory.⁴¹ Regulatory regimes of this nature have been established in Sierra Leone (in 2002)⁴² and Iraq (in 2004 under the CPA),⁴³ and the parliaments of Iraq and Afghanistan have considered draft legislation to establish new regimes along similar lines.⁴⁴ The envisaged scheme would require all PMSCs to obtain a licence from the host government in order to operate in state territory, such licences being valid for a specific time period (typically one year). As part of the authorisation process, the host government would lay down certain rules concerning *inter alia* PMSCs' weapons and services, accompanied by procedures to monitor compliance. Sanctions would apply to any PMSCs that provided military or security services without a licence. A regime of this nature could help to increase state

⁴⁰ See Montreux Document (n 24), p 12.

⁴¹ *ibid*, Part II, [25]-[48].

⁴² National Security and Central Intelligence Act 2002, s 19.

⁴³ See CPA Memorandum No 17, 'Registration Requirements for Private Security Companies' (26 June 2004); Minister of Interior, Kurdistan Regional Government, 'Private Security Company Requirements for Iraqi Kurdistan' (7 Dec 2005), available at <http://www.psc.ai.org/Docs/Foreign_Security_Company_Guidelines.pdf> (accessed 28 Aug 2009); Private Security Company Association of Iraq, *Baghdad MOI PSC Registration Guide 2006*, available at <www.psc.ai.org> (accessed 28 Aug 2009).

⁴⁴ See UN Press Release, 'Expert Group on Mercenaries Concludes Visit to Afghanistan' (8 April 2009); M Cottier, 'Elements for Contracting Private Military and Security Companies' (2006) 88 (863) *Intl Rev Red Cross* 637, 646-647.

control and transparency in the industry, and this in turn could help to prevent PMSC violations of IHL in state territory.

The Montreux Document also characterises as implicit in Common Article 1 an obligation on the host state to suppress PMSC violations of IHL.⁴⁵ In international conflicts this reinforces the specific obligations in the Geneva Conventions to repress grave breaches and to suppress other breaches of IHL, discussed below in Section C. In non-international conflicts, on the other hand, the Common Article 1 obligation to suppress violations essentially stands alone. Ideally the host state should adopt *criminal* legislation to fulfil this obligation; in fact, the ICTY Appeals Chamber suggested in the *Celebici* case that the absence of domestic legislation criminalising violations of Common Article 3 could in itself constitute a violation of Common Article 1.⁴⁶ The hiring state should also ‘consider establishing corporate criminal responsibility for crimes committed by the PMSC.’⁴⁷ Whatever the precise means adopted by the host state to prohibit PMSC violations of IHL, it is clear that the state must investigate and, where warranted by the evidence, prosecute, extradite or otherwise punish any PMSC personnel suspected of having violated IHL in state territory. The host state should also ‘provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSC and its personnel’, including providing for civil liability.⁴⁸

⁴⁵ Montreux Document (n 24), Part I, [9(c)] (quoted above).

⁴⁶ *Celebici* case (n 2), [167]; see also A Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 (1) EJIL 2.

⁴⁷ Montreux Document (n 24), Part II, [49].

⁴⁸ *ibid*, Part II, [50].

4. State responsibility for breach of Common Article 1

If the host state does not take adequate measures to control a PMSC and the company violates IHL in state territory, the state could incur international responsibility for its failure to ensure respect for IHL. Although no court to date has found a state responsible under Common Article 1 merely on the basis of such inaction, the above analysis has shown that this pathway to responsibility is certainly possible in principle.

Of course, the mere occurrence of a PMSC violation in state territory would not itself establish that the host state has violated its preventive obligation; the claimant would also need to prove that the state failed to exercise due diligence to ensure that the company respect IHL. The claimant would not need to prove, however, that an exercise of due diligence by the host state would have in fact prevented the violation of IHL in question. This would be difficult to prove and, in any event, it is irrelevant to the breach of the state's obligation to exercise due diligence to prevent violations of IHL. In order to establish such a breach, it would suffice to prove that the host state failed to take those measures within its power that *might* have been expected to prevent the violation in the circumstances.⁴⁹ The extent of the state's responsibility would then depend on an evaluation of, on the one hand, the preventive steps in fact taken by the state and, on the other hand, the state's

⁴⁹ This essentially mirrors the test used by the ICJ in the *Genocide* case (n 9), [430], as well as that used by the European Court of Human Rights in assessing the obligation to safeguard the right to life in *Keenan v UK* (App no 27229/95) ECHR 3 April 2001, [89], and *Osman v UK* (App no 23452/94) ECHR 28 Oct 1998, [116].

capacity to influence the PMSC, the degree of risk associated with the PMSC activity, and the resources available to the state in the circumstances.

The host state's obligation to ensure respect for IHL not only provides a potential mechanism for establishing state responsibility *ex post facto* in cases of PMSC misconduct; it could also help to set minimum standards of conduct for all states in whose territory PMSCs operate in international or non-international conflict. In this way, the obligation to ensure respect in Common Article 1 could play a similar role to the rules in Common Article 3 which, according to the ICJ, 'constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts'.⁵⁰

B. Obligation to protect civilians in international armed conflict

In addition to the general obligation to ensure respect for IHL, the Geneva Conventions and Protocol I impose a number of more specific obligations on states parties to protect civilians in international armed conflict, particularly women and children. These obligations require states to take certain positive steps to control not only the conduct of state agents and officials, but also the conduct of private persons.

⁵⁰ *Nicaragua* (n 2), [218]; see also *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72 (2 Oct 1995), [102].

Article 27 of GCIV provides that '[p]rotected persons...shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.' It further states that '[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.' In a similar vein, Article 76 of Protocol I obliges states to protect women 'in particular against rape, forced prostitution and any other form of indecent assault', and Article 77 obliges states to protect children 'against any form of indecent assault'. These obligations are particularly important in light of the high rate of rape and sexual assault in armed conflict.⁵¹

One can infer from these provisions a due diligence obligation on the host state to control PMSCs engaged in activities that could threaten the civilian population, especially women and children. This obligation is most relevant to those companies that bear weapons or otherwise operate in a coercive environment such as a detention centre. One can also infer a due diligence obligation to minimise the risk that off-duty contractors (or off-duty soldiers) will engage in unlawful sexual activities with women or children. These special obligations complement and reinforce the general obligation in Common Article 1 to ensure respect for IHL.

As part of its efforts to fulfil these obligations, the host state should take reasonable measures within its power to combat underage and forced prostitution in its territory. Such prostitution is common in zones of armed conflict and post-

⁵¹ See KD Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 Berkeley J Intl L 288.

conflict reconstruction, in part due to the large presence of unaccompanied, highly-paid and mostly male international workers. The 'sex-slave' scandal in Bosnia provides an example of PMSC misconduct in a post-conflict context. The American firm DynCorp provided a large number of personnel to the US government to meet its obligation to staff the UN police force in post-conflict Bosnia and Herzegovina. During 1999 and 2000, a number of DynCorp employees participated in a prostitution ring in Bosnia involving girls as young as twelve, many of whom were trafficking victims, and some contractors allegedly 'purchased' young prostitutes for personal use.⁵²

In non-international armed conflict, neither Common Article 3 nor Additional Protocol II contains a duty to take positive steps to protect the civilian population in general or women and children in particular. Articles 7-11 of Protocol II impose a limited duty on states to protect the wounded, sick and shipwrecked, as well as medical units and religious personnel, and both obligations entail a due diligence standard of conduct. Beyond these specific duties, the only provision mandating a general level of host state action in non-international conflict is Common Article 1.

C. Obligation to repress or suppress violations of IHL

In international armed conflict, the substantive provisions of the Conventions and Protocols explicitly oblige all states to take measures to repress or suppress breaches

⁵² See Human Rights Watch Report, 'Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution' (26 Nov 2002).

of IHL that have occurred or are ongoing. These obligations apply over and above the general obligation to suppress violations of IHL which is implicit in Common Article 1.

The clearest obligations on states relate to 'grave breaches' of the Geneva Conventions, a category which encompasses certain serious offences including wilful killing, torture or inhuman treatment, and wilfully causing great suffering or serious injury to body or health.⁵³ Article 49(1)/50(1)/129(1)/146(1) common to the Geneva Conventions explicitly requires all states, first, to enact any legislation necessary to criminalise grave breaches under domestic law and, subsequently, to prosecute or extradite suspects in the exercise of universal jurisdiction. In rare cases PMSC personnel might commit offences of this nature. For example, employees of the American PMSCs Titan and CACI, working under contract with the US, were found to have participated in the prisoner abuse at Abu Ghraib prison in Iraq in 2003-2004.⁵⁴ The host state of the PMSC will generally be the most obvious forum for prosecution in such cases, unless there is an agreement in place granting foreign contractors immunity from local laws. In Iraq, for example, Coalition Provisional Authority (CPA) Order No 17 of 2004 provided that '[c]ontractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts, including licensing and registering employees, businesses and corporations'.⁵⁵

⁵³ GCI, art 50; GCII, art 51; GCIII, art 130; GCIV, art 147.

⁵⁴ See GR Fay, 'Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade' (Aug 2004).

⁵⁵ CPA Order No 17 (27 June 2004), s 4(2). The US and Iraqi governments agreed to lift this immunity on 1 January 2009: see D Pallister, 'Foreign Security Teams to Lose Immunity from Prosecution in Iraq' *Guardian* (27 Dec 2008).

Where such immunity applies or the host state is otherwise unable or unwilling to conduct the prosecution itself, the state could fulfil its obligation to repress grave breaches by handing the PMSC employees over for trial to another state (such as their state of nationality) that has made out a *prima facie* case, or to an international criminal tribunal.⁵⁶

A more likely scenario would be where a PMSC employee committed a non-grave breach of IHL. All states have an obligation to ‘take measures necessary for the suppression of’ (*faire cesser*) non-grave breaches of IHL under Common Article 49(3)/50(3)/129(3)/146(3). Whilst this provision (unlike the equivalent provision relating to grave breaches) does not impose an *explicit* obligation on states to enact legislation enabling criminal prosecution, it will generally be difficult for a state to fulfil its obligation to suppress non-grave breaches in the absence of domestic criminal legislation.⁵⁷ According to the ICRC Commentary to Article 146(3) of GCIV, ‘there is no doubt that what is primarily meant is the repression [by criminal prosecution] of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Convention.’⁵⁸ The Commentary goes on to state more explicitly that

all breaches of the Convention should be repressed by national legislation. The Contracting Parties who have taken measures to repress the various grave breaches of the Convention and have fixed an appropriate penalty in each case should at least insert in their legislation a general clause providing for the punishment of other breaches.⁵⁹

⁵⁶ See Montreux Document (n 24), Part I, [11].

⁵⁷ See UCIHL Expert Meeting (n 7), 46-47.

⁵⁸ Pictet (ed), *Commentary to GCIV*, 594.

⁵⁹ See also ILC Draft Code of Crimes Against the Peace and Security of Mankind UN Doc A/SI/10 (1996), art 9; UNGA Res 3074 (XXVIII) (3 Dec 1973) UN Doc A/3074; Cassese (n 46).

The envisaged repression of non-grave breaches refers to prosecution by states in the exercise of ordinary jurisdiction, whereas the grave breaches regime explicitly provides for universal jurisdiction.

In non-international conflicts there are no specific provisions equivalent to Common Article 49/50/129/146, but an obligation to suppress violations of IHL is implicit in the general obligation to ensure respect for IHL in Common Article 1 (discussed above in Section A).⁶⁰ In this context, the ICTY Appeals Chamber explicitly stated in the *Celebici* case that a state's failure to enact legislation criminalising violations of Common Article 3 would 'arguably' be inconsistent with the general obligation in Common Article 1.⁶¹

II. Human rights law

HRL provides another key source of obligations on the host state to control PMSCs. Whilst HRL lacks the specificity of IHL in situations of armed conflict, it offers a significant advantage to victims by virtue of its sophisticated procedures for individual complaint and redress.⁶² Moreover, all violations of civil and political rights give rise to an individual right to an effective procedural remedy and reparation under HRL, whereas no such individual right exists in IHL.⁶³

⁶⁰ See Montreux Document (n 24), Part I, [9(c)].

⁶¹ *Celebici* case (n 2), [163]-[167].

⁶² See generally J Symonides (ed), *Human Rights: International Protection, Monitoring, Enforcement* (Ashgate/ UNESCO, Aldershot /Paris 2003).

⁶³ See L Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 851 IRRC 497.

This Part critically examines the obligations on the host state to take active steps to prevent, investigate, punish and redress violations of human rights committed by PMSCs in armed conflict. Before analysing the content of these obligations in Sections C and D, however, it is first necessary to confirm that the general regime of HRL applies in armed conflict (Section A), and to assess the relationship between HRL and IHL in this context (Section B).

A. Applicability of HRL in armed conflict

Unlike IHL, which is specially tailored to situations of armed conflict, HRL constitutes a general framework primarily designed to apply to ordinary life during peacetime. Any attempt to apply a general legal framework to the exceptional situation of armed conflict raises the question of how those general norms relate to the more specific norms of IHL.

1. Do the rules of IHL displace the rules of HRL in armed conflict?

Although IHL and HRL share a common humanist ideal, the two regimes differ in their historical origins, theoretical foundations and primary objectives.⁶⁴ IHL is designed to regulate the conduct of parties to an armed conflict with the purpose of 'alleviating as much as possible the calamities of war'.⁶⁵ It attempts to strike a balance between considerations of military necessity and the requirements of

⁶⁴ See L Doswald-Beck and S Vité, 'International Humanitarian Law and Human Rights Law' 293 *Intl Rev Red Cross* 94; RE Vinuesa, 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law' (1998) 1 *YBIHL* 69; C Droegge, 'The Interplay between International Humanitarian Law and International Human Rights Law' 40 *Israel L Rev* 310, 312-317.

⁶⁵ St Petersburg Declaration Renouncing the Use, in time of War, of Explosive Projectiles under 400 Grammes Weight (1868) in 'Laws of Armed Conflicts' 101, 102.

humanity, and it imposes obligations both on states and individuals in furtherance of that objective.⁶⁶ The primary purpose of HRL, on the other hand, is the protection of individuals from abuses of power by their own governments. Whereas IHL regulates armed conflict on the basis of formal equality between contestants, HRL applies to relationships between unequal parties. This traditional conception of human rights as a means of protecting the governed from the governing helps to explain why HRL imposes obligations only on states and not on individuals, and why it confers rights directly on individuals *per se* without the interposition of states. Victims of human rights violations may stand on their own rights without necessarily relying on the goodwill of their state to take up their case on the international plane. HRL also provides more advanced procedural safeguards for the protection of individual rights than IHL. The corollary of the general applicability of HRL, however, is that states have some leeway in restricting rights in the interests of national security or public safety, and in the extreme circumstances of an armed conflict the main human rights treaties allow for derogations from certain rights.⁶⁷

In light of the fundamental differences between IHL and HRL, one might assume that during armed conflict the war-oriented human rights contained in IHL simply supplant the peacetime rights contained in HRL. The drafters of the Universal

⁶⁶ See Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP, Cambridge 2004), 16-20.

⁶⁷ See International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 Mar 1976) 999 UNTS 171, art 4; European Convention on Human Rights (4 Nov 1950) CETS No 005, art 15; American Convention on Human Rights (adopted 22 Nov 1969, entered into force 18 July 1978) 1144 UNTS 123, art 27. The African Charter contains no derogation clause, but limitations are possible pursuant to Article 27(2) to take account of 'the rights of others, collective security, morality and common interest': African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 Oct 1986) OAU Doc CAB/LEG/67/3 rev 5.

Declaration of Human Rights of 1948⁶⁸ and the Geneva Conventions of 1949 seemed to assume that the two regimes would have essentially distinct fields of operation, and this understanding of IHL and HRL as two separate legal regimes largely prevailed at least until the 1970s.⁶⁹ Yet the drafters of the 1950 European Convention on Human Rights (ECHR) and the 1969 American Convention on Human Rights (American Convention) clearly envisaged that those instruments would continue to apply during armed conflict, since they included provisions stipulating that a situation of 'war' permits states to derogate from certain specified rights, but only to the extent and for the period of time strictly required by the exigencies of the situation.⁷⁰ Moreover, historical developments since that time have signified a gradual convergence of IHL and HRL, culminating in the decisions of the ICJ in the *Nuclear Weapons*, *Wall* and *Congo* cases, in a process which Meron describes as the "humanization" of humanitarian law'.⁷¹

It is now widely recognised that HRL continues to apply during both international and non-international armed conflict, and there is extensive state practice and *opinio juris* to that effect.⁷² For example, General Assembly Resolution 2675 (XXV) of 1970 on 'basic principles for the protection of civilian populations in armed conflicts'

⁶⁸ Universal Declaration of Human Rights (adopted 10 Dec 1948) UNGA Res 217 A(III), UN Doc A/810 at 71 (1948).

⁶⁹ See, eg, J Pictet, *Humanitarian Law and the Protection of War Victims* (Henry Dunant Institute, Geneva 1975), 15; Y Dinstein, 'The International Law of Inter-State Wars and Human Rights' [1977] *Israel YBk Human Rights* 148; H Meyrovitz, 'Le droit de la guerre et les droits de l'homme' (1972) 88 *Revue de droit public et de la science politique* 1059, 1104; WK Suter, 'An Enquiry into the Meaning of the Phrase "Human Rights in Armed Conflicts"' (1976) XV *Revue de droit pénal militaire et droit de la guerre* 393, 421.

⁷⁰ ECHR (n 67), art 15; American Convention (n 67), art 27.

⁷¹ T Meron, 'The Humanization of Humanitarian Law' (2000) 94 *AJIL* 239.

⁷² See Henckaerts and Doswald-Beck, *Customary IHL I* (n 4), 303-305.

refers in its preamble to the Geneva Conventions as well as to ‘the progressive development of the international law of armed conflict’.⁷³ In its first operative paragraph, the Resolution states that ‘fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.’ Since then, numerous resolutions of the General Assembly, the Security Council and the Commission on Human Rights have reaffirmed, either explicitly or implicitly, the continuing applicability of HRL in both international and non-international armed conflict.⁷⁴ Further demonstrating the convergence of IHL and HRL are a number of widely ratified international treaties which draw from both regimes, including the Convention on the Rights of the Child of 1989⁷⁵ and the Rome Statute of the International Criminal Court.⁷⁶

International human rights bodies and courts, including the UN Human Rights Committee, the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR), have applied human rights treaties in times of non-international armed conflict as well as international armed conflict.⁷⁷ In its *Nuclear Weapons* advisory opinion of 1995, the ICJ recognised that the protection of the International Covenant of Civil and Political Rights (ICCPR) ‘does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions

⁷³ UNGA Res 2675 (XXV) (9 Dec 1970) UN Doc A/2675.

⁷⁴ See Henckaerts and Doswald-Beck, *Customary IHL I* (n 4), 303-305; Droege (n 64), 316-317.

⁷⁵ (adopted 20 Nov 1989, entered into force 2 Sept 1990) 1577 UNTS 3, art 38.

⁷⁶ (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF.183/9 (1998) 37 ILM 999; see also UNGA Res 60/147 (16 Dec 2005) (n 17).

⁷⁷ See H-J Heintze, ‘On the Relationship between Human Rights Law Protection and International Humanitarian Law’ 86 (856) *Intl Rev Red Cross* 789; Droege (n 64), 320-322.

may be derogated from in a time of national emergency.⁷⁸ The Court reaffirmed this statement in its 2004 *Wall* advisory opinion, and extended the principle to the general application of human rights in armed conflict:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.⁷⁹

The Court reiterated this conclusion in the *Congo* case of 2005,⁸⁰ thereby making it clear that its opinion in the *Wall* case cannot be explained by the 'unusual circumstances of Israel's prolonged occupation' in the occupied Palestinian territories, since Uganda did not have such a long-term and consolidated presence in the eastern DRC.⁸¹

Whilst for the most part states have not objected to these interpretations, the governments of the US and Israel have contested the general applicability of HRL to armed conflict in recent years.⁸² In light of this official US position, the Montreux Document of 2008 is highly significant as a public affirmation by the US that IHL and

⁷⁸ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Rep 1996, [25].

⁷⁹ *Wall* advisory opinion (n 19), [106].

⁸⁰ *Case Concerning Armed Activities in the Territory of the Congo (DRC v Uganda)* (Merits) ICJ Rep 2005, [119].

⁸¹ Dennis suggested in 2005 that the ICJ's *Wall* advisory opinion could be attributed to this feature of the Israeli occupation: see M Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 AJIL 119, 122.

⁸² See, eg, UNHRC, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, 2nd and 3rd Periodic Reports of the United States of America (28 Nov 2005) UN Doc CCPR/C/USA/3, Annex I: Territorial Scope of the Application of the Covenant; Summary Record of the 2380th Meeting: USA, 2, UN Doc CCPR/C/SR2380 (27 July 2006); Summary Legal Position of the Government of Israel, Annex I to the Report of the Secretary-General Prepared Pursuant to GA Res, ES-10713, ¶ 4, UN Doc A/ES-10/248 (24 Nov 2003). For a discussion of the Israeli government's position, see B-Na Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003-2004) 37 Israel L Rev 17, 25-40; but note the contrasting approach of the Israeli High Court of Justice in *Ma'arab v The IDF Commander in Judea and Samaria* 57(2) PD 349, HCl 3239/02.

HRL apply concurrently in armed conflict. The Preface to the Document sets out the ‘understanding’ of the drafting states that ‘certain well-established rules of international law apply to States in their relations with [PMSCs] and their operation during armed conflict, *in particular under international humanitarian law and human rights law*’.⁸³ Part One of the Document then sets out the ‘existing legal obligations’ that bind states in times of armed conflict, including a number of obligations under HRL.⁸⁴ This can be taken to be a significant expression of *opinio juris* of the seventeen drafting states—including the US—as to the continuing applicability of HRL in times of armed conflict. In this regard, as Cockayne notes:⁸⁵

Given the uncertainty around the US position on such issues between 2003 and 2008, this was no small achievement. Indeed, one US government participant in the process pronounced the Montreux Document ‘a significant achievement of historic importance’, for precisely this reason.⁸⁵

2. Derogating from human rights in times of emergency

The principal human rights treaties allow states to derogate from certain rights in a time of emergency threatening the life of the nation. The emergency need not involve the whole nation, but it must be the case that the normal application of HRL—taking into account limitations that are permissible in relation to a number of rights for public safety and order—can no longer be ensured.⁸⁶ Derogations are permitted only to the extent strictly required by the exigencies of the situation, and

⁸³ Montreux Document (n 24), Preface, [1] (emphasis added).

⁸⁴ See, eg, *ibid*, Part I, [4], [7], [10].

⁸⁵ Cockayne (n 26), 403. Regarding the ‘US government participant’, Cockayne cites a ‘[c]onfidential statement to participants in the Swiss Initiative, made under the Chatham House rule, 2008’.

⁸⁶ See Henckaerts and Doswald-Beck, *Customary IHL I* (n 4), 301-302; Vinuesa, 76-81; D McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press, Oxford 1991), ch 7.

not in relation to the specified non-derogable rights such as the right to life and freedom from torture. The derogations clauses in Article 15 of the ECHR and Article 27 of the American Convention explicitly state that a situation of 'war' permits states to derogate from certain specified rights. The express reference to war in these provisions clearly supports the ICJ's opinion that HRL continues to apply during armed conflict in the absence of derogation; for if IHL automatically displaced HRL during armed conflict, there would be no need to derogate from any rights in the relevant treaties in case of war. The derogation clause in Article 4 of the ICCPR does not expressly mention 'war', but it is widely accepted that war is one of the most important emergencies falling within that provision. Conversely, Article 2 of the UN Convention Against Torture (UNCAT) explicitly states that a situation of war may *not* be invoked as a justification of torture.⁸⁷

Generally speaking there are two procedural requirements for the lawfulness of derogations: they must be officially proclaimed and other states party to the treaty must be notified thereof. The ICJ adopted a strict approach to the notice requirements for derogation from the ICCPR in the *Wall* case. In applying the Covenant to Israel's occupation of the Palestinian territories, the Court held that although Israel had formally derogated from Article 9, it had forfeited its right to derogate from other Articles because of its failure to notify other states parties of its intent. The Court concluded that Israel remained bound by the other Articles of the Covenant, not only in Israeli territory but also in relation to the occupied Palestinian

⁸⁷ UN Convention Against Torture (adopted 10 Dec 1984, entered into force 26 June 1987) 1465 UNTS 85.

territories.⁸⁸ In a similar vein, the ECtHR has insisted that strict adherence to the procedural requirements in Article 15 of the ECHR is a prerequisite for derogation from the Convention. In the *Isayeva* cases of February 2005, concerning Russia's conduct in the non-international armed conflict in Chechnya, the Court stated that '[n]o martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under article 15 of the Convention...The operation in question therefore has to be judged against a normal legal background.'⁸⁹ The ICRC's study on customary IHL embraces the strict approach of the ICJ and ECtHR.⁹⁰

In short, the host state of a PMSC will continue to be bound by HRL in relation to the company's activities in state territory during armed conflict, except to the extent that the state has formally derogated from its obligations as strictly required by the exigencies of the situation. The host state will always be bound by its obligation to respect and ensure non-derogable rights such as the right to life and freedom from torture. The remainder of this Part takes the continuing applicability of HRL during armed conflict as an accepted starting point, and proceeds to analyse the requirements of HRL in this specific context.

B. Relationship between HRL & IHL

Although IHL is, by and large, more specific than HRL in relation to armed conflict, this does not lead to the conclusion that the former regime will simply override the

⁸⁸ *Wall* advisory opinion (n 19), [127]; see also [136], [140].

⁸⁹ *Isayeva v Russia* (App no 57950/00) ECHR 24 Feb 2005, [191].

⁹⁰ Henckaerts and Doswald-Beck, *Customary IHL I* (n 4), 300.

latter in this context. Rather, the relationship between IHL and HRL must be determined in each case in relation to the particular norm in question.⁹¹ This contextual analysis is particularly important for modern military operations involving activities such as policing and the administration of territory, which are closer to regular governmental activities than traditional combat. In these circumstances, HRL may provide a more appropriate regulatory framework than IHL, notwithstanding the fact that the operations take place in a conflict zone.⁹²

1. The principle of *lex specialis*

In the *Wall* case, the ICJ identified three situations which might govern the relationship between IHL and HRL in regard to a particular right:

[S]ome rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.⁹³

Although the Court did not offer any specific guidance as to how to distinguish between these three categories, it is generally accepted that the conduct of hostilities is essentially a matter of IHL, whereas ordinary law enforcement by state authorities is essentially a matter of HRL. The two regimes will frequently overlap in relation to persons in the power of an authority (including persons in the power of a

⁹¹ See A Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' 74 *Nordic J Intl L* 27, 49; H Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 (2) *J Conflict & Security L* 265, 271. More generally, see Provost, *International Human Rights and Humanitarian Law* (CUP, Cambridge 2002).

⁹² See S Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence' (2005) 16 *EJIL* 696; Droege (n 64).

⁹³ *Wall* advisory opinion (n 19), [106].

PMSC hired by a state), in which case it is necessary to undertake a more nuanced analysis. Where IHL and HRL overlap, in that they both have something to say about a particular right, the principle of *lex specialis* can guide the interplay between the two regimes.

The International Law Commission Study Group on the Fragmentation of International Law (ILC Study Group) has found that the *lex specialis* principle can play two roles in relation to overlapping norms, depending on the factual situation and the particular norm in question.⁹⁴ First, the *lex specialis* rule may provide a more specific interpretation of the general rule, such that the two rules complement and reinforce one another. Second, the *lex specialis* rule may constitute an exception or limitation to the general rule, in the sense that the former modifies, derogates from or overrules the latter. Koskenniemi explains this distinction in the following terms:

There are two ways in which law takes account of the relationship of a particular rule to general rule...A particular rule may be considered an application of the general rule in a given circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand. Alternatively, a particular rule may be conceived as an exception to the general rule. In this case, the particular derogates from the general rule. The maxim *lex specialis derogate lex generalis* is usually dealt with as a conflict rule. However, it need not be limited to conflict.⁹⁵

This twofold conception of *lex specialis* is broader than the common understanding of the principle as a technique for solving conflicts between norms. Each aspect of the principle will now be considered in turn.

⁹⁴ See ILC Study Group on Fragmentation of International Law 'Difficulties arising from Diversification and Expansion of International Law' (29 July 2005) UN Doc A/CN.4/L.676.

⁹⁵ M Koskenniemi, 'Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self Contained Regimes"' (2004) UN Doc ILC(LVI)/SG/FIL/CRD.1 and Add.1UN Doc ILC(LVI)/SG/FIL/CRD.1 and Add.1, 4.

2. *Lex specialis* as a specific interpretation of the general rule

The first conception of *lex specialis*—as a more specific interpretation of the general rule—can guide the interplay between IHL and HRL in a wide range of situations. On this understanding, the particular rule and the general rule operate side-by-side in a relationship of complementarity and mutual reinforcement. This promotes the notion of international law as a coherent system rather than a mere set of discrete regimes.⁹⁶ The more specific rule may develop the general rule or apply that rule to a particular circumstance, whilst the general rule may articulate a rationale or a purpose of the more specific rule. The more specific rule should therefore ‘be read and understood within the confines or against the background of the general standard, typically as an elaboration, updating or a technical specification of the latter.’⁹⁷

3. *Lex specialis* as an exception or limitation to the general rule

The second conception of *lex specialis* identified by the ILC Study Group is simply an exception or limitation to the general rule. In this scenario, rather than reinforcing or explaining the general rule, the specific rule modifies, derogates from or overrides that rule. The right to life provides one example. Article 6 of the ICCPR states that ‘[n]o one shall be arbitrarily deprived of his life’, and Article 4(2) provides that this right is non-derogable. IHL, on the other hand, effectively tolerates the killing and

⁹⁶ See ILC Study Group (n 94); see also Droege (n 64), 340-344; UNHRC, General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13(2004), [11].

⁹⁷ ILC Study Group (n 94), [56].

wounding of innocent civilians during hostilities as lawful collateral damage.⁹⁸ The two regimes also utilise different conceptions of proportionality in this context: HRL requires that any use of force be proportionate to the aim of protecting life,⁹⁹ whereas under IHL the incidental loss of civilian life caused by an armed attack must not be excessive in relation to the concrete and direct military advantage anticipated.¹⁰⁰ In light of these differences in the context of hostilities, the more specific norm of IHL effectively modifies the more general norm of HRL. The ICJ explained this principle in its *Nuclear Weapons* advisory opinion. After affirming that the protections of the ICCPR continue to apply in armed conflict, the Court stated:

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.¹⁰¹

In other words, the right to life still applies in armed conflict, but in relation to the conduct of hostilities the content of that right is tied to the rules of IHL. The notion of an 'arbitrary' deprivation of life under HRL provides an interpretive window which permits the two norms to be 'applied concurrently, or within each other.'¹⁰² The *lex specialis* rule of IHL thus modifies or derogates from the general HRL standard. In the conduct of hostilities, acts that are lawful under IHL will not constitute arbitrary

⁹⁸ See Meron (n 71), 240.

⁹⁹ See, *McCann v UK* (App no 18984/91) ECHR Ser A no 324 (1995), [202]-[213].

¹⁰⁰ See Protocol I, art 51(5)(b).

¹⁰¹ *Nuclear Weapons* advisory opinion (n 78), [25]; see also Henckaerts and Doswald-Beck, *Customary IHL I* (n 4), 300; *Coard v US*, IACoMHR Rep No 109/99, Case 10.951, 29 Sept 1999, [42].

¹⁰² ILC Study Group (n 94), [96].

deprivations of life for the purposes of HRL, even if those acts lead to catastrophic losses of human lives.

The right to life in Article 27 of the American Convention has virtually identical wording to the equivalent right Article 4 of the ICCPR, and the Inter-American Commission on Human Rights has essentially followed the ICJ's approach in interpreting this right in the context of hostilities.¹⁰³ This approach would also appear to be valid under the ECHR, in light of the unique wording of the derogation clause in that instrument: Article 15(2) prohibits derogation from (*inter alia*) the right to life and freedom from torture and ill-treatment, but in relation to the right to life it provides an explicit exception in times of declared emergency 'in respect of deaths resulting from lawful acts of war'. A similar interpretation also appears open under the African Charter, which contains no derogation clause but which permits limitations on rights on the basis of (*inter alia*) 'collective security'.¹⁰⁴

In relation to some norms, however, it is not possible to harmonise IHL and HRL through a process of coordinated interpretation. Harmonisation 'may resolve apparent conflicts; it cannot resolve genuine conflicts'.¹⁰⁵ For example, Article 5 of the ECHR provides that '[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'. The provision then enumerates six specific situations which permit the deprivation of individual liberty, but this list does not

¹⁰³ *Coard v US* (n 101), [42].

¹⁰⁴ African Charter, art 27(2).

¹⁰⁵ C Borgen, 'Resolving Treaty Conflicts' (2005) 37 *George Washington Intl L Rev* 573, 640.

include the deprivation of liberty on account of a situation of war or other considerations of national security. There is therefore no interpretive window in Article 5 through which one could import the rules of IHL justifying the detention of individuals in certain situations of armed conflict, and in such situations the more specific rules of IHL will simply prevail over Article 5 to the extent of any inconsistency.

Yet that is not to say that IHL will always provide the more specific rule in the context of an armed conflict. The *lex specialis* principle is based on the notion of appropriateness: in any given situation, the rule that is more specific will be more appropriate and therefore more effective than its general counterpart.¹⁰⁶ IHL is certainly the more refined body of law in relation to the conduct of hostilities and other situations closely linked to the battlefield, but in relation to ordinary law enforcement by state authorities (including PMSCs hired by a state to carry out law enforcement functions), HRL will generally provide the more appropriate rule. The two regimes will frequently overlap in relation to persons in the power of an authority, in which case the closer the situation is to the battlefield, the more that IHL will take precedence.¹⁰⁷

The assessment of which regime is more appropriate to the circumstances is essentially one of fact rather than law. Consider, for example, a lethal use of force

¹⁰⁶ See M Akehurst, 'The Hierarchy of the Sources of International Law' (1974-5) XLVII BYBIL 273; J Pauwelyn, *Conflict of Norms in Public International Law* (CUP, Cambridge 2003), 385; Lindroos (n 91), 42.

¹⁰⁷ See Droege (n 64), 344.

by a PMSC employee working as an armed security guard in the host state. If the incident took place when the contractor was guarding an oilfield in a relatively stable part of the country and was attacked by criminal bandits, the question of whether the killing was 'arbitrary' for the purposes of the right to life would essentially be determined by the ordinary rules of HRL. But if the contractor was guarding a military target in the heart of the conflict zone and was attacked by enemy forces, the question of whether the killing was arbitrary would fall to be determined by the specific rules of IHL. This example illustrates how the decision as to which regime is the *lex specialis* in a particular case can be crucial in assessing the substantive scope of the host state's obligations and responsibility in relation to PMSCs.

C. Obligation to prevent human rights violations by PMSCs

All of the main human rights treaties contain general provisions requiring states to 'ensure' or 'secure' the rights of individuals within their jurisdiction.¹⁰⁸ Human rights bodies have interpreted these provisions as imposing an obligation on states to exercise due diligence to prevent, investigate, punish and redress human rights violations by private actors (such as PMSCs) within state jurisdiction. According to the IACtHR in *Velásquez Rodríguez v Honduras*, states must take 'all those means of a legal, political, administrative and cultural nature that promote the protection of

¹⁰⁸ See ICCPR, art 1(2); American Convention, art 1; ECHR, art 1; see also African Charter, art 1, which requires states to adopt measures 'to give effect to' rights.

human rights and ensure that any violations are considered and treated as illegal acts'.¹⁰⁹ Other human rights bodies have adopted a similarly broad approach.¹¹⁰

The obligation to prevent, investigate, punish and redress human rights violations by PMSCs is reflected in the Montreux Document, discussed in Part I of this Chapter, which provides that host states

are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.¹¹¹

A host state that fails to take the necessary measures to control PMSC behaviour could incur international responsibility if a contractor violates human rights in state territory.

In the unique context of an armed conflict, these obligations must always be interpreted in light of the relevant norms of IHL. Section B explained that in certain situations of armed conflict, IHL provides *lex specialis* rules which may modify or derogate from the general rules of HRL. In the conduct of hostilities, for example, the definition of an unlawful killing under HRL is essentially determined by the

¹⁰⁹ *Velásquez Rodríguez v Honduras*, Merits, Judgment of 29 June 1988, IACtHR Ser C No 4, [174]-[175].

¹¹⁰ Regarding the right to life, see UNHRC, General Comment 6, UN Doc A/37/40(1982), [3]-[5]; *LCB v UK* (App no 23413/94) ECHR 9 June 1998, [36]. Regarding the prohibition of torture and ill-treatment, see UNHRC, General Comment 20, Article 7, UN Doc HRI/GEN/1/Rev.1, at 30(1994), [2], [8]; *Costello-Roberts v UK* (App no 13134/87) ECHR Ser A no 247-C (1993), [26]-[28]; *A v UK* (App no 25599/94) ECHR 1998-VI, [22]; *Z v UK* (App no 29392/95) ECHR 10 May 2001, [73]; see also UNCAT (n 87), arts 1, 2, 4, 16.

¹¹¹ Montreux Document (n 24), Part I, [10].

special rules of IHL,¹¹² with the result that the host state's obligation to prevent PMSC killings is less demanding in hostilities than in more stable contexts. On the other hand, where PMSCs perform ordinary law enforcement or security functions, the host state will be held to a more demanding standard which is primarily determined by the ordinary rules of HRL. In relation to the prohibition of torture and ill-treatment, the rules of IHL largely mirror the rules of HRL, and consequently the substantive scope of the host state's preventive obligation will not differ greatly between the two regimes.

Another factor complicating the analysis of the host state's preventive obligations in armed conflict is that the state may have lost control over parts of its territory, or it may simply lack the resources and/or institutional capacity to control PMSC behaviour effectively. Notwithstanding these difficulties, the host state will remain obliged to exercise due diligence and take those measures that are reasonably within its power in the circumstances. The ECtHR make this clear in *Ilascu v Moldova and Russia*, holding that a state's

positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory... remain even where the exercise of the State's authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take.¹¹³

¹¹² See *Nuclear Weapons* advisory opinion (n 78), [25].

¹¹³ *Ilascu v Moldova and Russia* (App no 48787/99) ECHR 8 July 2004, [313].

The Court emphasised, however, that these positive obligations must not be interpreted ‘in such a way as to impose an impossible or disproportionate burden’ on the state.¹¹⁴

Bearing these general considerations in mind, this Section examines three specific aspects of the preventive obligation which are particularly pertinent to the host state of a PMSC, and identifies certain measures that the state should take in order to fill these preventive obligations. Section D then examines the state’s obligation to investigate, punish and redress human rights violations committed in its territory.

1. Special measures targeting known sources of danger

Human rights bodies have recognised that states may need to take more vigorous measures to prevent the recurrence of a particular violation, measures which go ‘beyond a victim-specific remedy’ and which ‘may require changes in the State Party’s laws or practices’.¹¹⁵ Similarly, states may need to take special measures targeting individuals who are known to be dangerous, taking into account the heightened risk that such individuals pose to society.¹¹⁶ These requirements reflect the general nature of the due diligence standard, discussed in Chapter II, which

¹¹⁴ *ibid*, [332].

¹¹⁵ General Comment 31 (n 96), [17]; see also *Neira Alegría v Peru*, Merits, Judgment of 19 Jan 1995, IACtHR Ser C No 20, [19].

¹¹⁶ See *Mastromatteo v Italy* (App no 37703/97) ECHR 24 Oct 2002.

demands a degree of diligence that is proportional to the degree of risk in the specific case.¹¹⁷

These principles are clearly relevant to the host state of a PMSC. Many PMSCs perform inherently dangerous activities involving the threat or use of force or coercion, and recent history has shown that the same type of misconduct tends to recur in the private security industry. Some companies are known to be particularly aggressive. For example, one journalist who spent a month with Blackwater personnel in Baghdad observed that '[t]hey're famous for being very aggressive. They use their machine guns like car horns.'¹¹⁸ According to a House of Representatives report, Blackwater was involved in an average of 1.4 shooting incidents per week in Iraq in 2005-2007.¹¹⁹ The company fired the first shots in over 80% of the incidents, despite the fact that its contract only authorised the defensive use of force, and over 80% of the shooting incidents resulted in casualties or property damage. The report also highlights specific incidents in which Blackwater personnel killed apparently innocent civilian bystanders, culminating in the killing of seventeen civilians in Baghdad in September 2007.

In light of the unique nature of the private security industry and the risk that PMSCs can pose to individual life, the obligation to protect life would seem to

¹¹⁷ See, eg, *Alabama Claims (US v Britain)* 1871, 572-573, 613; ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities with Commentaries (2001) II (2) YBILC, Commentary to art 3, [11]; RE Curtis, 'The Law of Hostile Military Expeditions as Applied by the United States: Part 2' (1914) 8 AJIL 224, 233; Sibert (n 37), 317.

¹¹⁸ RH Reid, 'Blackwater Loses Security License in Iraq' *Associated Press* (18 Sept 2007).

¹¹⁹ US House of Representatives Committee on Oversight and Governmental Reform, 'Additional Information about Blackwater USA' (1 Oct 2007), 1.

require states to develop preventive measures specially targeting PMSCs that operate on their territory, with particularly stringent preventive measures targeting companies that are known to be particularly aggressive.

2. Protecting individuals whose lives are at risk

In addition to taking measures targeting particular sources of danger, in certain circumstances a state may have an obligation to take positive steps to protect particular individuals whose lives are at risk. In *Herrera Rubio v Colombia*, for example, the Human Rights Committee found a violation of the right to life on the basis that the state had ‘failed to take appropriate measures to prevent the disappearance and subsequent killings’ of the applicant’s parents, where there was clear evidence that the government knew or ought to have known of a risk to the victims from private parties.¹²⁰

The ECtHR recognised a similar principle in *Osman v UK*, holding that an obligation to take steps to protect the life of an individual will arise where the

authorities knew or ought to have known at the time of the existence of a real risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.¹²¹

On the facts of the case, however, the Court found that there had been no breach of the right to life because the applicants were unable to establish that the UK knew or ought to have known of the risk to the victim’s life. The Court reiterated this test in

¹²⁰ *Herrera Rubio v Colombia* UNHRC 2 Nov 1987, UN Doc CCPR/C/OP/2 at 192, [11]; see also *Delgado Paez v Colombia* UNHRC 12 July 1990, UN Doc A/45/40.

¹²¹ *Osman v UK* (n 49), [116].

Kaya v Turkey, again emphasising the need for actual or constructive state knowledge of a real risk to the life of an identified individual.¹²²

In light of the strict *mens rea* requirement for state responsibility in these cases, it is difficult to see how this principle would apply to the host state of a PMSC; for although PMSCs working in armed conflict may at times pose a real risk to the life of individuals or groups, the host state will rarely be in a position to identify the potential victims in advance.

On the other hand, this obligation could be highly significant if the courts were to accept actual or constructive state knowledge of a particularly vulnerable *group* of individuals, or of a particular *location* that was known to be at risk.¹²³ This would impose a heightened obligation on the host state to take stringent preventive steps in relation to PMSCs working with that group or in that location. The IACtHR case of *Digna Ochoa and Plácido v Mexico* provides an example of an analogous approach. In that case, the Court ordered the state to adopt all necessary measures not only to protect four identified human rights defenders who had received threats to their lives, but also to ensure that all persons visiting or working in the offices of their human rights centre could perform their duties without risk to their lives or personal safety.¹²⁴

¹²² *Kaya v Turkey* (App no 22535/93) ECHR 28 Mar 2000; see also *Akkoç v Turkey* (App nos 22947/93, 22948/93) ECHR 10 Oct 2000.

¹²³ Hoppe gives the example of a crowded market-place in a conflict zone: see C Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 (5) EJIL 989, 1003.

¹²⁴ *Digna Ochoa and Plácido v Mexico*, Order of 17 Nov 1999, IACtHR Ser E No 2.

3. Special obligations relating to women & children

Like IHL discussed above in Part I, HRL obliges states to take special steps to protect women and children, who can be particularly vulnerable in armed conflict and post-conflict environments. In these contexts the host state should be mindful that some PMSC personnel (like national soldiers) may engage in sexual activities exploiting civilian women and/or children, as illustrated by the DynCorp 'sex-slave' scandal in post-conflict Bosnia.¹²⁵

In relation to the exploitation of children, Article 34 of the Convention on the Rights of the Child provides:

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.¹²⁶

In relation to women, Article 3 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) prohibits gender discrimination.¹²⁷ The CEDAW Committee has emphasised that the prohibition against gender discrimination 'includes gender-based violence', which in turn includes 'acts which inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion or

¹²⁵ See above, note 52 and accompanying text.

¹²⁶ Convention on the Rights of the Child (n 75). All states except for the US and Somalia have ratified this Convention.

¹²⁷ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 Dec 1979, entered into force 3 Sept 1981) 1249 UNTS 13. 185 states have ratified this Convention, with the US being the only developed nation that is not a state party.

other deprivations of liberty.¹²⁸ In discussing such violence, the Committee has noted that '[s]tates may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation.'¹²⁹

One can infer from these provisions a due diligence obligation on the host state to prevent PMSC personnel from having sexual relations with children and from committing violent or sexually exploitative acts against women, and to punish such acts when they occur.

4. Positive action to discharge the preventive obligations

In order to fulfil the preventive obligations identified in this Section, the host state will clearly need to criminalise violations of the right to life and the prohibition of torture and ill-treatment, and to investigate and punish offenders. Such *ex post facto* punishment serves a critical preventive function by reinforcing the state's prohibitory measures and deterring other potential wrongdoers. The establishment of a licensing scheme for PMSCs operating in state territory, as described in Part I of this Chapter and recommended in the Montreux Document,¹³⁰ would complement these criminal measures by increasing overall transparency and state control within the private security industry.

¹²⁸ Committee on the Elimination of Discrimination against Women General Recommendation 19 (30 Jan 1992) UN Doc A/47/38, [6].

¹²⁹ *ibid*, [9].

¹³⁰ Montreux Document (n 24), Part II, [25]-[48].

D. Obligations to investigate, punish & redress PMSC violations

HRL obliges states to investigate, punish and redress human rights violations within state jurisdiction. This Section considers the sources of these obligations, the circumstances in which they apply to the host state of a PMSC in armed conflict, and the measures that the host the state should take to discharge its obligations.

1. Sources of states' obligations to investigate, punish & redress violations

States' obligations to investigate, punish and redress human rights violations within state jurisdiction essentially derive from a combination of three norms: first, the general obligation to ensure rights; second, the principle of effectiveness—that is, the need to interpret rights in a manner that is practical and effective as opposed to theoretical and illusory; and third, the specific obligations in the main human rights treaties to provide an effective remedy to victims of human rights violations.¹³¹

Article 2(3) of the ICCPR sets out a typical series of obligations relating to the provision of effective domestic remedies:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

¹³¹ See A Mowbray, *The Development of Positive Obligations under the ECHR by the European Court of Human Rights* (Hart, Oxford 2004), 1-6; N Roht-Arriaza, 'Sources in International Treaties of an Obligation to Investigate, Prosecute and Provide Redress' in N Roht-Arriaza (ed) *Impunity and Human Rights in International Law and Practice* (OUP, Oxford 1995).

The Human Rights Committee has emphasised that the combination of Article 2(3) and the general obligation to ensure rights in Article 2(1) requires states to investigate, punish and redress human rights violations within state jurisdiction.¹³²

The American Convention establishes a similar scheme, which the IACtHR has explained in the following terms:

States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdictions (Art. 1).¹³³

The African Charter also has several provisions on remedies. Most significantly, Article 7 guarantees to every individual the right to have his cause heard, including ‘the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force’, and Article 26 imposes a duty on states parties to guarantee the independence of the courts and to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights. These provisions must be read in accordance with states’ general obligation under Article 1 to adopt measures ‘to give effect to’ rights.

In the European context, Article 13 of the ECHR provides a right to ‘an effective remedy before a national authority’ for all violations of Convention rights, and

¹³² General Comment 31 (n 96), [8].

¹³³ *Velásquez Rodríguez v Honduras* (n 109), [90].

Article 6(1) complements this provision by bestowing on individuals a procedural right of access to a fair hearing in the determination of their 'civil rights'. In addition to these general obligations, the ECtHR has implied into Article 2 (the right to life) and Article 3 (the prohibition of torture and ill-treatment) a procedural obligation to investigate alleged killings and incidents of ill-treatment. The Court considers these investigative obligations necessary to render the substantive rights effective in practice, in accordance with states' general duty to secure rights under Article 1.¹³⁴ Whilst the investigative obligations implicit in Articles 2 and 3 are conceptually distinct from the general obligation to provide effective domestic remedies set out in Article 13, there is considerable overlap between the two categories and in some cases a state may incur responsibility for a violation of both.¹³⁵

Finally, the UNCAT imposes a number of remedial obligations on states in relation to torture and ill-treatment. States must ensure that their 'competent authorities' conduct 'a prompt and impartial investigation' wherever there is reasonable ground to believe that torture or ill-treatment has been committed within state jurisdiction,¹³⁶ as well as establishing procedures to hear individual complaints.¹³⁷ In addition, in relation to torture states have an obligation to ensure

¹³⁴ See *McCann v UK* (n 99), [161]; *Ilhan v Turkey* (App no 22277/93) ECHR 27 June 2000, [91]; see also *Mowbray* (n 131), 27-40.

¹³⁵ See, eg, *Kaya v Turkey* (n 122), [109], [126].

¹³⁶ UNCAT (n 87), art 12.

¹³⁷ *ibid*, art 13. Although Articles 12 and 13 refer only to 'torture', Article 16 provides that these obligations also apply to 'other forms of cruel, inhuman or degrading treatment or punishment.'

that the victim 'obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible'.¹³⁸

2. When will these obligations arise in relation to PMSC violations in armed conflict?

The notion of an effective 'remedy' encompasses not only the punishment of offenders and the payment of compensation to victims, but also certain antecedent measures including the diligent investigation of allegations and the provision of adequate domestic procedures to hear individual complaints. When conceived in this way, the obligation to provide a remedy clearly cannot be dependent on any prior determination that a violation has in fact taken place. The ECtHR explained this conception in *Klass v Germany*, in relation to states' obligation under Article 13 to provide 'an effective remedy before a national authority' to any individual whose Convention rights 'are violated':

This provision, read literally, seems to say that a person is entitled to a national remedy only if a "violation" has occurred. However, a person cannot establish a "violation" before a national authority unless he is first able to lodge with such an authority a complaint to that effect. Consequently...it cannot be a prerequisite for the application of Article 13 (art. 13) that the Convention be in fact violated.¹³⁹

The Court concluded that a state's obligation to provide a remedy arises wherever an individual raises *an arguable claim* to have suffered a violation of his or her Convention rights within state jurisdiction.¹⁴⁰ In situations of armed conflict, it is important to consider the rules of IHL as well as HRL when assessing whether the

¹³⁸ *ibid*, art 14.

¹³⁹ *Klass v Germany* (App no 5029/71) ECHR Ser A no 28 (1978), [164].

¹⁴⁰ *ibid*; see also *Silver v UK* (App no 5947/72) ECHR Ser A no 61 (1983), [113].

victim's claim is 'arguable'. Regarding the right to life in the context of hostilities, for example, the question of what is an 'arguable' violation of the right to life under HRL will be tied to the rules of IHL.¹⁴¹ Killings that are clearly a lawful part of hostilities will not trigger the state's obligation to provide a remedy under HRL, whereas killings that *prima facie* appear to be the result of unlawful targeting or a failure of weapons to hit their targets may trigger the remedial obligation.¹⁴²

Crucially for the present analysis, the jurisprudence of the main human rights tribunals indicates that the obligation to provide a remedy is *not* limited to allegations of human rights abuses by state agents and officials, but may also arise in some cases where an individual claims to have suffered a violation at the hands of a private actor such as a PMSC. For example, the Human Rights Committee stated in its General Comment 31:

There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' *permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities*. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3.¹⁴³

Likewise, the IACtHR emphasised in *Velásquez Rodríguez* that the obligation to investigate and punish applies to violations committed by private persons as well as violations committed by state agents. A state's failure to take the necessary action

¹⁴¹ See *Nuclear Weapons* advisory opinion (n 78), [25].

¹⁴² See K Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 (1) AJIL 1, 33.

¹⁴³ General Comment 31 (n 96), [8] (emphasis added).

in relation to private violations effectively ‘allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the [American] Convention’, and this amounts to a failure on the part of the state ‘to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction’.¹⁴⁴

In the European context, the ECtHR has made it clear that the investigative obligations implicit in Articles 2 and 3 of the ECHR apply to violations committed by private actors as well as those committed by state agents.¹⁴⁵ In relation to victims’ access to justice and civil remedies under the ECHR, the case of *Osman v UK* suggests that the obligations in Articles 6(1) and 13 will arise wherever an individual seeks to sue state authorities for negligence for failing to prevent a private human rights violation in state jurisdiction.¹⁴⁶ Article 6(1) provides that ‘[i]n the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ This provision is more specific than the right to an effective remedy in Article 13, and therefore the general requirements of the latter are absorbed by the more stringent requirements of the former.¹⁴⁷ In *Osman* the victim’s family had sought to sue the police for failing to protect the victim from a private killing, but their claim was barred by virtue of the public policy immunity enjoyed by police when faced

¹⁴⁴ *Velásquez Rodríguez v Honduras* (n 109), [176]; see also [182].

¹⁴⁵ See *Secic v Croatia* (App no 40116/02) ECHR 31 May 2007, [53]; *MC v Bulgaria* (App no 39272/98) ECHR 4 Dec 2003, [151]; *Ergi v Turkey* (App no 23818/94) ECHR 1998-IV, [82]; *Kaya v Turkey* (n 122), [108].

¹⁴⁶ *Osman v UK* (n 49).

¹⁴⁷ *ibid*, [158].

with negligence claims connected to the investigation or suppression of crime. The Court found that there had been no violation of the UK's duty to prevent violations of the right to life, nor had there been any failure to investigate and prosecute. Nonetheless, the Court unanimously found that there had been a breach of Article 6(1) on the basis that the victim's family members had been denied access to a tribunal for a determination of their civil rights and obligations.¹⁴⁸ Clapham asserts that this decision points to 'an internationally protected human right to sue the police authorities for negligence for failing to protect the right to life in the context of a killing by a private person.'¹⁴⁹

3. Remedial action required of the host state

The host state's obligation under HRL to provide an effective remedy for human rights violations by PMSCs comprises both a procedural and a substantive element. On the procedural side, states must establish mechanisms to investigate claims of human rights abuses and provide adequate procedures for victims to have their claims heard by an impartial and competent tribunal. In relation to substantive redress, states must make reparation to victims, usually in the form of compensation, as well as punishing the perpetrators.

Criminal investigation and prosecution

Human rights bodies have made it clear that, in cases involving serious violations such as torture, ill-treatment and arbitrary killings, the remedy must include a

¹⁴⁸ *ibid*, [154].

¹⁴⁹ A Clapham, 'The European Convention on Human Rights' in C Scott (ed) *Torture as Tort* (Hart, Oxford 2001), 515-516.

criminal investigation and prosecution. For example, the Human Rights Committee has emphasised that '[c]omplaints about ill-treatment must be investigated effectively by competent authorities' and '[t]hose found guilty must be held responsible'.¹⁵⁰ Thus, in *Bautista de Arellana v Colombia* the Committee held that a combination of disciplinary sanctions and compensation did not constitute an effective remedy for a violation of the right to life; criminal investigation and prosecution were also required.¹⁵¹ The ECtHR has likewise stressed that in cases of serious violations, '[e]ffective deterrence is indispensable...and it can be achieved only by criminal-law provisions'.¹⁵²

The ECtHR has articulated a number of institutional and procedural requirements of an 'effective' investigation. In particular, the persons responsible for and carrying out the investigation must be independent from those implicated in the events, the investigation must be reasonably expeditious and subject to public scrutiny, the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident in order to establish the cause of death and the person responsible, and the victim's family must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.¹⁵³ The Court has

¹⁵⁰ UNHRC, General Comment 7, Article 7, UN Doc HRI/GEN/1/Rev.1 at 7(1994), [1].

¹⁵¹ *Bautista de Arellana v Colombia* UNHRC 11 Oct 1994, UN Doc CCPR/C/55/D/563/1993, [8.2].

¹⁵² *X & Y v Netherlands* (App no 8978/80) ECHR Ser A no 91 (1985), [27], referring to a violation of the right to privacy in Article 8.

¹⁵³ See *Oğur v Turkey* (App no 21594/93) ECHR 20 May 1999, [91]-[92]; *Güleç v Turkey* (App no 21593/93) ECHR 1998-IV, [81]-[82]; *Anguelova v Bulgaria* (App no 38361/97) ECHR 13 June 2002, [140]; *Kelly v UK* (App no 30054/96) ECHR 4 May 2001, [95]-[98]; *McKerr v UK* (App no 28883/95) ECHR 4 May 2001, [113].

applied these requirements to situations of armed conflict.¹⁵⁴ Whilst it may not always be appropriate to demand a public investigation with full victim participation in the context of an ongoing armed conflict, it is clear that investigations must still comply with the requirements of independence and impartiality.¹⁵⁵

The due diligence nature of the investigative obligation is clearly crucial in situations of armed conflict. As the IACtHR explained, '[t]he duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result'; nonetheless, even where the state faces significant obstacles, the investigation 'must be undertaken in a serious manner and not as a mere formality preordained to be ineffective.'¹⁵⁶ The ECtHR has likewise stressed that the investigative obligation continues to apply, but to a less onerous standard, where the state faces great practical difficulties in conducting its investigations. In *Kaya v Turkey*, for example, in finding Turkey to be in violation of its investigative obligation implicit in the right to life, the ECtHR acknowledged 'the difficulties facing public prosecutors in the south-east region [of Turkey] at that time', but nonetheless found that 'it was incumbent on the authorities to respond actively and with reasonable expedition'.¹⁵⁷

¹⁵⁴ *Isayeva v Russia* (n 89), [208]-[213]; see also *Myrna Mack-Chang v Guatemala*, Judgment of 25 Nov 2003, IACtHR Ser C No 101; UNHCR, 'Human Rights Committee: Concluding Observations on Colombia' (5 May 1997) UN Doc CCPR/C/79/Add 76, [32].

¹⁵⁵ See *Droege* (n 64), 352.

¹⁵⁶ *Velásquez Rodríguez v Honduras* (n 109), [177].

¹⁵⁷ *Kaya v Turkey* (n 122), [107]; see also *Assenov v Bulgaria* (App no 24760/94) ECHR 1998-VIII.

Even if the host state is able to conduct an effective investigation, it may face obstacles in prosecuting the contractors involved in the human rights violation. In particular, there may be an immunity agreement in place such as CPA Order No 17, which granted foreign contractors in Iraq immunity from local laws in matters relating to their contracts.¹⁵⁸ Where such immunity applies or the host state is otherwise unable to conduct an effective prosecution, the host state could fulfil its obligation by handing the PMSC employees over for trial to another state (such as their state of nationality) that has made out a *prima facie* case. For example, CPA Order No 17 impeded Iraq's attempts to prosecute the Blackwater contractors involved in the September 2007 shootings in Baghdad, notwithstanding Iraqi investigators' *prima facie* conclusion that the shootings were crimes under domestic law,¹⁵⁹ but the contractors subsequently faced prosecution in the US.¹⁶⁰ On the other hand, where host state prosecution is barred by an immunity agreement but the state is unable to ensure that the contractors are held accountable in another forum, the state may be in violation of its obligations under HRL. States that undertake inconsistent international obligations must deal with the consequences if those obligations conflict.

Access to justice and compensation

Finally, where an individual claims that the host state failed to prevent, investigate or punish a human rights abuse by a PMSC, the host state must provide procedures

¹⁵⁸ CPA Order No 17 (n 55), s 4(2). Contractors' immunity from prosecution under Iraqi law was lifted on 1 January 2009: see Pallister (n 55).

¹⁵⁹ See J Glanz and A Rubin, 'Blackwater Shootings "Murder", Iraq Says' *New York Times* (8 Oct 2007).

¹⁶⁰ See J Sturcke, 'Blackwater Security Guards Face Manslaughter Charges' *Guardian* (8 Dec 2008).

to hear the victim's claim against state authorities and must pay compensation to the victim where appropriate. A comparable scenario was in issue in the ECtHR case of *Osman v UK*, where the family of the deceased victim had sought to sue the British police for negligence for failing to prevent the victim's murder by a private person.¹⁶¹

Action taken by the host state to fulfil its obligation to provide an effective remedy could provide a crucial means for bringing wrongdoing PMSCs and/or their employees to account at the domestic level, providing victims with compensation for their injuries and, more generally, enabling the host state to assert its sovereignty over PMSC activities within its territory. On the other hand, a failure by the host state to take the necessary remedial action following an alleged PMSC violation could constitute a breach of the state's international obligations, quite independent of any responsibility for the state's own involvement in or failure to prevent the human rights violation in the first place.

III. Conclusion

The host state of a PMSC is presumed to possess some capacity to control company activities by virtue of its sovereignty and control over the territory in which the company operates. Accordingly, IHL and HRL impose certain obligations on the host state to take diligent measures to prevent, investigate, punish and redress PMSC misconduct in armed conflict. These obligations could provide an important

¹⁶¹ *Osman v UK* (n 49).

accountability mechanism to address PMSC misconduct, as the host state could incur responsibility for any failure to exercise due diligence in a particular case. Moreover, these obligations could play a key role in setting standards to guide the host state in developing its domestic laws and practices with a view to exercising greater control over PMSCs.

The obligation to ensure respect for IHL in Common Article 1 mandates a baseline level of positive action for all states in whose territory PMSCs operate, whether in international or non-international armed conflict. Although *prima facie* the vague terms of Common Article 1 might appear to render this obligation rather weak, a closer analysis reveals that it could provide a powerful tool for promoting greater host state control and accountability in the private security industry. More onerous obligations may also bind the host state in specific circumstances, but Common Article 1 will always provide a minimum yardstick to guide the state's actions in relation to PMSCs operating in its territory. HRL also requires the host state to take certain positive action to regulate PMSC behaviour in state territory. Since HRL provides a number of institutionalised procedures for hearing individual complaints, in many cases it will offer victims of PMSC abuse the best hope of securing an international remedy against the host state. The host state's obligation to provide an effective domestic remedy for human rights violations complements these international mechanisms by increasing the likelihood that victims will obtain redress at the domestic level.

Of course, a state in whose territory an armed conflict is taking place will frequently lack the capacity to ensure that PMSCs respect the full range of rights contained in the main human rights treaties. International law takes account of this reality in two ways. First, in certain situations the specific rules of IHL may modify the content of the host state's obligations under the general regime of HRL, effectively reducing the burden on the host state to ensure the rights of victims within its territory. Second, the due diligence standard is sufficiently flexible to take account of the practical difficulties that may confront the host state in attempting to control PMSCs operating in its territory, although the state will always be obliged to take those measures that are reasonably within its power in the circumstances. The diligent implementation of measures to control PMSCs—such as a licensing scheme for PMSCs operating in state territory—would not only help the host state to fulfil its obligations to ensure respect for IHL and HRL; it could also help the state to regain and retain its sovereignty during and after the armed conflict in the face of a large presence of foreign troops and contractors.

V. Obligations of the hiring state

The recent boom in private security raises the concern that states may simply outsource military and security activities to PMSCs without taking adequate measures to promote company compliance with international norms. In relation to their national military forces, states have clear obligations to take positive steps to ensure that soldiers respect international law and to investigate, punish and redress any violations that soldiers commit in the field. But what international standards exist to guide states' actions in relation to PMSCs they hire in armed conflict?

This Chapter argues that clear international standards *do* in fact exist, in the form of the hiring state's obligations under international humanitarian law (IHL) and human rights law (HRL) to take positive steps to prevent, investigate, punish and redress PMSC misconduct in armed conflict. These obligations could provide an alternative pathway to state responsibility in cases of PMSC misconduct where the wrongdoing contractor is *not* acting as an agent of the hiring state—that is, where the contractor is neither part of the hiring state's armed forces, nor exercising governmental authority, nor acting under the hiring state's instructions, direction or control, when he or she engages in the misconduct. In such cases, although the PMSC misconduct is not itself attributable to the hiring state, the state may nonetheless incur international responsibility if it has failed to fulfil its obligation to take diligent preventive or remedial action. This 'backup' pathway to state responsibility could help to minimise the gap in the rules of attribution (identified in Chapter III) between states that act through their national forces and states that act

through PMSCs.¹ On a broader level, the hiring state's obligations to control PMSCs could guide future state behaviour by mandating a minimum threshold of positive action for all states that hire PMSCs in armed conflict.

The first Part of this Chapter considers the preliminary question of whether international law constrains states' ability to hire PMSCs in the first place. The second Part assumes that the hiring state is not *per se* prohibited from using a PMSC to perform a particular activity, and proceeds to identify the circumstances in which the state may have an obligation to take positive steps to control PMSC behaviour.

I. Constraints on states' ability to hire PMSCs in armed conflict?

There is no general obligation on states requiring them to use their public forces rather than private actors to carry out military and security functions in armed conflict. Indeed, international law includes only limited obligations with regard to the internal order of states, and the organisation of military and security functions is very much part of this *domaine réservé*. International law does, however, impose a small number of restrictions on the ability of states to use PMSCs to carry out certain activities in armed conflict. Two regimes are particularly pertinent in this context: international mercenary law and IHL.

¹ See C Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 (5) EJIL 989.

A. International mercenary law

It is often assumed that PMSC personnel qualify as mercenaries under international law and that states are therefore restricted in their ability to hire PMSCs. Such blanket assumptions are erroneous, however, for two reasons. First, the definition of a mercenary in international law is extremely narrow and excludes many of the PMSC personnel who would qualify as mercenaries within common (non-legal) conceptions of the term.² Second, there is no broad prohibition of mercenary activity in international law. There are two international conventions that prohibit mercenarism: the Organisation of African Unity Convention for the Elimination of Mercenarism in Africa of 1977 (the OAU Convention)³ and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989 (the UN Convention);⁴ but the regional limitations and narrow scope of the OAU Convention and the low ratification of the UN Convention render these instruments irrelevant to most contemporary PMSCs.

Nonetheless, there may be cases in which a state party to one of these conventions hires PMSC personnel who qualify as mercenaries under the relevant definition, in which case the state could incur international responsibility for mercenarism. It is therefore important to delineate the scope of states' obligations under these conventions and to assess how these obligations apply to PMSCs.

² See Chapter I, Part III-A.

³ Convention of the OAU for the Elimination of Mercenarism in Africa (adopted 3 July 1977, entered into force 22 April 1985) OAU Doc CM/433/Rev.L. Annex 1.

⁴ International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (adopted 4 Dec 1989, entered into force 20 Oct 2001) 29 ILM 91, UN Doc A/Res/44/34.

The definitions of a mercenary contained in the UN Convention and the OAU Convention essentially reflect that contained in Article 47 of Protocol I, with certain minor alterations as discussed below. Article 47 does not prohibit mercenarism, nor does it impose any obligations on states in relation to mercenary activity; instead, it denies individual mercenaries the right to combatant and prisoner of war status in armed conflict. The two mercenary conventions go much further in that they criminalise mercenarism *per se* and impose a number of obligations on states in relation to mercenary activity.⁵ Another key difference is that the definition in Article 47 is limited to international armed conflicts, whereas the definitions in the two mercenary conventions encompass both international and non-international conflicts. Since this Thesis is concerned with the international obligations of *states* in relation to PMSCs in armed conflict, rather than the obligations of individual contractors or the potential negative consequences for those contractors of particular behaviour in armed conflict, the present discussion focuses on the two mercenary conventions rather than Article 47.

1 The obligations of states party to the UN Convention

The UN Convention of 1989 is the only universal instrument dedicated to addressing mercenary activity. The main weakness of the UN Convention is its extremely low rate of ratification: there are only 31 states parties and this list includes none of the major state powers.⁶ Article 5 of the Convention provides that 'States Parties shall

⁵ Article 3 of the OAU Convention also denies mercenaries the right to combatant and prisoner of war status in armed conflict.

⁶ The states parties are: Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cuba, Cyprus, Georgia, Guinea, Honduras, Italy, Liberia, Libyan Arab Jamahiriya, Maldives, Mali, Mauritania,

not recruit, use, finance or train mercenaries and shall prohibit such activities in accordance with the provisions of the present Convention'. This obligation is highly significant for states parties that hire PMSCs. The crucial factor in delineating the scope of this obligation is the definition of a mercenary in Article 1(1) as any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) Is not a member of the armed forces of a party to the conflict; and
- (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.⁷

An individual must satisfy all five conditions in order to qualify as a mercenary. The definition of a mercenary in Article 1(1) essentially mirrors the definition in Article 47 of Protocol I, except that the former omits the requirement in Article 47(2)(b) that the person 'does, in fact, take a direct part in hostilities'. It makes sense for Article 47 to include this extra criterion, since the purpose of that provision is to deny prisoner of war status to mercenaries on the basis of their actual participation in the conflict. The UN Convention instead incorporates the need for actual participation as an element of the crime of individual mercenarism in Article 3. For the purpose of the *state's* obligation under Article 5, on the other hand, the Convention does not

Moldova (Republic of), New Zealand, Peru, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan: see 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 (21 Jan 2009) UN Doc A/HRC/10/14, [86].

⁷ Article 1(2) provides an alternative definition of a mercenary, which encompasses individuals recruited to participate in 'a concerted act of violence' aimed at overthrowing a government or otherwise undermining the constitutional order or territorial integrity of a state. That definition is beyond the scope of the armed conflict scenario under consideration in this Thesis.

require actual participation in the conflict; it requires only that the state recruit, use, finance or train a mercenary with a view to future participation.

A close analysis of Article 1(1) reveals that a significant number of contemporary PMSC personnel could qualify as mercenaries thereunder, but the provision contains significant loopholes which would enable a hiring state so inclined to exclude individuals from the definition with relative ease.

Paragraph (a): recruited...in order to fight

The first defining criterion of mercenaries under Article 1(1) of the UN Convention is that they are 'recruited...in order to fight' in an armed conflict. An individual will 'fight' in an armed conflict if he or she takes a direct part in the hostilities.⁸ This is implicit in the definition of a mercenary in Article 47 of Protocol I, which includes a second criterion (not included in the UN Convention) that the individual '[d]oes, in fact, take a direct part in the hostilities'.⁹

The requirement that the individual be 'recruited...in order to fight' focuses upon the original scope and purpose of the PMSC's engagement: did the hiring state consider it reasonably likely that PMSC personnel would engage in acts that (assessed objectively) qualify as direct participation in hostilities? Whilst the contract of hire will of course be the primary point of reference for this assessment,

⁸ See UCIHL, 'Expert Meeting on Private Military Contractors' (Geneva, Aug 2005), 26-27; L Doswald-Beck, 'Private Military Companies under International Humanitarian Law' in S Chesterman and C Lehnardt (eds) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP, Oxford 2007), 122-123.

⁹ Protocol I, art 47(2)(b).

in some cases it may be necessary to look past the written terms of the contract in order to discover the true intentions of the parties. The contract concluded between the Croatian government and the American firm MPRI during the Balkans conflict of the 1990s, examined in Chapter I, provides one example.¹⁰ Although the contract provided that MPRI was to provide general instruction in civil-military relations, in reality the company planned and commanded specific military operations of the Croatian army during its war against Serbia. Whatever the written terms of the contract, it is likely that the parties envisioned that MPRI's operations would go beyond mere classroom training.¹¹ Singer also notes that in some cases PMSC personnel hired as military advisers or trainers are actually present on the frontline, proffering excuses such as the need to see if their training is working. During the Persian Gulf War, for example, Vinnell employees reportedly accompanied their Saudi National Guard units into the battle of Khafji.¹²

Once the envisioned PMSC activities have been identified, the crucial question under paragraph (a) is whether those activities qualify as 'direct participation in hostilities'. There is no definition of this term in IHL, and its meaning is highly ambiguous. The Commentary to Protocol I 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'.¹³ The ICRC's 'Interpretative

¹⁰ See Chapter I, text accompanying notes 175-185.

¹¹ See UCIHL Expert Meeting (n 8), 26.

¹² P Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (updated edn, Cornell University Press, London 2008), 95.

¹³ Y Sandoz, C Swinarski and B Zimmermann (eds), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC Geneva 1987), [1944].

Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (ICRC Guidance), which was published in June 2009 following a series of expert meetings held between 2003 and 2008, provides a more detailed legal interpretation of this phrase.¹⁴

It is clear from the ICRC Guidance that a PMSC act must meet three criteria in order to qualify as direct participation in hostilities. First, the act must be 'likely' either 'to adversely affect the military operations or military capacity' of a party to the conflict or 'to inflict death, injury, or destruction on persons or objects protected against direct attack.'¹⁵ The former threshold is generally more pertinent to PMSCs working for a state in armed conflict. Second, 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.'¹⁶ This test does *not* encompass PMSC acts that merely form part of the general effort to wage and sustain the war, such as the provision of training that is not an integral part of a specific military operation, since such acts cause only indirect harm. Also significant for PMSCs, a direct causal link is not necessarily dependent on the temporal or geographic proximity of the individual to the resulting harm. For example, a contractor who operates a remote-controlled missile is taking a direct part in hostilities, whereas a contractor who prepares food close to the frontline is

¹⁴ ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (June 2009).

¹⁵ *ibid*, 47-50.

¹⁶ *ibid*, 51-58; see also ICRC Commentary to the Additional Protocols (n 13), [1679].

not.¹⁷ The third criterion identified by the ICRC is that the act must form an integral part of the hostilities, in the sense that it 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.’¹⁸ If a contractor transporting medical supplies is subject to an unlawful attack by enemy forces, for example, an act of individual self-defence will *not* constitute direct participation as its purpose will not be to support a party to the conflict against another.¹⁹

How do these elements apply to specific PMSC services? Chapter I of this Thesis classified PMSC services into four broad categories on the basis of their proximity to the notional ‘tip of the spear’ in armed conflict: offensive combat, military/security expertise, armed security and military support.²⁰ Each category will now be assessed in turn.

There is no doubt that offensive combat contracts envision direct participation in hostilities. The employees of Executive Outcomes and Sandline who were hired to provide offensive combat services during the 1990s were therefore ‘recruited...in order to fight’ within paragraph (a) of the mercenary definition. The operation of complex weapons systems also falls within this category. Singer notes that during the 2003 invasion of Iraq, US-hired contractors actually loaded weapons systems such as B-2 stealth bombers and helped operate combat systems such as the Army’s

¹⁷ ICRC Guidance (n 14), 55.

¹⁸ *ibid*, 58-64.

¹⁹ *ibid*, 61.

²⁰ See Chapter I, Part IV.

Patriot missile batteries and the Navy's Aegis missile defence system.²¹ Such individuals clearly participated directly in hostilities.

The analysis is more complex in relation to PMSC contracts involving military or security expertise such as advice and training, the collection and analysis of intelligence, the maintenance of equipment, and the clearance of mines. Whilst the *travaux préparatoires* to Article 47 of Protocol I indicate that the definition of a mercenary was not generally intended to include advisers, trainers and military technicians,²² that intention was based on the assumption that such experts would not take a direct part in hostilities.²³ Military experts who are hired to perform functions that entail direct participation are 'recruited...in order to fight' within the mercenary definition. In this regard, the ICRC Guidance distinguishes between general advice, training, intelligence and technical services, which do not entail direct participation, and such services 'carried out with a view to the execution of a specific hostile act', which do entail direct participation.²⁴ The training/advice provided by MPRI to the Croatian government may have qualified as direct participation, since it appeared to relate to specific tactical military operations.²⁵ One can also apply this distinction to the maintenance of complex weapons systems. General depot maintenance conducted away from the battlefield does not qualify as

²¹ P Singer, 'Can't Win With 'Em, Can't Go to War Without 'Em: Private Military Contractors and Counterinsurgency', Foreign Policy Paper 4 (Brookings Institution, Washington Sept 2007), 2.

²² See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1976)* (1978), Report of Committee III, [25].

²³ See ICRC Commentary to the Additional Protocols (n 13), [1806] (in relation to art 47(2)(b)).

²⁴ ICRC Guidance (n 14), 66; see also 53; M Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2004-2005) 5 *Chicago J Intl L* 511, 542-545.

²⁵ See Chapter I, text accompanying notes 175-187. Note that Croatia ratified the UN Convention in 2000, several years after the MPRI operation.

direct participation, nor does routine maintenance even if conducted near the front; but the preparation of equipment for a specific battle does generally entail direct participation.²⁶ Likewise, contractors who collect or analyse tactical intelligence are generally participating directly in hostilities, whereas contractors who provide such services on a strategic level are not.²⁷ The ICRC Guidance further states that the clearance of mines placed by the adversary—another common PMSC service—constitutes direct participation in hostilities.²⁸

Turning to consider PMSC contracts for the provision of armed security, the question of whether these contractors are ‘recruited...in order to fight’ hinges on two factors: first, whether the persons or objects that the contractors are hired to guard constitute a military objective; and second, whether the contractors are hired to guard those persons/objects against enemy forces or merely against common criminals.²⁹ Article 52(2) of Protocol I provides that ‘attacks shall be limited strictly to military objectives’, and Article 49(1) defines ‘attacks’ as ‘acts of violence against the adversary, whether in offence or defence’. It follows that if a state hires a PMSC to defend a military objective in an armed conflict, any act of violence by PMSC personnel in defence of that objective against enemy forces will constitute an ‘attack’ within Article 49(1). Since the hiring state envisions the PMSC personnel

²⁶ See Schmitt (n 24), 544-545.

²⁷ See *ibid*; E-C Gillard, 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88 (863) *Intl Rev Red Cross* 525; R de Nevers, 'Private Security Companies and the Laws of War' (2009) 40 (2) *Security Dialogue* 169.

²⁸ ICRC Guidance (n 14), 48.

²⁹ See Doswald-Beck (n 8), 129; M Sossai, 'Status of Private Military Companies in the Law of War: The Question of Direct Participation in Hostilities' (European University Institute Working Paper 2009/6), 12; R de Nevers (n 27), 179.

engaging in such defensive attacks where necessary, the contractors must be viewed as 'recruited...in order to fight' in an armed conflict. Conversely, if a state hires a PMSC to guard a civilian object, any attack on that object will be unlawful under IHL and the PMSC personnel may take certain limited action in self-defence and defence of other civilians without participating directly in hostilities.³⁰ Such PMSC personnel are not envisioned as persons who will take a direct part in hostilities and they are not therefore 'recruited...in order to fight'. In practice, of course, a considerable grey zone exists between these two scenarios, particularly in low-intensity conflicts where it is often difficult to distinguish enemy attacks from common criminality. A logical approach would be to assume that the hiring state envisions PMSC personnel defending against attacks by enemy forces if, at the time of hiring, the protected object is or is likely to become a military objective. Any rules of engagement issued to PMSC personnel would provide further assistance in discerning the intentions of the hiring state in these circumstances.³¹

The final category of PMSC contract identified in Chapter I entails military support such as the preparation of food, the transport of personnel and equipment, and the assembly and disassembly of military bases. PMSC personnel hired to provide these services are not generally envisioned as participating directly in hostilities and thus they are not 'recruited...in order to fight' within the mercenary definition in Article 1(1) of the UN Convention. However, there may be exceptions. One scenario which consistently arose during the expert meetings leading to the

³⁰ See A Faite, 'Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law' (2004) 4 (2) Defence Studies 166, 174.

³¹ See UCIHL Expert Meeting (n 8), 27.

ICRC Guidance was that of the civilian truck driver 'Bob' who transports ammunition to an active firing position at the frontline.³² The ICRC Guidance states that the driver in this scenario must be regarded as an integral part of ongoing combat operations and, therefore, as directly participating in hostilities.³³ On the other hand, the transport of ammunition from a factory to a port for further shipping to a storehouse in a conflict zone 'is too remote from the use of that ammunition in specific military operations to cause the ensuing harm directly', and therefore does not constitute direct participation in hostilities.³⁴

Paragraph (b): motivated by private gain

Paragraph (b) is the 'crux' of mercenarism,³⁵ without which the definition would be meaningless.³⁶ In the context of Article 47 of Protocol I, this criterion is also commonly regarded as a serious flaw in the mercenary definition. It focuses on the *motivation* of the individual, identifying mercenaries not by reference to *what* they do, but *why* they do it. Yet monetary reward is often only one of several factors motivating an individual to take part in a conflict. For example, many national soldiers join the armed forces at least in part for the salary and benefits, whereas many irregular fighters are motivated by ideology or religion rather than financial gain. It is often difficult to identify the 'essential' motivation. According to the Diplock Report, the inclusion of this criterion renders the definition of a mercenary

³² See, eg, ICRC, 'Report of the First Expert Meeting on the Notion of Direct Participation in Hostilities' (Geneva, Sept 2003), 4.

³³ ICRC Guidance (n 14), 56.

³⁴ *ibid.*

³⁵ ICRC Commentary to the Additional Protocols (n 13), [1807].

³⁶ See S Percy, 'Mercenaries: Strong Norm, Weak Law' (2008) 61 (2) *Intl Organization* 367; J Taulbee, 'Myths, Mercenaries and Contemporary International Law' (1985) 15 *Cal W Intl LJ* 339.

‘either...unworkable, or so haphazard in its application as between comparable individuals as to be unacceptable’.³⁷

It is not surprising that this criterion is considered problematic in the context of Article 47, since the purpose of that provision is to deny combatant and prisoner of war status to individual mercenaries in an ongoing armed conflict. IHL is highly concerned to ensure that fighters are not unfairly or prematurely denied such status, and this is reflected in the requirement in Article 45 that, when in doubt, the holding party should presume prisoner of war status for any prisoner until such time as his status has been determined by a competent tribunal. This effectively restricts the holding party’s freedom to draw inferences of financial motivation from the surrounding circumstances, thereby rendering the mercenary definition in Article 47 virtually ‘unworkable’ in practice.

In relation to the *state’s* obligation not to hire mercenaries under Article 5 of the UN Convention, on the other hand, the requirement of financial motivation is far less problematic. It will frequently be possible to infer such motivation from the surrounding circumstances, particularly in the case of PMSC personnel who are openly engaged in the business of military and security provision. Where a state hires a PMSC to work in an armed conflict and the company personnel are well-paid, in the absence of evidence pointing to some other motivation it can reasonably be

³⁷ 'Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries' (London 1976), [7]; see also HC Burmester, 'The Recruitment and Use of Mercenaries in Armed Conflicts' (1978) 72 AJIL 37, 37-38; E Kwakwa, 'The Current Status of Mercenaries in the Law of Armed Conflict' (1990) 14 (1) Hastings Intl & Comp L Rev 67, 71-72.

inferred that the contractors are financially motivated for the purpose of the state's obligation under Article 5.

Paragraph (c): nationality

Article 1(1)(c) of the UN Convention further limits the definition of a mercenary to 'any person who...[i]s neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict'. Both the UN Convention and Article 47 of Protocol I were intended to address individual mercenaries rather than mercenary groups as such, and it is plain from the wording of this criterion that it is the nationality of the individual person, rather than the nationality of the group to which he or she belongs, that is decisive. Thus, where the nationality of the PMSC differs from that of the PMSC employee in question, it is the nationality of the latter that should be considered under paragraph (c).³⁸ This leads to an unsatisfactory situation whereby certain members of a PMSC may be considered mercenaries and others not, even when performing the same tasks; but there is no other interpretation reasonably open on the wording of the provision.

The nationality criterion would exclude a significant number of modern PMSC personnel, such as the British and American contractors who worked in Iraq following the 2003 invasion and the large number of host state nationals working for foreign PMSCs in Afghanistan and Iraq today. For other contractors, the hiring state

³⁸ See Doswald-Beck (n 8), 123; UCIHL Expert Meeting (n 8), 24-25.

could circumvent the nationality requirement by granting citizenship,³⁹ although it would be more likely to exclude such individuals from the mercenary definition by incorporating them into the national armed forces, as discussed below. The nationality criterion in Article 1(1) therefore constitutes a loophole in the UN Convention as it permits the hiring state to evade its obligation not to hire mercenaries by taking action lying solely within its own control.

Paragraphs (d) and (e): forming part of the armed forces of the hiring state

Paragraphs (d) and (e) of Article 1(1) present the biggest loopholes in the definition of a mercenary insofar as it delineates the hiring state's obligation not to hire mercenaries under Article 5, as the hiring state can easily exclude individual fighters by enrolling them temporarily in its armed forces. Cassese describes this as 'the most crucial inadequacy' of the mercenary definition.⁴⁰ Similarly, the ICRC Commentary to Article 47 of Protocol I states:

Perhaps with some justification it has been said that this clause made the definition of mercenaries completely meaningless...[as] each State has control over the composition of its armed forces subject to the provisions of Article 43, it is clear that enlistment in itself is sufficient to prevent the definition being met.⁴¹

In some cases a state may hire a PMSC to work in an armed conflict to which the state is itself a party. Prominent examples include Executive Outcomes and Sandline hired by the governments of Sierra Leone and Angola during the civil wars in those

³⁹ See UK Foreign Commonwealth Office Green Paper, 'Private Military Companies: Options for Regulation' (Feb 2002), 7; UN Commission on Human Rights, 'Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination' (20 Feb 1997) UN Doc E/CN.4/1997/24, 80-81.

⁴⁰ A Cassese, 'Mercenaries: Lawful Combatants or War Criminals?' (1980) 40 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1, 26.

⁴¹ ICRC Commentary to the Additional Protocols (n 13), [1813] (references omitted).

countries, MPRI hired by the Croatian government during the Balkan conflict, and the various PMSCs hired by the US and the UK in Iraq following the 2003 invasion.⁴²

In such cases the hiring state could exclude the contractors from paragraph (d) of the mercenary definition, which provides that a mercenary must not be a member of the armed forces of a party to the conflict, by incorporating them into its armed forces. Indeed, that was standard practice for Executive Outcomes and Sandline during the 1990s.⁴³

In other cases a state may hire a PMSC to work in an armed conflict to which the state is *not* itself a party. For example, a state may hire a PMSC to assist a foreign government fighting a civil war, or to work in a peacekeeping force, or to provide security for state officials working in a foreign conflict to which the hiring state is not a party. In such cases the hiring state could exclude the PMSC personnel from paragraph (e) of the mercenary definition, which provides that a mercenary must not have been 'sent by a State which is not a party to the conflict on official duty as a member of its armed forces', by incorporating them into its armed forces.

Even in the absence of formal enlistment, if PMSC personnel are fighting alongside national soldiers in an international armed conflict, the hiring state could argue that they are in fact so highly integrated into its armed forces that they form

⁴² For an overview of these operations, see Chapter I, Part IV.

⁴³ See S Dinnen, R May and A Regan (eds), *Challenging the State: The Sandline Affair in Papua New Guinea* (National Centre for Development Studies Canberra 1997), 163; JC Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International law, and the New World Disorder' (1998) 34 *Stan J Intl L* 75, 124; UK Green Paper (n 39), [6].

part of those forces *de facto* pursuant to Article 43 of Protocol I (if applicable).⁴⁴ This provides yet another potential avenue for a state to evade responsibility for hiring mercenaries under the UN Convention.

2 The obligations of states party to the OAU Convention

In the African context, the OAU Convention provides another source of obligations which might limit states' freedom to hire PMSCs in armed conflict. The Convention was the culmination of several years of collaboration between OAU member states during the 1960s and 1970s to confront the destabilising effects of mercenaries in Africa, and consequently its terms are tailored to the particular problem of mercenarism in that context.⁴⁵ The regional nature of the OAU Convention further limits its impact, as it is binding only on those African states that have ratified it.

Article 1(1) of the OAU Convention adopts the same basic definition of a mercenary as Article 47 of Protocol I, and thus contains all of the loopholes discussed above. Article 1(2) prohibits individuals, groups, associations, states or representatives of states from using or otherwise supporting mercenaries 'with the aim of opposing by armed violence a process of self-determination stability or the territorial integrity of another State'. This defines the crime of mercenarism narrowly according to the purpose of the actor in question. A state could therefore hire PMSC personnel who qualified as mercenaries under Article 1(1) and yet fail to

⁴⁴ See Chapter III, Part I-A(1).

⁴⁵ See KO Kufuor, 'The OAU Convention for the Elimination of Mercenarism in Civil Conflicts' in A-F Musah and JK Fayemi (eds) *Mercenaries: An African Security Dilemma* (Pluto Press, London 2000); TS Milliard, 'Overcoming Post-Colonial Myopia: A Call to Recognise and Regulate Private Military Companies' (2003) 176 *Mil L Rev* 1, 43-57.

satisfy the elements of the crime of mercenarism in Article 1(2) if it did not act with the specified purpose.

A number of commentators argue that OAU member states carefully constructed the crime of mercenarism in Article 1(2) to protect themselves and OAU-recognised national liberation movements from mercenary attacks, whilst retaining the option of using mercenaries against rebel groups within their own borders.⁴⁶ According to Cassese, OAU member states 'did not condemn every category of mercenary, but only such mercenaries as were fighting against national liberation movements or sovereign States.'⁴⁷ For example, the South African government (which was outside the OAU at the time) was prohibited from using mercenaries against the African National Congress, an OAU-recognised rebel group, whilst other states (such as Angola and Zaire) freely used mercenaries against dissident groups on their own soil.⁴⁸

Whatever the exact motives of the drafting states, it is clear that the reference to 'a process of self-determination' in Article 1(2) was directed at the anti-colonial/anti-racist struggle of the time.⁴⁹ This raises the question of how 'a process of self-determination' should be construed in the modern context. The widely-held view is that this phrase encompasses only internationally-recognised national

⁴⁶ See Cassese (n 40); Taulbee (n 36), 347; Zarate (n 43), 128; P Singer, 'War, Profits, and the Vacuum of Law: Privatised Military Firms and International Law' (2004) 42 Colum J Transnatl L 521, 529.

⁴⁷ Cassese (n 40), 24.

⁴⁸ Singer, 'War, Profits' (n 46), 529; Cassese (n 40), 3.

⁴⁹ See, eg, the Preamble to the Convention: 'Concerned with the threat which the activities of mercenaries pose to the legitimate exercise of the right of African People under colonial and racist domination to their independence and freedom'.

liberation movements, meaning that the OAU Convention does *not* prohibit states parties from hiring mercenaries to fight against dissident groups in their own territory.⁵⁰ It follows from this understanding that Sierra Leone and Angola would not have violated their obligations under Article 1(2) when they hired Executive Outcomes and Sandline to fight in their respective civil wars during the 1990s, even if they had not incorporated the PMSC personnel into their national armed forces. An alternative interpretation of Article 1(2) might construe 'a process of self-determination' more broadly to encompass certain minority group struggles against the government. Kufuor notes, for example, that the meaning of the Convention is not entirely clear as to whether states themselves can use mercenaries against rebels on their own soil, since the struggle for liberation 'might not necessarily be limited to the anti-colonial/anti-racist struggle' but might also include 'the continuing struggle by the people of Africa against authoritarian and undemocratic regimes'.⁵¹ Kufuor presents arguments for both interpretations and concludes that 'there is a need to redraft the Convention in order to clear the ambiguity in the text, or for the OAU to come out with a resolution specifying whether its members can or cannot use soldiers of fortune.'⁵²

⁵⁰ See, eg, Singer, 'War, Profits' (n 46), 528-529; Zarate (n 43), 128; UK Green Paper (n 39), [7]-[8]; Milliard (n 45), 54-57.

⁵¹ Kufuor (n 45), 202. Such a construction would reflect a broader conception of the right of self-determination of peoples: see, eg, the decision of the Supreme Court of Canada in *Reference re Secession of Quebec* [1998] 1 SCR 217; for analysis, see D Haljan, 'A Constitutional Duty to Negotiate Amendments: *Reference re Secession of Quebec*' (1999) 48 ICLQ 447; J Crawford, 'Right of Self-Determination in International Law' in P Alston (ed) *People's Rights* (OUP, Oxford 2005), 47-63.

⁵² Kufuor (n 45), 205.

On balance, it would seem that Article 1(2) of the OAU Convention as presently drafted does *not* prohibit states parties from hiring mercenaries to fight rebels on state territory. Article 1(2) does, however, prohibit states parties from hiring mercenaries to fight against *another state*, and this could restrict the freedom of states parties to hire PMSCs in certain circumstances. For example, O'Brien notes that the Angolan MPLA government hired the PMSC AirScan in October 1997 and then just weeks later overthrew the democratically elected government in Congo-Brazzaville.⁵³ This scenario clearly raises questions as to Angola's responsibility for mercenarism under Article 1(2) of the OAU Convention.

In short, despite popular conceptions of PMSC personnel as mercenaries, various factors combine to render international mercenary law irrelevant to most contemporary private security activity. Nonetheless, there may be cases in which a state party to one of the two mercenary conventions hires PMSC personnel who fall within the definition of a mercenary, and this could give rise to the responsibility of the hiring state for a violation of its obligations under the relevant instrument.

B. International humanitarian law

The Geneva Conventions impose a direct obligation on states to use regular soldiers in two specific situations of international armed conflict. First, Article 39 of GCIII provides that '[e]very prisoner of war camp shall be put under the immediate

⁵³ K O'Brien, 'Military-Advisory Groups and African Security: Privatised Peacekeeping?' (1998) 5 (3) Intl Peacekeeping 78.

authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power'. Second, Article 99 of GCIV imposes a similar, albeit less stringent, obligation in relation to places of internment: '[e]very place of internment shall be put under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power.' Thus, if a state placed a prisoner of war camp under the immediate authority of a PMSC employee, or if it allowed a contractor to operate a place of internment without authoritative military oversight, the state would violate its obligations under these provisions.⁵⁴ IHL places no such restrictions on states in non-international armed conflicts.

Having identified the few norms of international law that restrict the freedom of states to hire PMSCs in the first place, the remainder of this Chapter critically analyses the key obligations on the hiring state to take positive steps to control PMSC behaviour in armed conflict.

II. The hiring state's obligations to control PMSCs

A. International humanitarian law

IHL imposes a number of obligations on the hiring state to take positive steps to control PMSCs in armed conflict. This Section examines these obligations in five

⁵⁴ See also Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (17 Sept 2008) UN Doc A/63/467-S/2008/636, Part I, [2].

categories: first, the general duty to ensure respect for IHL in all circumstances; second, the duty to disseminate the Conventions and instruct particular individuals working in armed conflict; third, the duty to protect certain vulnerable groups in armed conflict; fourth, the special obligations of an occupying power in the occupied territory; and finally, the duty to repress or suppress violations of IHL.

1 The obligation to ensure respect for IHL

Chapter IV of this Thesis critically analysed the obligation in Common Article 1 ‘to ensure respect’ for IHL ‘in all circumstances’, and concluded that it requires the host state of a PMSC to take diligent steps to ensure that company personnel comply with IHL.⁵⁵ The present Chapter argues that the obligation in Common Article 1 is also highly pertinent to the hiring state of a PMSC. This discussion first addresses two specific questions which may arise in cases where a PMSC operates outside the territory of the hiring state. It then considers the measures that the hiring state should take to discharge its Common Article 1 obligation and the circumstances in which the state may incur responsibility for breach.

Does Common Article 1 bind the hiring state in relation to PMSCs operating outside state territory?

A key question in relation to the hiring state of a PMSC is whether Common Article 1 obliges states to take steps to control company behaviour *overseas*. As noted in Chapter IV, the obligation to ensure respect for IHL in Common Article 1 shares a number of features with the obligation to prevent and punish genocide in Article 1

⁵⁵ See Chapter IV, Part I-A.

of the Genocide Convention.⁵⁶ One important parallel is that neither Common Article 1 nor Article 1 of the Genocide Convention is territorially limited; the former applies to a state 'in all circumstances', whilst the latter applies to a state 'wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question.'⁵⁷ Thus, in *Nicaragua* the ICJ found that the US had violated its obligation to ensure respect for IHL by virtue of its encouragement of the rebel *contras* operating in the armed conflict in Nicaragua.⁵⁸ Similarly, in the *Genocide* case the Court found Serbia responsible for failing to prevent genocidal acts that had taken place outside Serbian territory.⁵⁹ The lack of any territorial limitation on Common Article 1 is clearly crucial for states that hire PMSCs to operate in armed conflict overseas, and this is all the more significant when compared with the strict jurisdictional limitations that apply in HRL, discussed below in Section B.

Chapter IV also argued that, although Common Article 1 binds all states 'in all circumstances', in practice a state must have some capacity to influence a PMSC effectively before the state will be required to take positive measures to control company behaviour.⁶⁰ Conversely, a state can only incur responsibility for a failure

⁵⁶ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 Dec 1948, entered into force 12 Jan 1951) 78 UNTS 277.

⁵⁷ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, (Merits) (26 Feb 2007), [183].

⁵⁸ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)* (Merits) ICJ Rep 1986, [220], [255].

⁵⁹ *Genocide* case (n 57), [183].

⁶⁰ See Chapter IV, text accompanying notes 31-34. For a similar point in relation to the obligation to ensure respect by other states, see B Kessler, 'The Duty to "Ensure Respect" under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts' (2001) 44 *German YBIL* 498, 505; N Levrat, 'Les conséquences de l'engagement pris par le HPC de "faire respecter" les conventions humanitaires' in F Kalshoven and Y Sandoz (eds) *Implementation of International Humanitarian Law* (Martinus Nijhoff, Dordrecht 1989), 279; H-P Gasser, 'Ensuring

to take action to ensure that a particular PMSC respect IHL if the state actually had some capacity to influence that company effectively. The ICJ implicitly adopted a similar approach to the obligation to prevent genocide in the *Genocide* case, noting that the measures required to discharge the obligation depend largely on the state's 'capacity to influence effectively the action of persons likely to commit, or already committing, genocide.'⁶¹ This indicates that a state will not incur responsibility for a failure to take preventive action directed towards particular individuals unless the state in fact had the capacity to influence those individuals effectively.

The requirement that a state have the 'capacity to influence effectively' a PMSC translates the universal and somewhat vague terms of Common Article 1 into an obligation on particular states to take positive action in relation to particular PMSCs. The hiring state of a PMSC has a clear means of influencing company behaviour through the contract of hire, even where the company operates overseas, and it follows that Common Article 1 obliges the hiring state to take positive action to ensure that the PMSC complies with IHL. This is reflected in the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed

Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations' in H Fox and M Meyer (eds) *Effecting Compliance* (BIICL, London 1993), 28; B Kessler, 'Die Durchsetzung der Genfer Abkommen von 1949 in nicht-internationalen bewaffneten Konflikten auf Grundlage ihres gemeinsamen Art. 1' (2001) 132 Veröffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel 26, 118.

⁶¹ *Genocide* case (n 57), [430].

Conflict, which stipulates that hiring states ‘have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs they contract’.⁶²

Does Common Article 1 bind the hiring state if it is not party to the conflict?

Another key question is whether the obligation ‘to ensure respect’ in Common Article 1 applies to *all* hiring states, or whether it applies only to those hiring states that are party to the armed conflict in question. In many cases where a state hires a PMSC to work in an armed conflict, the state will itself be a party to that conflict. For example, Executive Outcomes and Sandline fought for the governments of Sierra Leone and Angola in their respective civil wars, MPRI worked for the Croatian government during the Balkan conflict, and various PMSCs worked for the US and the UK in Iraq in 2003.⁶³ As there is widespread agreement that Common Article 1 was intended to impose obligations on states party to the conflict, there can be no doubt that a hiring state will be obliged to ensure PMSC respect for IHL in these circumstances.

There are also cases, however, where the hiring state is not a party to the conflict in which the PMSC operates. For example, a state may hire a PMSC to provide security for state officials working in a foreign conflict to which the state is not a party, or a state may send a PMSC to assist a foreign government fighting a

⁶² Montreux Document (n 54), Part I, [3]. Part I of the Montreux Document sets out the understanding of the seventeen drafting states (Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the UK, Ukraine, and the US) of the existing obligations of states, PMSCs and their personnel under international law in relation to PMSCs in armed conflict.

⁶³ See Chapter I, Part IV.

civil war, or a state may send a PMSC as part of a peacekeeping mission. These scenarios raise the question of whether Common Article 1 imposes any obligations on 'third states' not party to the conflict.

The ICRC has long answered this question in the affirmative, explaining in its Commentary to Common Article 1 that 'in the event of a Power failing to fulfil its obligations, each of the other Contracting Parties (neutral, allied or enemy) should endeavour to bring it back to an attitude of respect for the Convention.'⁶⁴ This interpretation of Common Article 1 encompasses *all* states, irrespective of whether they are party to the conflict in question.

Kalshoven takes issue with the ICRC's interpretation of Common Article 1, arguing in his comprehensive study of the *travaux préparatoires* to the Conventions that the ICRC's approach does not accord with the true intention of the drafters.⁶⁵ In particular, Kalshoven notes that the drafters did not intend for Common Article 1 to impose an obligation on third states to take action to ensure that states party to the conflict ensure respect for IHL. Instead, according to Kalshoven, the provision was intended to oblige states party to the conflict to ensure respect for the Conventions by their own populations as well as by their agents and officials, in particular with a view to expanding the binding effect of the Conventions to insurgents in a civil war. Kalshoven's findings on this point suggest that, if a strict originalist interpretation

⁶⁴ J Pictet (ed), *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC Geneva 1960), 18.

⁶⁵ F Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999) 2 YBIHL 3.

were applicable today, Common Article 1 might not impose obligations on a state that hired a PMSC to work in a foreign conflict to which the state was not itself a party.

However, the original intent of the drafters is never conclusive as to the current status of a legal norm, since modern treaty interpretation also relies heavily on the ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’.⁶⁶ Although the drafters may have envisaged a somewhat restricted interpretation of Common Article 1, in the decades since 1949 this provision has been widely interpreted as imposing an obligation on *all* states—including third states—to take reasonable steps to ensure that the rules of IHL are respected by all, particularly by the parties to the conflict. In 1968, for example, delegates at the Tehran Conference on Human Rights passed a resolution affirming that *every* state has an obligation to use all means at its disposal to promote respect for IHL by all.⁶⁷ The UN Security Council,⁶⁸ the General Assembly⁶⁹ and numerous other international organisations including the Council of Europe, NATO, the OAU and the Organization of American States have since passed resolutions calling upon *all* member states to respect and ensure respect for IHL.⁷⁰

⁶⁶ Article 31(3) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 Jan 1980) 1155 UNTS 331; see also A Aust, *Modern Treaty Law and Practice* (CUP, Cambridge 2000).

⁶⁷ Res XXIII, International Conference on Human Rights, Tehran (12 May 1968), adopted with no opposing votes.

⁶⁸ UNSC Res 681 (20 Dec 1990) UN Doc S/RES/681, [5].

⁶⁹ See, eg, UNGA Res 32/91 A (13 Dec 1977) UN Doc A/RES/32/91; UNGA Res 37/123 A (16 Dec 1982) UN Doc A/RES/37/123; UNGA Res 38/180 A (19 Dec 1983) UN Doc A/RES/38/180; UNGA Res 43/21 (3 Nov 1988) UN Doc A/RES/43/21; see also UNGA Res 60/147 (16 Dec 2005) UN Doc A/RES/60/147, [3].

⁷⁰ See J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, vol I: Rules* (CUP, Cambridge 2005), 510.

The ICJ confirmed this broad interpretation of Common Article 1 in its *Wall* advisory opinion of 2004, stating that every state party, ‘whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.’⁷¹

It follows that all states that hire PMSCs in armed conflict will be obliged to take steps to ensure that those companies comply with IHL, including states that are not party to the conflict. This discussion now turns to consider the precise measures that the hiring state should take to fulfil this obligation.

Positive action to discharge the Common Article 1 obligation

Part I of the Montreux Document identifies three distinct components of the hiring state’s obligation to ensure respect for IHL:

3. Contracting States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs they contract, in particular to:
 - a) ensure that PMSCs that they contract and their personnel are aware of their obligations and trained accordingly;
 - b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
 - c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means, such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.⁷²

Each of these constituent positive obligations—the obligation to instruct and train, the obligation to prevent, and the obligation to suppress—entails a due diligence

⁷¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Rep 2004, [158]. Judge Kooijmans disagreed with the majority’s conclusion that Common Article 1 imposes obligations on third states to take action in relation to other states: see Judge Kooijmans separate opinion, [50] (citing Kalshoven’s study of the *travaux préparatoires*).

⁷² Montreux Document (n 54), Part I, [3].

standard of conduct, which becomes more exacting as the state's capacity to influence the PMSC increases.⁷³ Generally speaking the hiring state will need to take a range of measures to meet this due diligence threshold. In this regard, Part II of the Montreux Document sets out 23 'good practices' which provide guidance as to the specific steps that the hiring state should take to discharge its international obligations in relation to PMSCs. In general a failure by the hiring state to implement any one of these good practices will not, in itself, constitute a breach of Common Article 1, but a wholesale disregard for these standards will most likely point to state responsibility for a failure to exercise due diligence. Conversely, diligent efforts to implement the good practices identified in the Montreux Document will generally ensure that the hiring state meets not only its obligation to ensure respect for IHL, but also any applicable obligations under HRL discussed below in Section B.

Part I, paragraph three of the Montreux Document (set out above) characterises training of PMSC personnel as a concrete obligation deriving from Common Article 1, rather than a mere good practice. This reflects the ICRC position on this issue.⁷⁴ In international armed conflict, the hiring state's obligation to ensure that PMSC personnel are adequately trained and instructed in IHL is reinforced by the specific duties of instruction in the Geneva Conventions and Protocol I, discussed below. The PMSC personnel hired by the US to work as interrogators at Abu Ghraib prison in

⁷³ See Chapter IV, text accompanying notes 35-39.

⁷⁴ See ICRC, *Frequently Asked Questions: International Humanitarian Law and Private Military/Security Companies*, available at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/pmc-fac-230506>> (accessed 10 Aug 2009).

Iraq present an extreme example of deficient PMSC training standards. When the prisoner abuse scandal came to light in 2004, it emerged that approximately thirty-five percent of the PMSC interrogators working at the prison lacked formal military training as interrogators, and neither their hiring firm CACI nor the US government had conducted adequate background investigations prior to their employment.⁷⁵ A more recent example of deficient training standards is the AmorGroup operation to guard the US Embassy in Kabul, which utilised a large number of guards who could not speak English and who had no security training or experience.⁷⁶

As for the obligation to take 'appropriate measures to prevent' violations of IHL, set out above in paragraph 3(b), first and foremost the Montreux Document suggests that the hiring state take into account whether a particular service 'could cause PMSC personnel to become involved in direct participation in hostilities'.⁷⁷ Whilst there is no general rule of international law prohibiting states from hiring PMSCs to take a direct part in hostilities, as discussed in Part I of this Chapter, it will be wise for states to consider carefully their use of contractors in certain high-risk situations.

⁷⁵ See GR Fay, 'Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade' (Aug 2004) (Fay Report); SL Schooner, 'Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government' (2005) 16 *Stanford L & Pol Rev* 549, 556-557; G Gibson and S Shane, 'Contractors Act as Interrogators' *Baltimore Sun* (4 May 2004).

⁷⁶ Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Contracting Oversight, 'New Information about the Guard Force Contract at the US Embassy in Kabul' (June 2009), available at <<http://mccaskill.senate.gov/pdf/061009/StaffAnalysis.pdf>> (accessed 14 Sept 2009).

⁷⁷ Montreux Document (n 54), Part II, [1].

If a state chooses to hire a PMSC, it should ensure that company personnel are adequately vetted in order to exclude individuals who have been convicted of violent crimes from working in armed conflict, where they are likely to face abuse-prone situations. Good practices 5 to 13 recommend certain vetting procedures in order to take into account, within available means, the past conduct of the PMSC and its personnel. This responds to widespread criticisms amongst private security commentators, such as the 2008 statement of the UN Working Group on Mercenaries that

among the PMSC contractors there are South Africans now training and providing support to the Iraqi police who served earlier in the South African police and army during the former apartheid regime, some of whom have committed crimes against humanity.⁷⁸

A failure to conduct adequate background investigations may increase the risk of contractor misconduct. In one incident in August 2009, for example, an ArmorGroup security guard allegedly shot and killed two fellow guards and wounded at least one Iraqi in Baghdad. It subsequently emerged that the guard had a criminal record and was described by one fellow contractor as 'a walking time-bomb'.⁷⁹ A thorough screening process should have excluded such an individual from employment as an armed guard in a conflict zone.

The hiring state should also 'include contractual clauses and performance requirements that ensure respect for relevant national law, international

⁷⁸ 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 (9 Jan 2008) UN Doc A/HRC/7/7, [47].

⁷⁹ See --, 'Briton held in Iraq over shooting' *BBC News* (10 Aug 2009); D Haynes and R Ford, 'Briton Facing Iraq Murder Trial on Probation for Gun Offence' (13 Aug 2009).

humanitarian law and human rights law by the contracted PMSC'.⁸⁰ In fact, this is the most direct way by which the hiring state can impose conditions on PMSC employees. Effective oversight of contractual performance is also crucial, and accordingly the Montreux Document contains an elaborate description of good practice in contract monitoring.⁸¹

Another important aspect of prevention under Common Article 1 relates to PMSCs hired to provide advice or training to military forces. Clearly a state that hires a PMSC to train/advise its own armed forces will be obliged to ensure that the PMSC training/advice complies with IHL. A state should apply the same procedure when it hires a PMSC to train/advise *foreign* forces. In *Nicaragua*, the ICJ found that the US had supplied to the Nicaraguan rebels a training manual which discussed *inter alia* the possible necessity of shooting civilians who were attempting to leave a town and advised the 'neutralization' of local judges and other officials.⁸² This contributed to the Court's finding that the US had violated Common Article 1 by encouraging the *contras* to violate IHL.⁸³ Assuming that the obligation in Common Article 1 requires states to take positive steps to prevent violations of IHL, it is possible to stretch the *Nicaragua* scenario one step further. Let us say that the US government today hired a PMSC to train a foreign force such as the Iraqi army, but the US neither provided training guidelines nor supervised the training in any way. If the company trained the force using a manual similar to that used in *Nicaragua*, it does not seem too

⁸⁰ Montreux Document (n 54), Part II, [14].

⁸¹ *ibid*, Part II, [21].

⁸² *Nicaragua* (n 58), [122].

⁸³ *ibid*, [255].

remote to suggest that the US might incur some responsibility if the foreign soldiers then violated IHL in accordance with their training. In such a case, the US would not be incurring responsibility directly for the violation of IHL committed by the foreign soldiers, but for its own failure to fulfil its obligation under Common Article 1 to ensure that the PMSC training/advice complied with IHL.

Finally, as set out in the Montreux Document, the obligation to ensure respect for IHL requires the hiring state to ‘suppress’ any PMSC violations that occur. In order to fulfil this aspect of the obligation, ideally the hiring state should first criminalise violations of IHL in its domestic law, and then investigate any alleged incidents of wrongdoing and, where appropriate, prosecute the individuals in question. Indeed, the ICTY Appeals Chamber stated in the *Celebici* case that the absence of domestic criminal legislation providing for the repression of violations of Common Article 3 ‘would, arguably, be inconsistent with the general obligation contained in common Article 1 of the Conventions’.⁸⁴ Individual contracts of hire should complement these criminal measures by stipulating contractual penalties in cases of violation. The hiring state should also take steps to prevent PMSC violations from recurring, for example by changing its hiring practices, issuing new instructions and introducing new training requirements for other PMSCs doing similar work in the field.

⁸⁴ *Prosecutor v Delalic* (Appeals Judgment) IT-96-21-A (20 Feb 2001) (*Celebici* case), [167].

State responsibility for a violation of Common Article 1

A hiring state that fails to exercise due diligence to control PMSC behaviour could incur responsibility for a breach of Common Article 1 if a company employee acts in a way that violates IHL. In order to establish such a breach, it would not be necessary to prove that an exercise of due diligence by the hiring state would have in fact prevented the PMSC violation in question. This would be difficult to prove and in any event it is irrelevant to the breach of the state's due diligence obligation. Rather, it would suffice to prove that the hiring state failed to take those measures within its power that *might* have been expected to prevent the violation in the circumstances.⁸⁵

If the PMSC employee was acting as an agent of the hiring state when he or she committed the violation, there would of course be no need to consider the state's obligation to ensure respect for IHL, since the PMSC violation would itself be an 'act of a state' giving rise to state responsibility. On the other hand, if the PMSC employee was not acting as an agent of the hiring state at the relevant time—meaning that he or she was neither part of the state's armed forces, nor exercising governmental authority, nor acting under the hiring state's instructions, direction or control—the hiring state's obligation to ensure respect for IHL could provide an alternative pathway to state responsibility. This would be particularly important if one adopted the ICJ's 'effective control' test for attribution, rather than the less

⁸⁵ This reflects the test utilised by the ICJ in the *Genocide* case (n 57), [430], and by the ECtHR in assessing the obligation to safeguard the right to life in *Keenan v UK* (App no 27229/95) ECHR 3 April 2001, [89], and *Osman v UK* (App no 23452/94) ECHR 28 Oct 1998, [116].

stringent ‘overall control’ test favoured by the ICTY. A similar situation faced the ICJ in the *Genocide* case, when Serbia’s obligation to prevent genocide assumed central importance because the Court could not attribute the genocide itself to Serbia using the stringent ‘effective control’ test for attribution.⁸⁶

In short, the obligation to ensure respect for IHL could help to maximise the responsibility of the hiring state for any PMSC misconduct committed in the field, thereby bridging the responsibility gap between states that act through PMSCs and states that act through their armed forces. More generally, Common Article 1 could play a valuable prospective role by setting a baseline level of obligatory conduct that *all* hiring states must satisfy in *all* circumstances, in addition to any more specific rules that may apply in a given case. In this way, Common Article 1 could play a similar role to Common Article 3 as ‘a minimum yardstick’⁸⁷ against which a hiring state’s conduct is to be assessed in both international and non-international armed conflicts. Having established this minimum standard of conduct for the hiring state, the remainder of this Section examines four of the more specific IHL obligations that may bind the state in particular circumstances.

2 Duty to train and disseminate

States have clear obligations to instruct their national soldiers in IHL and to ensure that legal advisers are available to the armed forces, when necessary, to advise

⁸⁶ *Genocide* case (n 57), [425]-[450].

⁸⁷ In *Nicaragua* (n 58), [218], the ICJ stated that Common Article 3 constitutes ‘a minimum yardstick’ which applies in all armed conflicts, ‘in addition to the more elaborate rules which are also to apply to international conflicts’; see also *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72 (2 Oct 1995), [102].

military commanders on the application of IHL.⁸⁸ Thus, in the rare case that a PMSC formed part of the hiring state's armed forces, the state would have an obligation to ensure that all company personnel had been trained in IHL.

Outside the context of the armed forces, IHL does not explicitly delineate any general obligation on states to instruct civilians in IHL. States are required to disseminate the Conventions and Protocol I as widely as possible, and to 'encourage' the study of these instruments by the civilian population. For example, Article 48 of GCII provides:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, *in particular to the armed fighting forces, the medical personnel and the chaplains.*⁸⁹

This provision is not generally considered to impose a binding obligation on states to ensure that their entire civilian population is knowledgeable about IHL.⁹⁰ However, PMSCs can hardly be grouped with the general civilian population in this context; on the contrary, it is likely that the drafters would have grouped PMSCs with 'the armed fighting forces, the medical personnel and the chaplains'.⁹¹ This interpretation is

⁸⁸ See, eg, Convention Respecting the Laws and Customs of War on Land (adopted 18 Oct 1907, entered into force 26 Jan 1910) 205 Consol TS 277, art 1; GCIII, art 127(1); Protocol I, arts 80(2), 82-83; Henckaerts and Doswald-Beck, vol I (n 70), Rules 141-142, 500-505.

⁸⁹ Emphasis added. A similar obligation appears in GCI, art 47, and Protocol I, art 83; see also J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, vol II: Practice* (CUP, Cambridge 2005), Rule 143, 505.

⁹⁰ See D Turns, 'Implementation and Compliance' in E Wilmschurst and S Breau (eds) *Perspectives on the ICRC's Study on Customary International Humanitarian Law* (BIICL, Cambridge 2007), 363-364; UCIHL Expert Meeting (n 8), 43.

⁹¹ See Doswald-Beck (n 8), 132-133.

particularly persuasive when one reads these provisions in conjunction with the general duty to ensure respect for IHL in Common Article 1.

In addition to the obligation to disseminate the Conventions and Protocol I, in international armed conflict IHL imposes an explicit obligation on states to train individuals who assume responsibilities in respect of prisoners of war or protected persons. There are no equivalent provisions applicable in non-international armed conflict.

In relation to prisoners of war, Article 39 of GCIII provides:

Every prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power. Such officer shall have in his possession a copy of the present Convention; *he shall ensure that its provisions are known to the camp staff and the guard and shall be responsible, under the direction of his government, for its application.*⁹²

Article 127(2) strengthens this requirement by stating that ‘[a]ny military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.’ Although the drafters of this provision undoubtedly had *governmental* entities in mind when they used the term ‘authorities’, in modern times when so many functions once considered governmental are performed by non-governmental entities, such a reading of ‘authorities’ would be too narrow. It would be in keeping with the spirit of the provision to require it to be applied to all PMSCs that ‘assume responsibilities’ for prisoners of war. The Detaining Power’s obligations under GCIII

⁹² Emphasis added.

provide useful standards to guide states that hire PMSCs to work in prisoner of war camps. These obligations would not, however, alter the responsibility of the hiring state if a PMSC mistreated a prisoner of war, since a Detaining Power retains absolute responsibility for the treatment given to prisoners by virtue of Article 12 of GCIII.

GCIV provides a further obligation in relation to ‘protected persons’, which it defines in Article 4 as ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.’ Article 144(2) of GCIV provides that ‘[a]ny civilian, military, police 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 inclusion of the phrase ‘any civilian’ clearly brings PMSCs within the scope of the obligation to instruct. Moreover, since the performance of some duties ‘in respect of protected persons’ (such as the duty to provide food and medical supplies) may *not* entail the exercise of governmental authority within the meaning of Article 5 of the ILC Articles, misconduct by PMSCs performing such duties would not necessarily be attributable to the hiring state.⁹³ The obligation to instruct PMSCs under Article 144(2) of GCIV could provide an alternative pathway to state responsibility in such cases.

⁹³ See generally Chapter III, Part II.

3 Protection of civilians in international armed conflict

As discussed in Chapter IV in relation to the host state of a PMSC, in international armed conflict Article 27 of GCIV imposes an obligation on states to take positive measures to protect civilians, particularly women and children.⁹⁴ Similarly, Article 76 of Protocol I obliges states to protect women ‘in particular against rape, forced prostitution and any other form of indecent assault’, and Article 77 obliges states to protect children ‘against any form of indecent assault’.

These provisions effectively oblige the hiring state to exercise due diligence to control PMSCs performing activities that could threaten the civilian population, particularly women and children, and to minimise the risk that off-duty contractors will engage in unlawful sexual activities with women or children.⁹⁵ To fulfil these obligations, the hiring state should take steps to ensure not only that PMSC personnel are adequately vetted and trained, but also that the company has a clear policy of dismissing any contractors found to have engaged in activities that exploit women or children. Such measures could help to prevent a repeat of the DynCorp ‘sex-slave’ scandal that took place in Bosnia in 1999-2000, discussed in Chapter IV, in which employees of the US firm DynCorp working under contract with the US government were implicated in a prostitution ring involving girls as young as twelve,

⁹⁴ See Chapter IV, Part II-B.

⁹⁵ See C Hoppe, *State Responsibility for Violations of International Humanitarian Law Committed by Individuals Providing Coercive Services under a Contract with a State* (Centre for Studies and Research of The Hague Academy of International Law, 2008), 43-44.

including trafficking victims.⁹⁶ Finally, the hiring state should ensure that any contractors found to have engaged in unlawful activities with civilian women or girls face disciplinary and, when the evidence merits, criminal proceedings.

4 **Obligation to repress or suppress violations of IHL**

The Geneva Conventions impose an explicit obligation on the hiring state of a PMSC, like other states, to ‘repress’ grave breaches⁹⁷ and to ‘suppress’ other breaches of IHL in international armed conflict.⁹⁸ This clearly obliges the hiring state to enact legislation enabling criminal prosecution or extradition of PMSC personnel who commit grave breaches of IHL, whether in state territory or overseas, in the exercise of universal jurisdiction. The hiring state should also enact domestic legislation criminalising non-grave breaches of IHL—although it is not under an *explicit* obligation to do so—and should prosecute any offending PMSC personnel in the exercise of ordinary criminal jurisdiction.⁹⁹ The hiring state should combine its criminal legislation with other measures to suppress PMSC violations of IHL, such as ensuring that contractors are vetted and trained, including clear and appropriate terms in the contract, implementing procedures to monitor contractors in the field, and imposing contractual penalties for violations.

⁹⁶ See Chapter IV, text accompanying note 52; see also Human Rights Watch Report, ‘Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution’ (26 Nov 2002).

⁹⁷ Common Article 49(1)/50(1)/129(1)/146(1); see also Montreux Document (n 54), Part I, [5].

⁹⁸ Common Article 49(3)/50(3)/129(3)/146(3).

⁹⁹ See J Pictet (ed), *Commentary, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (ICRC Geneva 1958), 593-594.

There are no specific provisions of this nature applicable in non-international armed conflict, but a general obligation to suppress violations of IHL is implicit in the obligation to ensure respect for IHL in Common Article 1, as discussed above.¹⁰⁰

5 Special obligations of an occupying power

In some situations of military occupation, the occupying power may hire a PMSC to work in the occupied territory. This was the case for the PMSCs hired by the Coalition Provisional Authority in Iraq, for example, following the 2003 invasion. In such cases the hiring state will be bound by Article 43 of the Hague Regulations, which provides that the occupying power 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'¹⁰¹

In the *Congo* case of 2005, the ICJ stated that Article 43 entails three distinct duties, namely, 'to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.'¹⁰² Having concluded that Uganda was an occupying power in Ituri at the relevant time, the Court found that

¹⁰⁰ See also Montreux Document (n 54), Part I, [9(c)]; *Celebici* case (n 84), [163]-[167].

¹⁰¹ Regulations Respecting the Laws and Customs of War on Land, annexed to the Convention Respecting the Laws and Customs of War on Land (adopted 18 Oct 1907, entered into force 26 Jan 1910) 205 Consol TS 277.

¹⁰² *Case Concerning Armed Activities in the Territory of the Congo (DRC v Uganda)* (Merits) ICJ Rep 2005, [178].

Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any *lack of vigilance* in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.¹⁰³

The Court therefore applied a standard of 'vigilance', synonymous with due diligence, to the obligation in Article 43 of the Hague Regulations. The Court's reference to 'other actors present in the occupied territory' would clearly encompass any PMSCs operating in the area.

It follows that an occupying power will have an obligation to take positive steps and exercise due diligence to prevent PMSC violations within the occupied territory, irrespective of whether the companies are working for the occupying power itself or for some other state or non-state actor. Where the occupying power is also the hiring state of the PMSC, the duty of vigilance to prevent violations of IHL will be even greater than that of Uganda in the *Congo* case, particularly when Article 43 is read in conjunction with the general duty to ensure respect for IHL in Common Article 1.¹⁰⁴

¹⁰³ *ibid*, [179] (emphasis added).

¹⁰⁴ See also Montreux Document (n 54), Part I, [1].

B. Human rights law

HRL also imposes, in certain circumstances, important obligations on the hiring state to control PMSCs. Chapter IV identified the principal foundations and objectives of HRL and discussed how this general framework differs from and relates to the more specialised framework of IHL.¹⁰⁵ It is widely accepted that HRL continues to apply during armed conflict, except to extent that states have formally derogated from the particular human rights treaty in question.¹⁰⁶ Such derogations are permitted only to the extent strictly required by the exigencies of the situation, and not in relation to the specified non-derogable rights such as the right to life and freedom from torture.

The dual application of HRL alongside IHL has great potential to enhance the protection of individual rights in armed conflict.¹⁰⁷ Certain procedural rights are more strongly enshrined in HRL than IHL, particularly the right to an individual remedy and to an independent and impartial investigation. HRL also offers a number of sophisticated international procedures for individual complaint and redress—procedures which are not available under IHL—and victims may stand on their own rights without necessarily relying on the goodwill of their state to take up their case. As discussed in Chapter IV, however, the concurrent application of IHL and HRL also complicates legal analysis as it necessitates a nuanced assessment of

¹⁰⁵ See Chapter IV, Parts I-A and I-B.

¹⁰⁶ See International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 Mar 1976) 999 UNTS 171, art 4; European Convention on Human Rights (4 Nov 1950) CETS No 005, art 15; American Convention on Human Rights (adopted 22 Nov 1969, entered into force 18 July 1978) 1144 UNTS 123, art 27.

¹⁰⁷ See generally Provost, *International Human Rights and Humanitarian Law* (CUP, Cambridge 2002).

the relationship between the two regimes in the particular circumstances under consideration.

One significant limitation of HRL is that it imposes obligations on states only within their ‘jurisdiction’, and this notion of jurisdiction is primarily territorial.¹⁰⁸ In other words, HRL only binds states outside their territory in certain specific circumstances. This conception flows from the classic paradigm of HRL as a mechanism for protecting individuals from abuses by their governments. Where a PMSC operates within the hiring state’s own territory—that is, where the hiring state is also the host state—the HRL analysis will essentially fall within Chapter IV of this Thesis. The present Section, on the other hand, focuses on the situation where a state hires a PMSC to operate in a *foreign* conflict—that is, where the hiring state and the host state are different. The constraints on the extraterritorial applicability of HRL are clearly crucial in such cases. This Section first considers the preliminary question of extraterritorial jurisdiction, and it then proceeds to assess the substantive content of the hiring state’s obligations to prevent, investigate, punish and redress PMSC violations of human rights, assuming that HRL binds the hiring state in relation to the particular PMSC activities in question.

¹⁰⁸ See, eg, ECHR, art 1; American Convention, art 1; ICCPR, art 2(1); UN Convention Against Torture (adopted 10 Dec 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT), art 2(1), although note that the obligation to prosecute torture under Article 7 of the UNCAT also applies to torture committed outside state jurisdiction.

1 Extraterritorial scope of human rights law

In certain circumstances, HRL may impose obligations on the hiring state in relation to PMSC activities overseas, but the precise scope of extraterritorial jurisdiction will depend on the specific wording of the human rights treaty in question. Each of the three main human rights treaties will be considered in turn.

International Covenant on Civil and Political Rights

On its face, the ICCPR presents the most difficult case for extraterritorial jurisdiction by virtue of its application clause in Article 2(1), which provides that each state party ‘undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognised in the present Covenant’.¹⁰⁹ Nonetheless, very early in its existence the Human Rights Committee adopted a broad approach to the applicability of the ICCPR, essentially interpreting the terms ‘territory’ and ‘jurisdiction’ in Article 2(1) as disjunctive.¹¹⁰

The Human Rights Committee has equated the notion of ‘jurisdiction’ in Article 2(1) with power or effective control over the individual victim. In the 1981 case of *Lopez Burgos v Uruguay*, for example, the Committee applied the ICCPR to the abduction, arrest, secret detention and torture of a Uruguayan citizen by Uruguay agents outside state territory, stating that

¹⁰⁹ Emphasis added.

¹¹⁰ For a detailed analysis of the extraterritorial application of the ICCPR, see D McGoldrick, ‘The International Covenant on Civil and Political Rights’ in F Coomans and M Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia, Oxford 2004); M Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’ in *ibid.*

[t]he reference...to 'individuals subject to its jurisdiction'...is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.¹¹¹

In the view of the Committee, it would be 'unconscionable' if a state could perpetrate violations of the Covenant on the territory of another state when it could not perpetrate such violations on its own territory.¹¹² More recently, the Committee's General Comment 31 confirms this broad interpretation of Article 2(1), emphasising that 'a State party must respect and ensure the rights laid down in the Covenant to *anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party*'.¹¹³ The Committee has applied this approach in a number of different contexts where a state takes measures which result in human rights violations overseas, including in situations of military occupation¹¹⁴ and in relation to troops taking part in peacekeeping operations abroad.¹¹⁵

Where a state detains individuals overseas and hires a PMSC to work at the detention centre—as was the case when the US hired the PMSCs Titan and CACI to work at Abu Ghraib prison in Iraq—the state will clearly be bound by the ICCPR in

¹¹¹ *Lopez Burgos v Uruguay* UNHRC 29 July 1981, UN Doc A/36/40, 176, [12.2].

¹¹² *ibid*, [12.3]; see also *Delia Saldías de Lopez v Uruguay* UNHRC 29 July 1981, UN Doc CCPR/C/OP/1, 88; *Celiberti de Casariego v Uruguay* UNHRC 29 July 1981, UN Doc Supp No 40 (A/36/40) at 185; *Mabel Pereira Montero v Uruguay* UNHRC 31 Mar 1983, UN Doc Supp No 40 (A/38/40) at 186.

¹¹³ UNHRC, General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13(2004), [10] (emphasis added).

¹¹⁴ See Concluding Observations on: Cyprus UN Doc CCPR/C/79/Add39 (21 Sept 1994), [3]; Israel UN Doc CCPR/CO/78/ISR (21 Aug 2003), [11]; UN Doc CCPR/C/79/Add93 (18 Aug 1998), [10]; see also T Meron, 'Applicability of Multilateral Conventions to Occupied Territories' (1978) 72 AJIL 542; E Cohen, *Human Rights in the Israeli Occupied Territories* (Manchester University Press, Manchester 1985).

¹¹⁵ See Concluding Observations on: Belgium CCPR/CO/81/BEL (12 Aug 2004), [6]; CCPR/C/79/Add99 (19 Nov 1998), [17]; Netherlands CCPR/CO/72/NET (27 Aug 2001), [8].

relation to the company's operations. Yet the jurisprudence of the Human Rights Committee demonstrates that the ICCPR may also apply extraterritorially in situations that do *not* involve full control over the individual.¹¹⁶ In the 'passport cases', for example, the Committee held that a state's control over its citizens' freedom of movement between foreign states gives rise to a positive obligation to issue a passport to its citizens overseas.¹¹⁷ Another example is *Ibrahim Gueye v France*, which concerned retired Senegalese soldiers of the French military forces who were living in Senegal but receiving a pension from France. As they received a lower pension than French retired soldiers in the same situation, the Committee found that they had suffered discrimination in violation of Article 26. The Committee noted that the Senegalese soldiers were 'not generally subject to French jurisdiction', but nonetheless considered it a sufficient basis for the extraterritorial application of the ICCPR that the soldiers 'rely on French legislation in relation to the amount of their pension rights.'¹¹⁸

The passport cases and *Ibrahim Gueye v France* suggest that extraterritorial jurisdiction could derive from a state's exercise of control over a *particular aspect* of a person's life overseas, even if the person is not entirely within the power of the authorities. The victims in those cases had a strong, long-term link to the state in question—citizenship in the passport cases and former membership of the armed forces and receipt of a state pension in *Ibrahim*; but could a more short-term

¹¹⁶ See Scheinin (n 110).

¹¹⁷ *Nunez v Uruguay* UNCHR 22 July 1983, UN Doc Supp No 40 (A/38/40) at 225; *Mabel Pereira Montero v Uruguay* (n 112); *Sophie Vidal Martins v Uruguay* UNCHR 23 Mar 1982, UN Doc Supp No 40 (A/37/40) at 157.

¹¹⁸ *Ibrahim Gueye v France* UNHRC 6 April 1989, UN Doc CCPR/C/35/D/196/1985, [9.4].

exercise of state control suffice? For example, what if Iraqi civilians living in a particular compound relied exclusively on the US to provide security, and the US outsourced that task to a PMSC? Would the US be obliged to take steps to ensure that the PMSC personnel acted in accordance with HRL in their relations with the Iraqi civilians they were protecting? The broad conception of jurisdiction adopted by the Human Rights Committee provides some scope for arguments of this nature.

Both the US and Israel have objected to the Human Rights Committee's broad interpretation of the extraterritorial applicability of the ICCPR.¹¹⁹ Michael Dennis, formerly of the US State Department, reflected the official US position in arguing in 2005 that states' human rights obligations were never intended to apply extraterritorially during periods of armed conflict.¹²⁰ Dennis propounded a strict interpretation of Article 2(1) of the ICCPR whereby both conditions must be met—that is, the victim of the violation must be 'within state territory' and 'subject to state jurisdiction'—before the Convention can apply extraterritorially. The Israeli government adopts by and large the same approach propounded by Dennis in rejecting the application of HRL in the occupied Palestinian territories, although the Israeli High Court of Justice has taken a different view in some of its judgments, most notably in the *Ma'arab* case of 2003.¹²¹

¹¹⁹ See, eg, Second Periodic Report of Israel to the Human Rights Committee (4 Dec 2001) UN Doc CCPR/C/ISR/2001/2, [8]; UNHRC, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, 2nd and 3rd Periodic Reports of the United States of America (28 Nov 2005) UN Doc CCPR/C/USA/3, Annex I: 'Territorial Scope of the Application of the Covenant'.

¹²⁰ M Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 AJIL 119.

¹²¹ *Ma'arab v The IDF Commander in Judea and Samaria* 57(2) PD 349, HCJ 3239/02.

The ICJ has essentially adopted the approach of the Human Rights Committee in relation to the extraterritorial applicability of the ICCPR. In the *Wall* case the Court stated that the Covenant 'is applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory' in concluding that the ICCPR, the International Covenant on Economic, Social and Cultural Rights,¹²² and the Convention on the Rights of the Child¹²³ were all applicable within the occupied Palestinian territory.¹²⁴

The ICJ appeared to take this approach one step further in the *Congo* case of 2005, stating that "international human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory", particularly in occupied territories'.¹²⁵ The Court found Uganda in violation of its human rights obligations under the ICCPR and other instruments in relation to its conduct in the DRC, not only as an occupying power in the Ituri province but also in other locations (particularly the city of Kisangani) where it was not an occupying power.¹²⁶ This suggests that territorial control falling short of formal occupation, such as territorial control exercised temporarily by an invading force, could suffice to establish the applicability of human rights instruments. On this understanding, the ICCPR could bind the hiring state of a PMSC in relation to the company's activities in foreign conflict, simply because the state's military forces exercised temporary

¹²² International Covenant on Economic, Social and Cultural Rights (adopted 16 Dec 1966, entered into force 3 Jan 1976) 993 UNTS 3.

¹²³ Convention on the Rights of the Child (adopted 20 Nov 1989, entered into force 2 Sept 1990) 1577 UNTS 3.

¹²⁴ *Wall* advisory opinion (n 71), [108]-[111].

¹²⁵ *Congo* case (n 102), [216] (emphasis added).

¹²⁶ *ibid*, [206]-[207], [220].

control over the area in which the PMSC was operating; this would be highly significant indeed.

Inter-American system

In the Organization of American States, human rights are understood to be the rights set out in the American Convention on Human Rights in relation to the states parties thereto, and those set out in the American Declaration on the Rights and Duties of Man¹²⁷ in relation to the other member states that have not ratified the Convention.¹²⁸ The American Convention binds states parties in regard to 'all persons subject to their jurisdiction'.¹²⁹ The American Declaration, on the other hand, has no express jurisdictional scope and was not intended to function as a treaty. Nonetheless, it is important in the present context because most of the examples of the extraterritorial application of human rights instruments in the inter-American system concern the US, which has not ratified the American Convention.

The Inter-American Commission on Human Rights (IACoMHR) has found that both the Convention and the Declaration can bind a state extraterritorially in relation to persons who are subject to the state's authority and control.¹³⁰ The

¹²⁷ American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States (April 1948).

¹²⁸ See Statute of the IACoMHR adopted by the Organization of American States General Assembly, Res No 448 (Oct 1979), art 1.

¹²⁹ American Convention, art 1.

¹³⁰ See *Saldano v Argentina* Petition, IACoMHR Rep No 38/99, 11 Mar 1999, [18]-[19]; *Coard v US*, IACoMHR Rep No 109/99, Case 10.951, 29 Sept 1999, [37]; C Cerna, 'Extraterritorial Application of the Human Rights Instruments of the Inter-American System' in Coomans and Kamminga (eds) (n 110); D Cassel, 'Extraterritorial Application of Inter-American Human Rights Instruments' in Coomans and Kamminga (eds) (n 110); J Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (CUP, Cambridge 2003).

Commission has adopted a very broad understanding of control in this context, particularly in relation to military operations. For example, in asserting jurisdiction over acts associated with the US invasion of Panama, the IAComHR did not consider it necessary to establish that the US had exercised effective control over the particular territory in which alleged killings and property damage by the US military took place; nor was it necessary to establish that the US had arrested the individual victims prior to the incidents.¹³¹ The Commission simply stated that, 'where it is asserted that a use of military force has resulted in noncombatant deaths, personal injury, and property loss, the human rights of the noncombatants are implicated.'¹³²

Continuing this trend, in *Alejandro v Cuba* the IAComHR ruled that the capacity of Cuban military pilots to shoot down civilian planes over international waters was sufficient to ground jurisdiction, even though the pilots did not control the territory in which the incident occurred.¹³³ According to the IAComHR, whilst 'jurisdiction' in the American Convention usually refers to persons who are within the territory of a state, it can also encompass extraterritorial actions 'when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad.'¹³⁴

These cases suggest that the extraterritorial violation of a negative obligation (such as an unlawful killing) by a state agent could itself ground jurisdiction, without

¹³¹ *Salas v US* IAComHR Rep No 31/93, Case No 10.573, 14 Oct 1993. The case was declared admissible in 1993 but is still pending a decision on the merits.

¹³² *ibid*, [6].

¹³³ *Alejandro v Cuba* IAComHR Rep No 86/99, Case No 11.589, 29 Sept 1999.

¹³⁴ *ibid*, [23].

the need to establish effective state control over the territory or the individual victim in question. This could be highly significant for the US in the private security context, as it suggests that the American Declaration could bind the US in relation to human rights violations committed by PMSC personnel who are acting as state agents in the context of American military operations outside US territory.

A key uncertainty remains, however, in that the Inter-American system has never exercised jurisdiction over the acts of a member state perpetrated *outside the region*. In all of the IACoMHR cases noted above, the relevant acts took place within the territory of a member of the Organization of American States. It is therefore difficult to assess whether the victims of human rights abuses by PMSCs hired by the US in Iraq or Afghanistan, for example, have any reasonable expectations or rights under the instruments of the Inter-American system. The preamble to the American Convention refers to the intention of states parties ‘to consolidate *in this hemisphere*, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man’.¹³⁵ This might be construed as an implicit geographic limitation on jurisdiction.¹³⁶ On the other hand, the notion of ‘authority and control’ developed by the IACoMHR is extremely broad, and there is no logical reason why such authority and control should be construed as limited to a particular geographic region. Why should the US be taken to be exercising authority and control over Iraqis detained at Guantanamo

¹³⁵ Emphasis added.

¹³⁶ See Hoppe, *State Responsibility* (n 95), 996.

Bay,¹³⁷ but not over Iraqis detained at Abu Ghraib? Indeed, as Meron argued convincingly in 1995:

Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction or *de facto* jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues.¹³⁸

The IACoMHR itself quoted Meron's statement in *Coard v US*¹³⁹ in support of its holding that

each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. *In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.*¹⁴⁰

To be sure, human rights bodies 'must draw the lines that circumscribe the limits on the exercise of their jurisdiction somewhere';¹⁴¹ but the IACoMHR has clearly and consistently drawn that line on the basis of state 'authority and control' rather than on the basis of rigid geographic boundaries.

European Convention on Human Rights

Article 1 of the ECHR provides that the Convention binds states in relation to 'everyone within their jurisdiction'. The European Court of Human Rights (ECtHR)

¹³⁷ See *Precautionary Measures issued by the Inter-American Commission of Human Rights Concerning the Detainees at Guantanamo Bay, Cuba*, IACoMHR 13 March 2002.

¹³⁸ T Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 AJIL 78, 81.

¹³⁹ *Coard v US* (n 130), note 6.

¹⁴⁰ *ibid*, [37] (emphasis added).

¹⁴¹ *Cerna* (n 130), 170.

has recognised a relational concept of extraterritorial jurisdiction, which is grounded on the state's exercise of effective control over a person or over territory.¹⁴²

In *Loizidou v Turkey*, the Grand Chamber of the Court found the Convention to be applicable to individuals acting under the umbrella of Turkish officials in northern Cyprus.¹⁴³ The Court noted that Turkey's effective overall control over the territory in northern Cyprus gave rise not only to an obligation to respect human rights, but also to an obligation to take positive steps 'to secure, in such an area, the rights and freedoms set out in the Convention'.¹⁴⁴ In a series of subsequent cases, the Court emphasised that Turkey's effective overall control over northern Cyprus obliged it to secure in the relevant territory *the entire range* of substantive rights set out in the Convention.¹⁴⁵

Against this background, it is perhaps surprising that the Grand Chamber adopted such a restrictive interpretation of the term 'jurisdiction' in its 2001 decision in *Bankovic v Belgium*.¹⁴⁶ Relatives of four individuals who had been killed in the NATO attacks on a Belgrade broadcasting station had lodged a complaint against several NATO member states, alleging violations of *inter alia* the right to life, the right to freedom of expression and the right to an effective legal remedy. The Court declared the case inadmissible on the basis that the applicants had not been

¹⁴² For a recent analysis of the extraterritorial scope of the ECHR, see S Wills, *Protecting Civilians: The Obligations of Peacekeepers* (OUP, Oxford 2009).

¹⁴³ *Loizidou v Turkey* (App no 15318/89) ECHR 18 Dec 1996.

¹⁴⁴ *ibid*, [62].

¹⁴⁵ *Cyprus v Turkey* (App no 25781/94) ECHR 10 May 2001, [77]; *Djavit An v Cyprus* (App no 20652/92) ECHR 20 Feb 2003, [18]-[23]; *Demades v Turkey* (App no 16219/90) ECHR 31 July 2003.

¹⁴⁶ *Bankovic v Belgium* (App no 52207/99) Inadmissibility Decision, ECHR 12 Dec 2001.

within the jurisdiction of the states concerned at the relevant time. According to the Court, its case law

demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.¹⁴⁷

The Court also pointed out that the Convention is a regional treaty directed toward the 'European legal space' (*espace juridique*), rather than an instrument designed to be applied throughout the world. The Federal Republic of Yugoslavia was simply not a part of this legal space.¹⁴⁸ The notion of legal space triggered considerable speculation. On a limited reading of the judgment, it was no more than a response to an argument raised by the applicants in relation to the specific facts of the case. On a broader reading, however, the notion of 'legal space' implied that any act committed by a state party outside the geographic area covered by the Convention would fall outside the jurisdiction of the state.¹⁴⁹

In more recent decisions, the ECtHR has implicitly moved away from *Bankovic's* narrow approach to jurisdiction and has reaffirmed that, although a state's jurisdictional competence is primarily territorial, the ECHR may apply

¹⁴⁷ *ibid*, [71]. This stands in clear contrast to the IACoMHR's decision in *Alejandro v Cuba*, discussed above (n 133).

¹⁴⁸ *Bankovic v Belgium* (n 146), [79]-[80].

¹⁴⁹ See R Lawson, 'Life after *Bankovic*: On the Extraterritorial Application of the European Convention on Human Rights' in Coomans and Kamminga (eds) (n 110); P Leach, 'The British Military in Iraq: The Applicability of the *Espace Juridique* Doctrine under the European Convention on Human Rights' (2005) Public Law 448; L Condorelli, 'La protection des droits de l'Homme lors d'actions militaires menées à l'étranger' (2005) 32 *Collegium* 89, 100.

extraterritorially where a state exercises effective overall control over territory (including such control falling short of formal occupation) or over an individual.

The leading authority on control over territory is the decision of the Grand Chamber in *Ilascu v Moldova and Russia*, in which the Court found Russia to be responsible for human rights violations on the basis of its effective overall control over Moldovan territory falling short of formal occupation.¹⁵⁰ The Court stated:

According to the relevant principles of international law, a State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – it exercises in practice effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration.¹⁵¹

The Court again recognised the possibility of extraterritorial jurisdiction based on control over territory falling short of occupation in *Issa v Turkey*. Concerning a number of Iraqi shepherds who were shot and mutilated in northern Iraq at a time when there was a large-scale Turkish military operation into Iraq, the Court stated:

The Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, *temporarily, effective overall control of a particular portion of the territory* of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey...¹⁵²

Two aspects of this statement are particularly significant. First, the Court recognised that a state's *temporary* exercise of effective overall control over territory could bring individuals within the jurisdiction of the state, thereby implicitly rejecting the arguments put forward by the respondents in *Bankovic* that the notion of 'effective

¹⁵⁰ *Ilascu v Moldova and Russia* (App no 48787/99) ECHR 8 July 2004.

¹⁵¹ *ibid*, [314].

¹⁵² *Issa v Turkey* (App no 31821/96) ECHR 16 Nov 2004, [74] (emphasis added).

control' entails 'some form of structured relationship existing over a period of time'.¹⁵³ Second, the Court recognised that acts performed by agents of a state party *outside the European legal space* could entail state responsibility. Had Turkey exercised effective overall control over the portion of Iraqi territory in question, the individuals within that territory would have been within Turkish jurisdiction notwithstanding the fact that the area was outside the legal space of the contracting parties. On the evidence, however, the Court was not satisfied that Turkey did in fact exercise effective control over the relevant territory at the time of the victims' deaths.

A third highly significant aspect of the judgment in *Issa v Turkey* is its recognition that the Convention may bind a state extraterritorially in relation to particular *individuals*, irrespective of any effective overall state control over territory. According to the Court, a state may incur responsibility where individuals, though in the territory of another state, are nonetheless under the former state's *authority and control* through its agents operating in the latter state.¹⁵⁴ Citing decisions of the IACoMHR¹⁵⁵ and the Human Rights Committee¹⁵⁶ (*inter alia*), the ECtHR emphasised that 'Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.'¹⁵⁷

¹⁵³ *Bankovic v Belgium* (n 146), [36].

¹⁵⁴ *Issa v Turkey* (n 152), [71].

¹⁵⁵ *Coard v US* (n 130), [7], [39], [41] and [43].

¹⁵⁶ *Lopez Burgos v Uruguay* (n 111), [12.3]; *Celiberti de Casariego v Uruguay* (n 112), [10.3].

¹⁵⁷ *Issa v Turkey* (n 152), [71].

The Court adopted a similar approach in *Öcalan v Turkey*, holding that the Convention bound Turkey in relation to the acts of Turkish forces in assuming custody over the leader of the Kurdish Workers' Party in Kenya before transferring him to Turkey.¹⁵⁸ The Court distinguished the circumstances from those in *Bankovic* on the grounds that the applicant was physically forced to return to Turkey by Turkish officials and was under their 'authority and control' following his arrest and return to Turkey.¹⁵⁹

Thus, although the ECtHR continues to cite *Bankovic* as good authority, its post-*Bankovic* jurisprudence signals a clear shift towards a more flexible notion of jurisdiction based on 'effective overall control' over territory or 'authority and control' over an individual. This would appear to bring the Court closer to the Human Rights Committee and the IACtHR on the question of extraterritorial jurisdiction, and this in turn provides some hope to victims of human rights violations by PMSCs that are hired by an ECHR contracting state, wherever those victims may be located.

Having identified the circumstances in which a victim of PMSC abuse might fall within the jurisdiction of the hiring state for the purposes of HRL, the remainder of this Section assumes the applicability of HRL as its starting point and proceeds to assess the substantive obligations on the hiring state to prevent, investigate, punish and redress PMSC violations of human rights in armed conflict.

¹⁵⁸ *Öcalan v Turkey* (App no 46221/99) ECHR 12 May 2005.

¹⁵⁹ *ibid*, [91].

2 Obligation to prevent human rights violations by PMSCs

The obligation to ensure rights requires states to take positive steps to prevent, investigate, punish and redress private violations of human rights within state jurisdiction.¹⁶⁰ Part I of the Montreux Document thus provides that hiring states

are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.¹⁶¹

If the hiring state of a PMSC fails to take adequate measures to control company behaviour and a contractor violates human rights within state jurisdiction, the state could incur international responsibility. This pathway to state responsibility could assume central importance in cases where the wrongdoing contractor is *not* acting as an agent of the hiring state. As the IACtHR explains, '[a]n illegal act which violates human rights and which is initially not directly imputable to a State...can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation'.¹⁶²

In the context of an armed conflict, the substantive content of the hiring state's HRL obligations must be assessed by reference to the rules of IHL. Chapter IV critically examined the relationship between IHL and HRL, and explained that in

¹⁶⁰ Regarding the right to life, see *Velásquez Rodríguez v Honduras*, Merits, Judgment of 29 July 1988, IACtHR Ser C No 4, [174]-[175]; UNHRC, General Comment 6, UN Doc A/37/40(1982), [3]-[5]; *LCB v UK* (App no 23413/94) ECHR 9 June 1998, [36]. Regarding the prohibition of torture and ill-treatment, see *Costello-Roberts v UK* (App no 13134/87) ECHR Ser A no 247-C (1993), [26]-[28]; *A v UK* (App no 25599/94) ECHR 1998-VI, [22]; *Z v UK* (App no 29392/95) ECHR 10 May 2001, [73]; UNHRC, General Comment 20, Article 7, UN Doc HRI/GEN/1/Rev.1, at 30(1994), [2], [8]; UNCAT (n 108), arts 1, 2, 4, 16.

¹⁶¹ Montreux Document (n 54), Part I, [4].

¹⁶² *Velásquez Rodríguez* (n 160), [172].

certain situations of armed conflict the rules of IHL may modify or derogate from the rules of HRL.¹⁶³ This is particularly important when assessing the obligations deriving from the right to life, since the notion of an ‘arbitrary’ deprivation of life differs between IHL and HRL.¹⁶⁴ Where PMSC personnel participate in hostilities, the scope of the hiring state’s HRL obligation to prevent PMSC killings will essentially be tied to the rules of IHL. On the other hand, where PMSC personnel perform activities like law enforcement or the security of civilian objects, the hiring state’s HRL obligation to prevent PMSC killings will be tied more closely to the ordinary rules of HRL. In relation to the prohibition of torture and ill-treatment, the rules of IHL largely mirror the rules of HRL, with the result that the substantive scope of the hiring state’s preventive obligation will not differ greatly between the two regimes.

With these considerations in mind, this Section critically analyses four specific elements of the hiring state’s obligation to prevent PMSC violations of human rights within state jurisdiction, and it then identifies the specific measures that the hiring state should take in order to fulfil its obligations.

Special measures targeting known sources of danger

States have a heightened duty under HRL to take preventive action targeting known sources of danger, particularly with a view to minimising recurring violations¹⁶⁵ and

¹⁶³ See Chapter IV, Part II-B.

¹⁶⁴ See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Rep 1996, [25].

¹⁶⁵ See General Comment 31 (n 113), [17]; *Neira Alegría v Peru*, Merits, Judgment of 19 Jan 1995, IACtHR Ser C No 20, [19].

controlling individuals who are known to pose a danger to society.¹⁶⁶ This reflects the general nature of the due diligence standard, which demands a degree of diligence that is proportional to the degree of risk in the specific case.¹⁶⁷ Chapter IV argued that this heightened preventive duty applies in relation to PMSCs, particularly given the inherently dangerous nature of some PMSC activities, the ad hoc nature of their recruitment and the fact that the same violations tend to recur within the industry.¹⁶⁸ It follows from this argument that states have an obligation to take special measures to control the PMSCs they hire, over and above the measures that would ordinarily be required in relation to other companies. PMSCs that are known to be particularly aggressive may require particularly stringent control mechanisms.

Planning & controlling security operations to minimise the risk to life

Also highly relevant to the hiring state is the obligation to take the upmost care when planning and carrying out operations that might involve the use of lethal force, in order to minimise any risk to life to the greatest extent possible. This entails a duty *inter alia* to choose means and methods that are proportionate to the legitimate aims of the operation, to take into account contingencies in planning, to allow for an appropriate margin of error, and to consider sufficient alternative options.

¹⁶⁶ See *Mastromatteo v Italy* (App no 37703/97) ECHR 24 Oct 2002.

¹⁶⁷ See Chapter II, text accompanying notes 71-74.

¹⁶⁸ See Chapter IV, text accompanying notes 118-119.

Both the IACtHR and the Human Rights Committee have emphasised the need for the means and methods used by state security forces to be proportionate to the aims of the operation. For example, *Neira Alegría v Peru* involved a riot at a detention centre, during which the authorities delegated control over the centre to the armed forces and over 100 prisoners were subsequently killed.¹⁶⁹ The IACtHR acknowledged that the rioters had been armed and highly dangerous, but nonetheless found that the means and methods employed by the armed forces were ‘disproportionate’ in the circumstances. The death of the three inmates in question therefore constituted a violation of the right to life. The Human Rights Committee likewise stressed the lack of proportionality in the means and methods used by state security forces in *Suarez de Guerrero v Colombia*, leading to a finding that there had been a violation of the right to life.¹⁷⁰

The ECtHR first recognised an implicit duty to plan and control security operations in *McCann v UK*.¹⁷¹ That case concerned an anti-terrorist operation in Gibraltar led by the British Special Air Service, during which the UK forces shot and killed three terrorist suspects. Both the majority and the minority of the Court evaluated the adequacy of the UK’s prospective planning and organisation of its security forces’ operation in assessing whether there had been a violation of the right to life. The majority ultimately concluded that a violation had taken place. The Court once again evaluated a state’s planning and organisation of its security

¹⁶⁹ *Neira Alegría v Peru* (n 165).

¹⁷⁰ *Suarez de Guerrero v Colombia* UNHRC 31 Mar 1982, UN Doc Supp No 40 (A/37/40) at 137.

¹⁷¹ *McCann v UK* (App no 18984/91) ECHR Ser A no 324 (1995); see also A Mowbray, *The Development of Positive Obligations under the ECHR by the European Court of Human Rights* (Hart, Oxford 2004), ch 2.

operations in *Andronicou and Constantinou v Cyprus*, focusing particularly on the authorities' decision to call in the special forces (who were trained to kill) to respond to a 'lovers' quarrel' in a domestic apartment, leading to the killing both of the hostage and the hostage taker.¹⁷²

Whereas both *McCann* and *Andronicou* involved killings by state security forces, in *Ergi v Turkey* the Court made it clear that the obligation to plan and control security operations may give rise to state responsibility for a failure to ensure the right to life, even where the killing in question is *not* attributable to the state.¹⁷³ The case of *Avsar v Turkey* illustrates how this principle could apply to PMSCs.¹⁷⁴ In *Avsar*, the ECtHR applied the *Ergi* principle to civilian volunteers who were performing quasi-police functions in association with the full-time security forces in south-east Turkey. Finding that there had been a breach of the right to life, the Court acknowledged 'the risks attaching to the use of civilian volunteers in a quasi-police function', particularly since the volunteers 'were outside the normal structure of discipline and training applicable to gendarmes and police officers'. In these circumstances, it was not 'apparent what safeguards there were against wilful or unintentional abuses of position carried out by the village guards'.¹⁷⁵ These comments indicate that Turkey's failure to provide adequate training to the civilian volunteers and to subject them to effective discipline was central to the Court's finding that there had been a violation of the right to life.

¹⁷² *Andronicou and Constantinou v Cyprus* (App no 25052/94) ECHR 1997-VI.

¹⁷³ *Ergi v Turkey* (App no 23818/94) ECHR 1998-IV.

¹⁷⁴ *Avsar v Turkey* (App no 25657/94) ECHR 10 July 2001.

¹⁷⁵ *ibid*, [414].

The application of these principles to the private security industry suggests that states have an obligation, first, to consider carefully the military and security tasks that they outsource to private companies and, where they choose to hire PMSCs, to take diligent measures to control the use of force by company personnel so as to minimise the risk to life as far as possible.

Protecting the physical integrity of detainees

Another important aspect of the hiring state's preventive obligation is the duty to take special measures to protect the physical integrity of individuals in state custody, including a duty to prevent attacks by other detainees. Since the well-being of each detainee lies wholly, or in large part, within the exclusive knowledge of the detaining state, strong presumptions of fact will arise in respect of any injuries and deaths occurring during detention.¹⁷⁶ If a person is detained in good health and subsequently dies or suffers injury whilst in custody, the detaining state will be obliged to provide a satisfactory and convincing explanation for the detainee's injuries or death.¹⁷⁷ Thus in the House of Lords case of *Al-Skeini* the UK had an obligation to account for the death of one of the claimants in a British military prison in Iraq.¹⁷⁸ These obligations would apply equally were a PMSC operating the

¹⁷⁶ See *Neira Alegria v Peru* (n 165); *Edwards v UK* (App no 46477/99) ECHR 14 Mar 2002; *Lantsova v Russian Federation* UNHRC 26 Mar 2002, UN Doc CCPR/C/74/D/763/1997; *Pantea v Romania* (App no 33343/96) ECHR 3 June 2003.

¹⁷⁷ See *Juan Humberto Sánchez v Honduras*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 7 June 2003, IACtHR Ser C No 99, [111]; *Salman v Turkey* (App no 21986/93) ECHR 27 June 2000, [100]; *Çakici v Turkey* (App no 23657/94) ECHR 8 July 1999, [85].

¹⁷⁸ *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26.

detention centre rather than a state official, since a state ‘cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals’.¹⁷⁹

It follows that if a state hires a PMSC to work at a detention centre in armed conflict—just as the US hired the PMSCs Titan and CACI to provide interrogators and interpreters at Abu Ghraib prison in Iraq—the state must take steps to ensure, first, that the contractors do not themselves mistreat the detainees and, second, that the contractors protect detainees from attacks by other prisoners.

Special obligations to protect women and children

Lastly, Article 34 of the Convention on the Rights of the Child¹⁸⁰ and Article 3 of the Convention on the Elimination of All Forms of Discrimination against Women,¹⁸¹ both discussed in Chapter IV, effectively impose an obligation on the hiring state to exercise due diligence to prevent PMSCs from having sexual relations with children or committing violent or sexually exploitative acts against women within state jurisdiction.¹⁸²

Positive action to discharge the preventive obligations

To fulfil the various elements of its duty to prevent PMSC violations of human rights, the hiring state will need to take a range of measures to control PMSC activities in

¹⁷⁹ *Costello-Roberts v UK* (n 160), [27]; *Storck v Germany* (App no 61603/00) ECHR 16 June 2005, [103].

¹⁸⁰ Convention on the Rights of the Child (n 123).

¹⁸¹ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 Dec 1979, entered into force 3 Sept 1981) 1249 UNTS 13.

¹⁸² See Chapter IV, text accompanying notes 125-129.

armed conflict. As noted above in Section A in relation to the obligation ‘to ensure respect’ for IHL, the ‘good practices’ section of the Montreux Document recommends (*inter alia*) vetting and training PMSC personnel, ensuring that their contracts contain clear and appropriate rules governing the use of force, and implementing procedures to monitor PMSCs in the field and to report any violations that take.¹⁸³

These measures are particularly important where a PMSC is hired to work in a coercive environment such as a detention centre. The Standard Minimum Rules for the Treatment of Prisoners emphasise the importance of hiring suitable personnel at the outset, stating that the prison administration ‘shall provide for the careful selection of every grade of the personnel, since it is on their integrity, humanity, professional capacity and personal suitability for the work that the proper administration of the institutions depends.’¹⁸⁴ Moreover, ‘[b]efore entering on duty, the personnel shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests’.¹⁸⁵ The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials likewise call for ‘continuous and thorough professional training’.¹⁸⁶ Soft law instruments of this nature can play a useful role in refining and fleshing out states’ obligations under

¹⁸³ See Montreux Document (n 54), Part II, [1]-[23].

¹⁸⁴ Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders (Geneva, 1955) and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, art 46(1).

¹⁸⁵ *ibid*, art 47(2).

¹⁸⁶ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 Aug-7 Sept 1990, [18].

HRL.¹⁸⁷ Article 10 of the UNCAT incorporates these standards into a hard law obligation:

Each State Party shall ensure that education and information regarding the prohibition against torture [or other acts of cruel, inhuman or degrading treatment or punishment¹⁸⁸] are fully included in the training of law enforcement personnel...*and other persons* who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.¹⁸⁹

In relation to PMSC personnel hired as interrogators, states have an obligation to provide clear safeguards during interrogation and custody, and to conduct regular reviews of procedures for detention and interrogation. Article 11 of the UNCAT provides:

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture [or other acts of cruel, inhuman or degrading treatment or punishment].

Both the Human Rights Committee¹⁹⁰ and the IACtHR¹⁹¹ have also emphasised the need for special training programmes for prison, police, and judicial officials in order to prevent torture and ill-treatment.

The Abu Ghraib prisoner abuse scandal of 2003-2004 highlights the importance of these obligations for the hiring state. It was noted above in Section A that approximately thirty-five percent of the contract interrogators working at the prison lacked formal military interrogation training, and neither CACI nor the US

¹⁸⁷ See C Droege, 'Private Military and Security Companies and Human Rights: A Rough Sketch of the Legal Framework' Workshop of the Swiss Initiative on PMCs/PSCs (Küsnacht, Jan 2006), 3.

¹⁸⁸ See UNCAT (n 108), art 16.

¹⁸⁹ Emphasis added.

¹⁹⁰ UNHRC, General Comment 20 (n 160), [11].

¹⁹¹ *Tibi v Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 7 Sept 2004, IACtHR Ser C No 114, [159]-[162].

government had screened prospective employees effectively. These initial failures were exacerbated by the fact that 'there was no credible exercise of appropriate oversight of contract performance at Abu Ghraib', and in some cases contractors may have even 'supervised' public personnel rather than the other way around.¹⁹²

Finally, if a particular PMSC repeatedly violates human rights within state jurisdiction, the hiring state may need to amend its hiring practices and supervisory procedures in relation to that particular company. One example of hiring state behaviour which would appear to fall short of this requirement was the US State Department's continuous use of Blackwater security guards in Iraq for several years following the 2003 invasion (assuming for the sake of this discussion that HRL applied extraterritorially in that particular case). An October 2007 Report of the House of Representatives Committee on Oversight and Governmental Reform documented an extremely high rate of offensive shooting by Blackwater contractors hired to provide 'defensive' security in Iraq, with over 80% of documented incidents resulting in casualties or property damage.¹⁹³ Despite this consistent practice, the Report notes:

There is no evidence in the documents that the Committee has reviewed that the State Department sought to restrain Blackwater's actions, raised concerns about the number of shooting incidents involving Blackwater or the company's high rate of shooting first, or detained Blackwater contractors for investigation.¹⁹⁴

¹⁹² Fay Report (n 75), 52; see also Schooner (n 75), 556-557.

¹⁹³ US House of Representatives Committee on Oversight and Governmental Reform, 'Additional Information about Blackwater USA' (1 Oct 2007), 1.

¹⁹⁴ *ibid*, 2.

In fact, throughout this period Blackwater remained the State Department's company of choice for the provision of protective services in Iraq, receiving \$832 million from government contracts between 2004 and 2006.¹⁹⁵

3 Obligation to investigate, punish & redress PMSC violations

HRL also imposes obligations on states to investigate, prosecute and redress violations of human rights within state jurisdiction. Chapter IV set out the main sources of these obligations, the circumstances in which the obligations will arise in relation to violations by PMSCs in armed conflict, and the remedial action required of a state in a particular case.¹⁹⁶ The present Section applies that analysis to the hiring state of a PMSC in relation to violations of human rights committed by company personnel in armed conflict overseas. The discussion first considers the hiring state's obligation to investigate and prosecute PMSC violations of human rights, and then considers the obligation to ensure that victims can access adequate procedures to have their claims heard and to obtain compensation.

Criminal investigation & prosecution

Human rights bodies have consistently emphasised the importance of effective criminal investigations and prosecutions in relation to killings and ill-treatment within state jurisdiction. Criminal investigations that are capable of leading to the identification and punishment of the perpetrators are necessary not only to provide justice to individual victims as part of an effective remedy, but also more generally to

¹⁹⁵ *ibid*, 5.

¹⁹⁶ See Chapter IV, Part II-D.

ensure that domestic laws prohibiting killings and ill-treatment are enforced in order to render the substantive rights effective in practice.¹⁹⁷

A state's obligation to investigate and (where appropriate) prosecute arises wherever an individual raises an arguable claim to have suffered a human rights violation within state jurisdiction, including violations by private actors such as PMSCs.¹⁹⁸ As explained in Chapter IV, in situations of armed conflict the notion of an 'arguable' claim must be assessed by reference to the relevant rules of IHL as well as HRL.¹⁹⁹ This is particularly important where it is alleged that a PMSC has violated the right to life of the victim, since the substantive content of the right to life differs considerably between IHL and HRL.²⁰⁰

Where a PMSC operates in an armed conflict outside the territory of the hiring state, it may be extremely difficult for that state to conduct an effective investigation into allegations of human rights abuses by company personnel. While these difficulties do not relieve the hiring state of its investigative obligations, they will of course be taken into account when assessing whether the state has met the due diligence standard. The measures taken by the US following the Blackwater shootings in Baghdad on 16 September 2007 provide an example of action that would probably fulfil the hiring state's investigate obligation in this context

¹⁹⁷ See, eg, *Assenov v Bulgaria* (App no 24760/94) ECHR 1998-VIII, [102]; *Labita v Italy* (App no 26772/95) ECHR 6 April 2000, [131].

¹⁹⁸ See, eg, *Secic v Croatia* (App no 40116/02) ECHR 31 May 2007, [53]; *MC v Bulgaria* (App no 39272/98) ECHR 4 Dec 2003, [151]; *Ergi v Turkey* (n 173), [82]; *Kaya v Turkey* (App no 22535/93) ECHR 28 Mar 2000, [108]; *Velásquez Rodríguez* (n 160), [176], [182].

¹⁹⁹ See Chapter IV, text accompanying notes 140-142.

²⁰⁰ See *Nuclear Weapons* advisory opinion (n 164), [25].

(assuming, for the sake of the present discussion, that the US was bound by HRL in relation to Blackwater's conduct). The House of Representatives Committee on Oversight and Government Reform published a report on the incident on 1 October 2007, and the following day the Committee held a hearing in order to reassess Blackwater's continued presence in Iraq and to evaluate the State Department's response to the shootings.²⁰¹ A criminal investigation ensued, leading to the indictment of five Blackwater employees in December 2008 on several counts of manslaughter and attempted manslaughter.²⁰²

Clearly the hiring state's investigation will only be capable of leading to a prosecution if the state has criminal jurisdiction over the PMSC activities in question. This can be complicated where the PMSC is operating outside state territory. Since civilians' crimes ordinarily fall within the jurisdiction of the state in which they are committed, a PMSC employee operating outside the territory of the hiring state would ordinarily face prosecution in the host state rather than the hiring state. Such prosecution may be unlikely, however, where the host state is engaged in an armed conflict on its territory, and in some cases foreign contractors may enjoy immunity from local criminal jurisdiction by virtue of an agreement like Coalition Provisional Authority (CPA) Order No 17, which granted foreign contractors in Iraq immunity from local laws in matters relating to their contracts.²⁰³

²⁰¹ US House of Representatives Report (n 193).

²⁰² See K Zoepf, 'US Prosecutor in Blackwater Shooting Case Arrives in Baghdad' *New York Times* (7 Dec 2008); J Sturcke, 'Blackwater Security Guards Face Manslaughter Charges' *Guardian* (8 Dec 2008).

²⁰³ CPA Order No 17 (27 June 2004), s 4(2). Contractors' immunity from prosecution under Iraqi law was lifted on 1 January 2009: see D Pallister, 'Foreign Security Teams to Lose Immunity from Prosecution in Iraq' *Guardian* (27 Dec 2008).

An examination of the events following the Abu Ghraib prison scandal of 2003-2004 highlights the inadequacies in the US rules for extraterritorial criminal jurisdiction at that time, particularly when coupled with the contractor immunity granted by CPA Order Number 17. Investigators referred four contractors to the US Department of Justice after finding that they had contributed to the prisoner abuse, and two contractors for failing to report it. However, not all of those contractors could be prosecuted under the Military Extraterritorial Jurisdiction Act (MEJA),²⁰⁴ and none was covered by the Uniform Code of Military Justice (UCMJ).²⁰⁵ The US has since amended both the MEJA and the UCMJ in order to permit the prosecution, in certain circumstances, of PMSC employees who commit crimes overseas. Each instrument will now be examined in turn.

The MEJA effectively establishes federal criminal jurisdiction over certain offences committed outside the US by individuals (including both US and non-US nationals) 'employed by or accompanying the [US] armed forces' in situations where the host nation is unable or unwilling to prosecute.²⁰⁶ The requirement that individuals be employed by or accompanying US forces encompasses contractors who are hired by the Department of Defense (DoD) or any other federal agency or any provisional authority, to the extent that they are employed in support of a DoD

²⁰⁴ Military Extraterritorial Jurisdiction Act 2000.

²⁰⁵ Uniform Code of Military Justice 10 USC § 801 *et seq*; see Fay Report (n 75); R Merle and E McCarthy, '6 Employees from CACI International, Titan Referred for Prosecution' *Washington Post* (26 Aug 2004).

²⁰⁶ 18 USC § 3261(b). The Act applies to federal criminal offences that are punishable by imprisonment for more than one year: 18 USC § 3261(a).

mission overseas.²⁰⁷ This requirement excludes, however, contractors who are hired by the State Department to guard embassies or government officials, thus excluding the Blackwater employees who killed seventeen Iraqi civilians whilst defending a State Department motorcade in Baghdad in September 2007. The Act also excludes contractors who are nationals of or ordinarily resident in the host nation, thus excluding the large number of Iraqi and Afghan nationals who work for PMSCs accompanying the US armed forces in Iraq and Afghanistan.²⁰⁸ Whilst the MEJA provides one potential mechanism for the US to prosecute crimes committed by PMSC personnel working for the US in foreign armed conflicts, its relatively narrow scope has combined with general prosecutorial passivity to undercut its utility in this context.

The UCMJ represents a more promising tool for US prosecutors seeking to hold wrongdoing PMSC personnel to account. A January 2007 amendment to the UCMJ brought private contractors in contingency operations (such as Iraq and Afghanistan) within US courts martial jurisdiction.²⁰⁹ In September 2007, the US Deputy Secretary of Defense issued a directive to senior officers in the Pentagon, reminding them that all DoD contractors are subject to UCMJ jurisdiction and that '[c]ommanders also have available to them contract and administrative remedies, and other remedies, including discipline and other possible criminal prosecution.'²¹⁰ The first prosecution of a PMSC employee under the UCMJ was conducted in June 2008, albeit for very

²⁰⁷ 18 USC § 3267(1)(A).

²⁰⁸ 18 USC § 3267(1)(c) and (2)(c).

²⁰⁹ See F Stockman, 'Contractors in War Zones Lose Immunity' *Boston Globe* (7 Jan 2007).

²¹⁰ US Deputy Secretary of Defense, 'Management of DoD Contractors and Contractor Personnel Accompanying US Armed Forces in Contingency Operations Outside the US' (25 Sept 2007), 2.

minor offences.²¹¹ Whilst the UCMJ is broader than the MEJA as applied to PMSC personnel, it still excludes contractors who are not serving with or accompanying US forces in the field. Moreover, given that the trial of civilians in military courts raises serious due process concerns under the US constitution, it is highly likely that the application of the UCMJ to private contractors will be challenged in the future.²¹²

The recent amendments to the UCMJ bring it more into line with the equivalent UK legislation, pursuant to which civilians accompanying the British armed forces can be tried by court-martial if they commit a criminal offence overseas.²¹³ Although the UK system does not raise the same constitutional issues as the UCMJ in the US, it is unclear whether it is compatible with the defendant's right to a fair trial in Article 6 of the ECHR.²¹⁴

In short, both the US and the UK now have jurisdiction to prosecute certain human rights violations committed by PMSCs overseas. The key test for HRL will be whether the authorities exercise due diligence in pursuing these prosecutions in practice.

²¹¹ *US v Alaa 'Alex' Mohammed Ali* (22 June 2008).

²¹² See *Reid v Covert* 352 US 77 (1956) and *Kinsella v Krueger* 351 US 470 (1956), in which the Supreme Court declined to extend the UCMJ to civilians in criminal cases.

²¹³ See Army Act 1955, ss 70(2), 209(2); Air Force Act 1955, ss 70(2), 209(2); UK Law Commission, 'The Territorial and Extraterritorial Extent of the Criminal Law' (Rep No 19, 1978), 34-35.

²¹⁴ See *Incal v Turkey* (App no 22678/93) ECHR 9 June 1998, [71]-[73].

Access to justice and compensation

Finally, where an individual raises an arguable claim that the hiring state bears responsibility for a PMSC violation, either because the PMSC employee was acting as a state agent or because the state failed to exercise due diligence to prevent, investigate or punish the violation, the state must provide procedures to hear the victim's claim against state authorities and must pay compensation where appropriate.²¹⁵ This obligation increases the likelihood that victims of PMSC abuses will obtain redress and that wrongdoing PMSCs and/or their employees will be held to account at the domestic level.

III. Conclusion

International law imposes a number of obligations on the hiring state of a PMSC to exercise due diligence and take positive measures to prevent, investigate, punish and redress PMSC violations of international law. The contractual relationship between the hiring state and the PMSC places the state in an excellent position to influence the company's behaviour in the field, particularly in the case of highly-developed states such as the US and the UK which have the resources and institutional capacity to meet a high threshold of diligence.

The obligation to ensure respect for IHL in Common Article 1 establishes a minimum threshold of mandatory regulation for all states that hire PMSCs, whether

²¹⁵ See General Comment 31 (n 113), [8]; *Velásquez Rodríguez* (n 160), [176], [182]; *Osman v UK* (n 85); A Clapham, 'The European Convention on Human Rights' in C Scott (ed) *Torture as Tort* (Hart, Oxford 2001), 515-516; UNCAT (n 108), art 14.

in international or non-international armed conflict. The broad scope and universal applicability of this obligation render it a powerful tool for promoting greater state control and accountability in the private security industry, particularly in relation to PMSCs that operate outside the territory of their hiring state. HRL can also impose important obligations on the hiring state to take positive steps to control PMSC behaviour, and these obligations could provide a key mechanism for victims of PMSC abuse to seek redress. However, constraints on extraterritorial applicability limit the utility of HRL in relation to PMSC operations outside the hiring state's territory. This reflects the traditional conception of human rights as protections for individuals against their own government. All of the main human rights treaties will bind the hiring state overseas where it is an occupying power or where it otherwise exercises effective control over the territory in which the PMSC operates or over the individual victim in question. The jurisprudence of the IACoMHR indicates that the American Convention will bind the hiring state in relation to an even greater range of PMSC activities overseas, although it is not clear whether that instrument imposes obligations on states parties outside the Americas. In any case, where human rights obligations are applicable to the hiring state in armed conflict, HRL's sophisticated individual complaint procedures could provide an effective mechanism to scrutinise PMSC behaviour through the responsibility of the hiring state, and the state's obligation to provide an effective remedy offers victims hope of obtaining compensation and holding PMSCs to account under domestic law.

The hiring state's due diligence obligations under IHL and HRL could play a key role in establishing state responsibility for PMSC violations in cases where the

wrongdoing PMSC employee is *not* acting as an agent or official of the hiring state—that is, where the contractor is neither part of the state’s armed forces, nor exercising governmental authority, nor acting under the hiring state’s instructions, direction or control. It follows that the relative importance of these obligations in enhancing state responsibility will depend on the scope given to the rules of attribution. The stricter the interpretation of those rules, the more difficult it will be to attribute PMSC misconduct directly to the hiring state and the greater the role for the state’s due diligence obligations under IHL and HRL. Further discussion of these due diligence obligations could also play an important prospective role in setting minimum standards of conduct for all states that outsource their military and security activities to PMSCs. This in turn could enhance state control and transparency within the private security industry and improve overall respect for IHL and human rights in the field.

VI. Obligations of the home state

International law has thus far been reluctant to impose any broad obligations on the home state of a multinational corporation to regulate the company's activities overseas. This stands to reason since a state is not generally responsible for the wrongful acts of its nationals abroad, unless of course such acts can be attributed to it under the rules of state responsibility, and there is no general obligation on a state to prevent harmful conduct by its nationals overseas. It follows that the home state of a PMSC—that is, the state in which the company is based or incorporated—will *not* incur international responsibility for all violations committed by that PMSC overseas merely by virtue of the territorial link between the state and the company.

Nonetheless, international law imposes a number of obligations on the home state of a PMSC to take certain positive steps to prevent the company from engaging in harmful conduct overseas and to punish any such conduct that occurs. Where an obligation of this nature applies and the home state fails to take the necessary measures, misconduct by the PMSC may give rise to the state's responsibility under international law. The state may fail to prevent local PMSCs from engaging in terrorist activities overseas, for example, or from providing military services to rebels attempting to overthrow the government of a foreign state; indeed there have been reports of PMSCs providing these services in the past.¹ Responsibility in such cases

¹ See UK Foreign Commonwealth Office Green Paper, 'Private Military Companies: Options for Regulation' (Feb 2002), 36-38; K O'Brien, 'Military-Advisory Groups and African Security: Privatised Peacekeeping?' (1998) 5 (3) Intl Peacekeeping 78.

arises neither from the attribution of the PMSC misconduct to the home state, nor from the state's complicity in that misconduct, but from the state's *own failure* to fulfil its obligation of prevention or punishment.²

Part I of this Chapter discusses the general principle in the *Corfu Channel* case and assesses the extent to which it may apply to the modern private security industry. The subsequent four Parts then examine four specific fields of international law which may impose pertinent obligations on the home state of a PMSC: the norm of non-intervention in the internal affairs of states (discussed in Part II), the law of neutrality (Part III), international humanitarian law (Part IV) and human rights law (Part V).

I. Obligation to prevent private acts harmful to other states?

The ICJ recognised in the *Corfu Channel* case the 'general and well-recognised' principle that every state has an obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other states.'³ This derives from the fundamental principle of state sovereignty, which not only grants to states the right to decide what acts shall or shall not be done within their territory, but also imposes

² Complicity would require positive state assistance in the commission of the activities: see *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, (Merits) (26 Feb 2007), [432]; ILC Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001) II (2) YBILC, art 16; R Ago, 'Fourth Report on State Responsibility' (1972) II YBILC, [65].

³ *Corfu Channel (UK v Albania)* (Merits) ICJ Rep 1949, 22.

an obligation on states to take certain positive measures to secure, within their territory, respect for the sovereignty of other states.⁴

Corfu Channel involved Albanian responsibility for mine explosions which struck and damaged two British destroyers in Albanian territorial waters. Although the Court accepted that Albania had not laid the mines, it concluded from the evidence that the laying of the mines could not have been accomplished without the knowledge of the Albanian government. That knowledge gave rise to an obligation on the part of Albania to take specific measures to prevent the mines from causing harm to the vessels of other states, namely, to notify shipping generally of the existence of the minefield and to warn the approaching British ships of the imminent danger. Albania's failure to take those measures gave rise to its international responsibility for the damage caused to UK vessels by the explosion of the mines.

The Court held that the obligation of prevention is based on

certain general and well-recognised principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.⁵

Although in *Corfu Channel* the damage to the injured state (the UK) took place in the territory of the state that harboured the initial source of danger (Albania), one could apply the same general principle to cases in which the damage took place in the territory of the injured state or a third state. As Brownlie explains,

⁴ See WE Hall, *The Rights and Duties of Neutrals* (Longmans, Green, London 1874), 16-18; MR García-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* (Martinus Nijhoff, The Hague 1962), 50-51; UN Secretariat, *Survey of International Law*, UN Doc A/CN.4/1 Rev. 1 (1949), 34-35.

⁵ *Corfu Channel* (n 3), 22.

the principles at work in the *Corfu Channel* Case apply in those cases in which the harm to other states occurs beyond the boundaries of the state harbouring the source of danger. Activities of this class include the operations of armed bands and pirates, always assuming that the state is liable for failing to control rather than actual control or connivance.⁶

In relation to the prohibition of the use of force, which was in issue in *Corfu Channel* itself, it is widely accepted that states have an obligation to take positive steps to prevent private acts within state territory that are directed against the territorial integrity of another state.⁷ Beyond the use of force context, the general principle on which the ICJ relied in *Corfu Channel* forms the basis for a number of more specific obligations which can be broadly grouped together as obligations to prevent ‘transboundary harm’.⁸ Such obligations are well-established in (*inter alia*) international environmental law,⁹ international law on terrorism,¹⁰ the prohibition of intervention into the internal affairs of other states,¹¹ and the law of neutrality.¹² The latter two fields are particularly pertinent to this Thesis and are examined in Parts II and III of this Chapter. In addition, specific duties of prevention are contained in a number of treaties in various contexts, such as the obligation to prevent genocide in Article 1 of the Genocide Convention.¹³ Although in practice the

⁶ I Brownlie, *State Responsibility* (Clarendon Press, Oxford 1983), 182.

⁷ See, eg, UNGA Res 2625 (XXV) (24 Oct 1970) UN Doc A/8028.

⁸ See R Bratspies and R Miller (eds), *Transboundary Harm in International Law* (CUP Cambridge 2006).

⁹ See *Trail Smelter Arbitration* (1938) 2 RIAA 1905; ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities with Commentaries (2001) II (2) YBILC; F Francioni and T Scovazzi (eds), *International Responsibility for Environmental Harm* (Graham & Trotman London 1991); T Gehring and M Jachtenfuchs, 'Liability for Transboundary Environmental Damage: Towards a General Liability Regime?' (1993) 4 EJIL 92.

¹⁰ See UNGA Res 49/60 (9 Dec 1994) UN Doc A/RES/49/60.

¹¹ See Res 2625 (n 7), [2].

¹² See Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 Oct 1907, entered into force 26 Jan 1910) 205 Consol TS 299 (Hague V), art 5.

¹³ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 Dec 1948, entered into force 12 Jan 1951) 78 UNTS 277.

lack of jurisprudence in other fields might appear to limit the scope of the general obligation enunciated in *Corfu Channel*, this lack of jurisprudence does not necessarily exclude the existence of a preventive duty in other contexts. In principle, the reasoning of the ICJ in *Corfu Channel* could certainly be applied in other fields, and this provides scope for the development of the traditional rules of international law to accommodate the modern private security industry.

Once it is shown that international law imposes an obligation on the home state to take positive steps to prevent a particular PMSC activity within state territory, two additional factors must be established before that state can incur responsibility for a violation of its obligation: first, there must be a failure by the state to take adequate preventive measures; and, second, there must be a specific instance of the prohibited PMSC activity in question. As explained in Chapter II of this Thesis, a state's failure to take adequate preventive steps may result either from broad structural inadequacies in the state system or from the failure of individual state agents to *use* that system diligently to prevent PMSC misconduct in a particular case. Thus, a state cannot escape liability for failing to prevent a prohibited PMSC activity simply because it had previously failed to enact laws that would have enabled its administrative and judicial authorities to prevent or suppress that activity. In *Alabama Claims*, for example, Britain could not plead the insufficiency of its

neutrality legislation to escape liability to the US for the violation by private individuals of British neutrality.¹⁴

Obligations of prevention generally entail a due diligence standard of conduct, requiring states to take all measures reasonably within their power to prevent the prohibited activities, as far as possible. Chapter II critically examined the notion of due diligence and noted that it entails a 'flexible reasonableness standard adaptable to the particular facts and circumstances'.¹⁵ While the precise requirements of due diligence will depend on the particular obligation in question, factors relevant to the assessment may include the risk that the individual's activities will give rise to a violation of IHL, the level of influence that the state exercises over the PMSC in question, and the resources that are available to the state to take preventive measures.

Bearing in mind these general comments, the remaining four Parts of this Chapter examine four specific fields of international law in order to identify the most pertinent obligations of prevention on the home state of a PMSC: the prohibition of intervention, the law of neutrality, international humanitarian law (IHL) and human rights law (HRL).

¹⁴ *Alabama Claims (US v Britain)* 1871; see also *Baldwin (US) v Mexico* (11 April 1838) in JB Moore, *History and Digest of the International Arbitrations to which the US has been a Party* (GPO, Washington 1898), 2623; *Noyes* (1933) 6 RIAA 308, 311; *Kennedy* (1927) 4 RIAA 194, 198; WE Hall, *International Law* (8 edn, Clarendon Press, Oxford 1924), 641-2; H Lauterpacht, 'Revolutionary Activities by Private Persons against Foreign States' (1928) 22 AJIL 105, 128; E Borchard, *Diplomatic Protection of Citizens Abroad* (Banks Law Publishing, New York 1928), § 86.

¹⁵ R Barnidge, *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (CUP, Cambridge 2007), 138.

II. The norm of non-intervention

It is a fundamental tenet of international law that a state must not intervene, directly or indirectly, in the affairs of another state. This principle not only prohibits interventions carried out by state agents and officials, but it also imposes an obligation on states to take certain positive steps to prevent or punish egregious interventions by private actors operating from state territory.

This Part considers the application of the norm of non-intervention to the modern private security industry. In particular, it examines the situation where a PMSC based or incorporated in one state (the home state) is hired to provide military or security services in another state (the host state), in order to help fight a civil war or carry out a coup against the government of the host state. In such a scenario, the PMSC may be hired either by a third state or by a rebel group seeking to overthrow the host state government.

Although the majority of PMSCs denounce the provision of services to rebel groups seeking to overthrow a foreign government, there have been reports of PMSCs working for such groups in the past. For example, the 2002 UK Green Paper notes that Laurent Kabila's rebel forces allegedly hired Omega Support Ltd and International Defence and Security to fight against President Mobutu in the former Zaire in 1996-1997.¹⁶ After Kabila became President of the newly-named Democratic Republic of the Congo, rebels fighting against his government reportedly

¹⁶ UK Green Paper (n 1), 36-37.

hired SafeNet in 1998 to provide military services.¹⁷ Similarly, the Florida-based PMSC AirScan reportedly provided military support to rebels in Uganda in 1997-1998,¹⁸ and may have provided weapons to rebels in the Sudan.¹⁹ There have also been reports of PMSCs being hired by the government of a state that is attempting to overthrow the government of another state. For example, O'Brien notes that the Angolan MPLA government hired AirScan in October 1997 and then just weeks later overthrew the democratically elected government in Congo-Brazzaville.²⁰ These incidents illustrate that disreputable PMSCs acting on the fringes of the industry could trigger the international responsibility of their home state for a failure to comply with the norm of non-intervention.²¹

The first Section of this Part identifies the relevant obligations on the home state of a PMSC under the norm of non-intervention. Section B then considers the precise PMSC activities that the home state is obliged to prevent or punish, and Section C identifies the positive action that the home state should take to discharge these obligations.

¹⁷ *ibid*, 38.

¹⁸ *ibid*, 36.

¹⁹ J Peck, 'Re-Militarising Africa for Corporate Profit' (Oct 2000) Z-Magazine.

²⁰ O'Brien (n 1).

²¹ In addition, in June 2007 the US charged eleven individuals with conspiring to overthrow the Laos government. Although no PMSCs were involved, this incident demonstrates the potential market in the US for private actors to help overthrow a foreign government: see US Dept of Justice Press Release 4 June 2007 <http://www.usdojgov/usao/cae/press_releases/docs/2007/06-04-07JackPressRIspdf> (accessed 25 Aug 2009).

A. Sources of the norm of non-intervention

There are two main sources of rules governing the legality of intervention: the UN Charter and customary international law. The UN Charter contains a prohibition of the use of force by states and a prohibition of intervention by the UN, but it does not explicitly impose an obligation of non-intervention on states. Article 2(4) provides that all member states must 'refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations'. Article 2(7) prohibits the UN from intervening 'in matters which are essentially within the domestic jurisdiction of any state'. Although in its terms Article 2(7) is merely a rule of constitutional competence for an international organisation, it is commonly regarded as reflecting the general principle of non-intervention.²² Article 2(1), concerning sovereign equality, and Article 1(2), concerning the equal rights of peoples and their right of self-determination, provide further legal bases for the principle of non-intervention.²³

The ICJ made it clear in *Nicaragua* that the prohibition of intervention also constitutes an essential principle of customary international law.²⁴ The Court

²² See D McGoldrick, 'The Principle of Non-intervention: Human Rights' in AV Lowe and C Warbrick (eds) *The UN and the Principles of International Law* (Routledge, London 1994), 88.

²³ See M Sahovic, 'Non-Intervention in the Internal Affairs of States' in M Sahovic (ed) *Principles of International Law Concerning Friendly Relations and Cooperation* (Oceana Publications, New York 1969), 249-250.

²⁴ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)* (Merits) ICJ Rep 1986, [202].

expressly stated that the formulation in General Assembly Resolution 2625 (XXV) (1970)²⁵ reflects the customary rule.²⁶ Paragraph 1 of that Resolution provides:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are in violation of international law.

Paragraph 2 provides:

...Also, no State shall organise, assist, foment, finance, incite *or tolerate* subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.²⁷

The word 'tolerate' in Paragraph 2 is crucial to the current analysis. According to the Oxford English Dictionary, to 'tolerate' X is 'to allow [X] to exist or to be done or practised without authoritative interference'.²⁸ It is generally accepted that the obligation not to tolerate the activities identified in Resolution 2625 requires states to take positive steps and exercise due diligence to prevent those activities within state territory.²⁹ Some earlier formulations of the obligation made this clear. For example, Article 1 of the 1928 Convention on the Duties and Rights of States in the event of Civil Strife obliges the contracting parties 'to use all means at their disposal to prevent the inhabitants of their territories, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the

²⁵ Res 2625 (n 7). This essentially reproduced the formulation in UNGA Res 2131 (XX) (21 Dec 1965) UN Doc A/6014. For a detailed account of the drafting of Resolution 2625, see Sahovic (ed), *Principles of International Law Concerning Friendly Relations and Cooperation* (n 23), 219-276.

²⁶ *Nicaragua* (n 24), [264].

²⁷ Emphasis added.

²⁸ J Simpson and E Weiner, *Oxford English Dictionary* (2 edn, Clarendon Press, Oxford 1989), 200.

²⁹ See Q Wright, 'Subversive Intervention' (1960) 54 AJIL 521, 531; AVW Thomas and AJJ Thomas, 'International Legal Aspects of the Civil War in Spain, 1936-39' in R Falk (ed) *The International Law of Civil War* (Johns Hopkins Press, Baltimore 1971), 154; F Lin, 'Subversive Intervention' (1963) 25 U Pitt L Rev 35, 38; García-Mora (n 4).

purpose of starting or promoting civil strife'.³⁰ Having identified the customary obligation of prevention reflected in Resolution 2625, the next step is to identify the precise PMSC activities to which the obligation applies.

B. Prohibited PMSC activities

PMSC involvement in 'subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State' is a precondition to the international responsibility of the home state of that PMSC. This Section examines that formulation in greater detail.

1 '...subversive, terrorist or armed activities...'

The term 'subversive activities' in Resolution 2625 refers to acts that are intended or likely to incite revolt against the government. It is usually discussed in the context of propaganda against a foreign government or infiltration into the political organisations of another state, a context which is not pertinent to this Thesis.³¹ The norm of non-intervention does not generally require states to prevent criticism of, or propaganda directed against, other states or governments on the part of private persons; indeed, such a requirement would undermine the fundamental right of freedom of expression.³² States are required, however, to exercise due diligence to suppress private propaganda that *directly* incites the overthrow of the government

³⁰ Convention on the Duties and Rights of States in the event of Civil Strife (20 Feb 1928) 134 LNTS 25.

³¹ See, eg, Wright, 'Subversive Intervention' (n 29), 529-533; Lauterpacht (n 14), 126.

³² See R Jennings and A Watts (eds), *Oppenheim's International Law* (9 edn Longman Harlow 1992), 393, 403-406; Wright, 'Subversive Intervention' (n 29), 530-531.

of another state, at least where there exists a 'clear and present danger' that such incitement will succeed.³³ Contracts involving the provision of military advice/training by a PMSC based or incorporated in one state to rebel forces operating in another state could constitute 'subversive activities' if that advice/training was intended or likely to *directly* incite revolt against the government of the host state. Other PMSC services, however, would be unlikely to fall within the scope of 'subversive activities' for the purposes of Resolution 2625.

The term 'terrorist activities' is more complex, as it covers a wide range of diverse criminal acts linked to the somewhat elusive notion of 'terrorism'.³⁴ The basic element of terrorism is that it is done with some kind of political motive, as reflected in one definition in General Assembly Resolution 49/60 (1994): 'Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes.'³⁵ Yet it has proved impossible to pin down the precise elements that distinguish terrorism from ordinary criminal activity and to express those elements in an internationally-accepted legal definition.³⁶ Higgins discussed this difficulty in 1997 and concluded that terrorism is 'a term without any legal significance...a convenient way of alluding

³³ See Wright, 'Subversive Intervention' (n 29), 531.

³⁴ For a detailed analysis of states' obligations to prevent terrorism, see Barnidge (n 15), chs 4-5.

³⁵ UNGA Res 49/60 (9 Dec 1994) UN Doc A/RES/49/60. Cassese considers this to be 'an acceptable definition of terrorism': see A Cassese, *International Law* (2 edn, OUP, Oxford 2005), 449.

³⁶ See generally B Saul, *Defining Terrorism in International Law* (OUP, Oxford 2006).

to activities, whether of states or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.’³⁷

Notwithstanding the absence of any agreed definition of terrorism in international law, there is now widespread agreement on how to identify certain specific terrorist activities. International efforts to define and criminalise these activities increased dramatically following the attacks of 11 September 2001 and the adoption of Security Council Resolution 1373, which calls on states to become parties to the various international instruments on terrorism.³⁸ Around two-thirds of UN member states have either ratified or acceded to at least 10 of the 16 international counter-terrorism instruments, and there is no longer any country that has neither signed nor become a party to at least one of them.³⁹ These instruments prohibit various activities linked to terrorism including terrorist financing, aircraft hijacking, hostage taking, civil aircraft safety, airport violence, attacks on diplomats, nuclear terrorism and terrorist bombings. Thus, in this difficult domain, states ‘prefer to draw up Conventions prohibiting individual sets of well-specified acts’ rather than articulating a comprehensive international definition of terrorism as such.⁴⁰ Returning to the non-intervention analysis, a sensible approach would be to construe the term ‘terrorist activities’ in Resolution 2625 as encompassing the

³⁷ R Higgins, ‘The General International Law of Terrorism’ in R Higgins and M Flory (eds) *Terrorism and International Law* (Routledge, London 1997) 13, 28; see also R Baxter, ‘A Sceptical Look at the Concept of Terrorism’ (1974) 7 (2) *Akron L Rev* 380.

³⁸ UNSC Res 1373 (28 Sept 2001) UN Doc S/RES/1373.

³⁹ See UN Security Council Counter-Terrorism Committee <<http://www.un.org/sc/ctc/laws.html>> (accessed 30 Aug 2009).

⁴⁰ A Cassese, *International Criminal Law* (OUP, Oxford 2003), 123; see also J Pejić, ‘Terrorist Acts and Groups: A Role for International Law?’ (2004) *BYBIL* 71, 95-96.

commission, attempted commission or conspiracy to commit any of the core activities defined in the 16 international counter-terrorism instruments mentioned above, as well as the provision of direct material support (such as money, weapons, or expert advice or training) for those activities.⁴¹ This conception would encompass PMSCs contracted to provide military/security services to help a client plan or carry out any of the core activities prohibited by the 16 counter-terrorism instruments.

Finally, ‘armed activities’ in Resolution 2625 is a more general term which essentially encompasses any organised activities that utilise weapons with the intention of causing serious damage to persons or property. That is not to say that PMSC personnel would themselves need to engage in offensive combat or even bear arms in a foreign state in order to fall within the scope of this term. Rather, as in the case for terrorist activities, a PMSC would seem to fall within the term ‘armed activities’ for the purposes of the state’s obligation in Resolution 2625 if it provided military or security services to help a client plan or carry out activities of this nature.

2 ‘...directed towards the violent overthrow of...’

In assessing whether a particular PMSC activity may give rise to the responsibility of the home state, it is also necessary to examine the *purpose* towards which that activity is directed, since Resolution 2625 imposes on states a duty to prevent only those activities that are ‘directed towards the violent overthrow of the regime of

⁴¹ In relation to material support see, eg, Council of Europe Convention on the Prevention of Terrorism 2006 (adopted 16 May 2005, entered into force 1 June 2007) CETS No 196, s 7; UK Terrorism Act 2006, s 6; US Patriot Act 2001, s 805; US Intelligence Reform and Terrorism Prevention Act 2004, s 6603.

another state'. Indeed, this unlawful objective is the very essence of the prohibition of intervention.

Where a PMSC based or incorporated in one state (the home state) enters into a contract with a rebel group that is seeking to overthrow the government of another state (the host state) in a violent manner, and the PMSC is aware of that objective, the activities of the PMSC under the contract will be 'directed towards the violent overthrow' of the regime of the host state. Such knowledge may be inferred from the surrounding circumstances, particularly in the context of a military coup or civil war against the incumbent government. On the other hand, where the PMSC enters into a contract with the government of a third state (the hiring state), rather than a rebel group, the overall objective of the operation may be less clear. The third state may deny that it is attempting to overthrow the government of the host state, or it may claim that it has been invited by the government of the host state to assist in quelling internal unrest. In such cases, the objective of attempting violently to overthrow the government of another state would need to be reasonably clear from the terms of the contract or the nature of the operation, or both, in order to fall within the formulation in Resolution 2625.

3 '...the regime of another state.'

As the obligation not to 'tolerate' applies only to activities directed towards the violent overthrow of the regime of another state, it is necessary to determine how to identify a particular regime as the government. A regime is generally recognised as the legitimate government of a state when it exercises *de facto* control over state

territory.⁴² Whereas a widely-recognised government has the sovereign right to request foreign assistance to suppress internal unrest or simply to enhance its military strength,⁴³ the provision of aid to a rebel group is unequivocally unlawful—even after a full-scale civil war has erupted and control over state territory is divided between the warring parties.⁴⁴ Some commentators contend that aid to the government is also prohibited after the conflict has reached the threshold of a civil war,⁴⁵ whereas others argue that such aid must be frozen at pre-civil war levels.⁴⁶ Regardless of whether it retains the sovereign right to request outside assistance, the government of a state generally continues to represent the state in its international relations well beyond the moment that it loses control of the country and until the time that another, identifiable group has gained control.⁴⁷ For example, in the 1990s President Kabbah's government continued to represent Sierra Leone in the General Assembly even after he had fled to Guinea.⁴⁸ Thus, once a regime is widely-recognised as the government of a state by virtue of its exercise of *de facto* control over state territory, that regime will continue to qualify as 'the

⁴² See, eg, 'US Statement of 1977' in D Harris (ed) *Cases and Materials on International Law* (6 edn, Sweet & Maxwell, London 2004); UK Statement of 1980 (1980) 51 BYBIL 367; C Warbrick, 'The New British Policy on Recognition of Governments' (1981) 30 ICLQ 568; S Talmon, 'Recognition of Governments: An Analysis of the New British Policy and Practice' (1992) 63 BYBIL 231.

⁴³ UNSC Res 387 (31 Mar 1976) UN Doc S/RES/387; UNGA Res 3314 (XXIX) (14 Dec 1974) UN Doc A/9631, art 3(e); *Nicaragua* (n 24), [246].

⁴⁴ *Nicaragua* (n 24), [246].

⁴⁵ See, eg, Hall, *International Law* (n 14), 346; Q Wright, 'US Intervention in the Lebanon' [1959] 53 AJIL 112, 121-122.

⁴⁶ See, TJ Farer, 'Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife' (1969) 82 Harv L Rev 511; JN Moore, 'Intervention: A Monochromatic Term for a Polychromatic Reality' in R Falk (ed) *The Vietnam War and International Law* (Princeton University Press, Princeton 1969); W Friedmann, 'Intervention, Civil War and the Role of International Law' (1965) 59 Am Soc Intl L & Proc 67; D Wippman, 'Change and Continuity in Legal Justifications for Military Intervention in Internal Conflicts' (1996) 27 Colum Hum Rts L Rev 435, 439-440.

⁴⁷ L Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 BYBIL 189, 197-200.

⁴⁸ See UN Press Release SC/6481, 'Security Council Stresses Need for Immediate Restoration of Democratically Elected Government to Sierra Leone' (26 Feb 1998).

regime of' the state for the purposes of the norm of non-intervention, even after the outbreak of a civil war and up until another single regime has itself been recognised as the new government.

C. Positive action to discharge the obligation

The obligation not to tolerate the activities identified in Resolution 2625 requires states to exercise due diligence and take all measures reasonably within their power to prevent those activities within state territory. In order to fulfil this obligation, states will first need to ensure that they have adequate legislative, administrative and judicial arrangements in place to prevent, detect, restrain and punish the prohibited activities. States will then need to exercise due diligence to prevent particular prohibited activities and to detect, investigate and punish such activities where they occur or are about to occur.⁴⁹ Of course, the notion of 'tolerance' clearly implies some degree of state knowledge or wilful blindness. It follows that, for the home state to incur responsibility for tolerating PMSC activities that violate the norm of non-intervention, it must be shown that the state was aware or ought to have been aware that the activities were occurring or that there was a serious risk that they would occur in the future.⁵⁰ Such knowledge may be inferred from the circumstances, as occurred in *Corfu Channel*.⁵¹

⁴⁹ See generally R Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 German YBIL 9, 26-30; Borchard (n 14), § 86; UNGA Res 60/147 (16 Dec 2005) UN Doc A/RES/60/147, [2]-[3].

⁵⁰ See FJ Hampson, 'Mercenaries: Diagnosis Before Proscription' (1991) 3 Neth YBIL 1, 22.

⁵¹ *Corfu Channel* (n 3), 18.

There have been sporadic reports of PMSCs providing services to clients attempting to challenge the government of a foreign state, and there is a serious risk that disreputable firms operating at the fringes of the industry will provide services to such clients in the future. It is highly likely that some of those firms will be based in states with a flourishing private security industry but little or no governmental regulation, such as the UK. The British government's 2002 Green Paper entitled 'Private Military Companies: Options for Regulation' demonstrates its knowledge of the risks posed by PMSCs and of the need to regulate the local industry.⁵² Due diligence would thus appear to require the government to take special measures of prevention targeting the local industry. More recent governmental policy papers, however, indicate a preference for non-binding self-regulation rather than a formal regulatory regime.⁵³ This reflects the broader problem that the UK, 'despite being closely associated with the world of private security, since at least the 1970s,... has an unfortunate pattern of dealing with the problems caused by private force in civil wars abroad after they occur.'⁵⁴ In these circumstances, if a British PMSC were to undertake one of the prohibited activities identified in Resolution 2625, the UK would risk incurring international responsibility for 'tolerating' private interventions into the internal affairs of another state.

⁵² UK Green Paper (n 1).

⁵³ See FCO Consultation Paper, 'Consultation on Promoting High Standards of Conduct by Private Military and Security Companies Internationally' (April 2009); FCO Impact Assessment, 'Promoting High Standards of Conduct by Private Military and Security Companies Internationally' (April 2009).

⁵⁴ S Percy, 'Private Security Companies and Civil Wars' (2009) 11 (1) *Civil Wars* 57, 66.

One possible means for states to discharge their obligations under Resolution 2625 would be to establish a licensing scheme for PMSCs based or incorporated in state territory. The envisaged scheme would require all local PMSCs initially to register with the government and subsequently to obtain a governmental licence for each and every contract that they concluded with a foreign client for the provision of military or security services. Such a scheme would incorporate considerations of intervention law into the criteria against which PMSC contracts were assessed, thereby enabling the government to refuse to license PMSC contracts that may involve the activities prohibited by Resolution 2625. Any PMSCs that provided military or security services without governmental approval would incur sanctions and could be barred from operating in the home state altogether. Licensing schemes of this nature currently operate in the US⁵⁵ and South Africa.⁵⁶ The British government recommended the establishment of a similar scheme in its 2002 Green Paper, but then failed to take any further action.⁵⁷ The 'good practices' section of the 2008 Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, which was discussed in earlier Chapters of this Thesis,⁵⁸ recommends that home states 'consider establishing' an authorisation system for

⁵⁵ Arms Export Control Act 1976; International Traffic in Arms Regulations 22 CFR Parts 120-130.

⁵⁶ Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 2007. For a detailed discussion of these regimes, see M Caparini, 'Licensing Regimes for the Export of Military Goods and Services' in Chesterman and Lehnardt (eds) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP, Oxford 2007), 158.

⁵⁷ See UK Green Paper (n 1), 24-25; Foreign Affairs Committee Ninth Report, 'Private Military Companies' (Oct 2002).

⁵⁸ See *inter alia* Chapter IV, text accompanying note 40; Chapter V, text accompanying note 73.

the provision of military and security services abroad.⁵⁹ The Document also recommends the harmonisation of export authorisation systems with other states, possibly through 'regional approaches',⁶⁰ a suggestion which was intended to allow room for the adaptation of the approach used in the European Arms Export Code⁶¹ to the export of military and security services.⁶² The implementation of a licensing scheme for local PMSCs would help to ensure that the home state fulfil not only its obligations under the norm of non-intervention, but also its obligations under the law of neutrality and IHL, discussed below.

III. The law of neutrality

In certain international armed conflicts today, the law of neutrality imposes obligations on neutral states to control private military and security activities originating from their territory. The law of neutrality is redundant in respect of non-international armed conflicts, however, as it has been subsumed within the prohibition of intervention in the affairs of other states.⁶³

⁵⁹ Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (17 Sept 2008) UN Doc A/63/467-S/2008/636, Part II, [54].

⁶⁰ *ibid*, Part II, [56].

⁶¹ European Union Code of Conduct for Arms Exports (8 June 1998).

⁶² See J Cockayne, 'Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document' (2009) 13 (3) *J Conflict & Security L* 401, 413.

⁶³ R Higgins, 'International Law and Civil Conflict' in E Luard (ed) *The International Regulation of Civil Wars* (Thames & Hudson Ltd, London 1972), 171; R Gomulkiewicz, 'International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency' (1988) 63 *Wash L Rev* 42, 48; *Santissima Trinidad*, 20 *US (7 Wheat)* 283 (1822), 337-338; A Layeb, 'Mercenary Activity: United States Neutrality Laws and Enforcement' (1989) 10 *NY Law School J Intl & Comp L* 269, 291-292.

This Part examines how the law of neutrality may be relevant to the modern private security industry, particularly to an international armed conflict in which the home state of a PMSC is neutral whereas the hiring state is a belligerent. Section A discusses the general applicability of the law of neutrality to modern international armed conflicts. Section B then considers the obligations on the home state in relation to PMSCs, the steps that the home state should take to discharge these obligations, and the particular PMSC activities that may jeopardise the home state's neutrality.

A. Applicability of the law of neutrality to modern conflicts

1 The traditional law of neutrality

Whilst the basic notion of neutrality as non-participation in war has a long history, the conception of neutrality as a formal legal status involving defined rights and duties appeared to emerge only in the eighteenth century.⁶⁴ By the nineteenth century, it had developed into a sophisticated and well-defined system of rights and obligations applicable in wartime.

The Hague Conventions of 1907 codified the customary rules of neutrality in the earliest formalised international laws of war in the modern state system. Under the Hague Conventions and customary law, the applicability and operation of the law of

⁶⁴ See PC Jessup and others, *Neutrality, its History, Economics and Law* (Columbia University Press, New York 1935) vol I, 4, 20-21, 249; Q Wright, 'The Future of Neutrality' 12 Intl Conciliation 353, 363; H Lauterpacht (ed), *Oppenheim's International Law, vol I: Peace* (7 edn Longmans, London 1952), 626-627.

neutrality were relatively clear. Belligerents would first notify third states of the existence of a state of war,⁶⁵ and third states then had a duty to choose a status of either co-belligerent or neutral and to declare their decision formally. That declaration established a legal relationship of neutrals and belligerents, and brought into operation the entire system of neutrality law, which then remained in operation until the official termination of the war or until either a belligerent or a neutral chose to assume an active belligerent status toward the other.⁶⁶

2 The law of neutrality post-1945

The efforts to outlaw war following World War I, which culminated in Article 2(4) of the UN Charter, called into question the very philosophy underlying the law of neutrality. 'The foundation of the doctrine of neutrality was the absolute right of the state to resort to war',⁶⁷ but Article 2(4) of the Charter effectively outlawed war by prohibiting the threat or use of force by states. In the legal order envisaged by the Charter, the Security Council would adopt a binding Chapter VII Resolution designating the aggressor in any armed conflict. All or some member states (as determined by the Security Council pursuant to Article 48) would then be bound to participate in any subsequent collective military action, and all member states would

⁶⁵ Convention Relative to the Opening of Hostilities (adopted 18 Oct 1907, entered into force 26 Jan 1910) 205 Consol TS 263 (Hague III), art 2.

⁶⁶ See PM Norton, 'Between the Ideology and the Reality: The Shadow of the Law of Neutrality' (1976) 17 Harv Intl LJ 249, 250; Lauterpacht (ed), *Oppenheim's International Law* (7 edn) vol I (n 64), 653-654; 666-672.

⁶⁷ H Lauterpacht, 'The Revision of the Law of War' (1952) 29 BYBIL 360, 369; see also I Brownlie, *International Law and the Use of Force by States* (Clarendon Press, Oxford 1963), 402-404; G Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (Stevens, London 1968), 664-666.

be bound by Articles 2(5) and 25 to support the action and to refrain from taking any measures to impede it.⁶⁸

In certain circumstances, the collective security system established by the Charter supersedes the traditional law of neutrality. Specifically, where the Security Council has made an authoritative determination of the aggressor or wrongdoer in an armed conflict, Articles 2(5) and 25 impose an obligation on member states *not* to adopt a strict neutral stance in the traditional sense, at least to the extent that such a stance involves the granting of belligerent rights to the aggressor.⁶⁹ This obligation takes precedence over states' other international obligations by virtue of Article 103. In such cases, states wishing to remain neutral may only adopt a stance of 'qualified' neutrality, which involves non-participation in the hostilities but which does not require absolute impartiality toward both parties to the conflict. This non-participation does *not* bring into play the traditional law of neutrality, as that system contemplates only two relations: belligerency and strict neutrality.⁷⁰

The UN Charter did not render the traditional law of neutrality entirely redundant, however, since in the overwhelming majority of cases the Security

⁶⁸ Article 39 authorises the Security Council to determine the existence of any threat to the peace, breach of the peace or act of aggression and to make recommendations or decide what measures shall be taken to maintain or restore international peace and security. The Council may then take binding measures falling short of the use of force under Article 41, or it may authorise the use of force under Article 42. Article 25 obliges all members to comply with Council decisions.

⁶⁹ The Security Council has in some cases made a binding determination as to which party in a conflict is the aggressor: see, eg, UNSC Res 454 (2 Nov 1979) UN Doc S/RES/454 (South African aggression against Angola) and UNSC Res 573 (4 Oct 1985) UN Doc S/RES/573 (Israeli aggression against Tunisia).

⁷⁰ Hall, *Neutrals* (n 4), 14. A number of treaties concluded since 1945 implicitly accept that non-participation in hostilities is a valid position that is distinct from strict neutrality: see, eg, GCIII, arts 4B(2) and 122; Protocol I, arts 9(2)(a), 19 and 31.

Council does not authoritatively designate the wrongdoing party. This leaves third states free to make their own determinations at their own risk.⁷¹ Third states may assist the victim state in an exercise of collective self-defence under Article 51, in which case the dual requirements of necessity and proportionality strictly limit the scope of the operation, or they may adopt lesser forms of discrimination against the aggressor. Alternatively, third states may adopt a position of strict neutrality in the conflict, thereby bringing into play the system of rights and obligations of neutrality law. Indeed, states have expressly declared themselves 'neutral' in a number of conflicts since 1945.⁷² The US adopted a position of neutrality in the 1967 Arab-Israeli war, but abandoned that position in the 1973 war.⁷³ In the Iran-Iraq conflict (1980-1988), although the parties never officially declared war, the US, the UK, the Soviet Union and China all characterised the conflict as war and stated that they would remain neutral.⁷⁴ This state practice indicates that strict neutrality remains a possible status in a considerable number of situations. The fact that many modern military manuals refer to the law of neutrality supports this conclusion.⁷⁵

⁷¹ Brownlie, *Use of Force* (n 67), 404.

⁷² For an analysis of state practice, see Norton (n 66), 254-278; C Greenwood, 'The Concept of War in Modern International Law' (1987) 36 ICLQ 283, 290-294; G Petrochilos, 'The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality' (1998) 31 Vanderbilt J Transnatl L 575, 583-601.

⁷³ See Norton (n 66), 301.

⁷⁴ See Petrochilos (n 72), 594. From the outbreak of hostilities in Sept 1980 until Oct 1985, the UK government spoke of the 'Iran-Iraq War' and proclaimed 'neutrality' in that war; but from Oct 1985, the government spoke of 'the conflict between Iran and Iraq' and described the UK position as one of 'impartiality': see C Gray, 'The British Position in Regard to the Gulf Conflict' (1988) 37 ICLQ 420, 421.

⁷⁵ See, eg, D Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (OUP, Oxford 1995), ch 11; UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP, Oxford 2004), [1.42]-[1.43]; US Army, *Field Manual 27-10: The Law of Land Warfare* (1956), ch 9.

3 Circumstances in which the law of neutrality applies today

Whilst there appears to be widespread agreement that the law of neutrality retains vitality in some modern situations, the precise circumstances in which it applies are not entirely clear. The traditional law hinged upon the existence of a state of war in the legal sense, which required both the objective existence of armed hostilities and a subjective intent on the part of one or both of the parties to conduct a war.⁷⁶ Such intent was usually manifested by a formal declaration of war, but it could also be inferred from the circumstances.⁷⁷ Article 2 of Hague III thus provides:

The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.⁷⁸

Since belligerents in modern conflicts rarely declare war, there is rarely any clear manifestation of the intent to wage war. Nonetheless, numerous examples exist of states adopting a neutral stance in conflicts in the absence of any declaration of war. In the Falklands Conflict of 1982, for example, many states adopted a formal neutral stance, even though the UK positively denied the existence of a state of war.⁷⁹ Furthermore, as Brownlie notes, '[s]ince 1920 draftsmen of treaties have usually avoided "war" as a term of art' and have referred instead to factual phenomena

⁷⁶ Greenwood (n 72); Brownlie, *Use of Force* (n 67), 38; Fleck (n 75), [1106]; E Castren, *The Present Law of War and Neutrality* (Suomalainen Tiedeakatemia, Helsinki 1954), 31.

⁷⁷ Norton (n 66), 250; Lauterpacht (ed), *Oppenheim's International Law* (7 edn) vol I (n 64), 653-654; 666-672.

⁷⁸ Hague III (n 65).

⁷⁹ See G Marston, 'UK Materials in International Law' (1982) 53 BYBIL 519, 519-520; Statement of Prime Minister Thatcher, 22 Parl Deb, HC 616 (1982); Petrochilos (n 72), 599-601; Brownlie, *Use of Force* (n 67), 395.

such as the use of force, armed attack, and armed aggression.⁸⁰ The application of the Geneva Conventions, for example, hinges upon the factual existence of an 'armed conflict'.⁸¹ In light of this practice, many commentators agree that the sensible view is that the law of neutrality can apply to any conflict that constitutes a war in the material sense—in other words, neutrality is a permissible stance in any 'armed conflict'.⁸²

Nonetheless, it is not clear whether a neutral stance is entirely voluntary or whether it is mandatory in certain circumstances. Many modern commentators assert that the law of neutrality continues to apply automatically to all third states in cases of declared war, as in the past.⁸³ Yet most conflicts today are not declared to be 'war', and as Oppenheim explains 'it is not clear to what extent an undeclared war of this nature imposes upon third states the *obligations* of neutrality'.⁸⁴ The simplest approach to this dilemma would be to assert that all third states are automatically neutral in all armed conflicts and are therefore automatically subject to neutral obligations.⁸⁵ However, there is little evidence in state practice or in the literature to support that assertion.⁸⁶

⁸⁰ Brownlie, *Use of Force* (n 67), 393-394.

⁸¹ Article 2 common to the four Geneva Conventions of 1949; see also Greenwood (n 72), 294-303.

⁸² See, eg, Lauterpacht, 'The Revision of the Law of War' (n 67), 293; Brownlie, *Use of Force* (n 67), 395-396; M Greenspan, *The Modern Law of Land Warfare* (University of California Press, Berkeley 1959), 531; H Briggs, *The Law of Nations* (2 edn, Stevens, London 1952), 975.

⁸³ Although Greenwood points out the illogical and unsatisfactory nature of this position: see Greenwood (n 72). In any case, this does not affect the right of third states to assist the victim state in an exercise of collective self-defence: see Brownlie, *Use of Force* (n 67), 403.

⁸⁴ H Lauterpacht (ed), *Oppenheim's International Law, vol II: Disputes, War and Neutrality* (7 edn Longmans, London 1952), 293, note 1 (emphasis added).

⁸⁵ See the remarks of Carl Salans (then Deputy Legal Adviser to the US Department of State) [1968] *Prcdgs Am Soc Intl L* 76.

⁸⁶ See Greenwood (n 72), 300.

An alternative approach would be to stipulate that third states may *voluntarily* assume a neutral status in any armed conflict, but cannot have that status imposed upon them except in a declared war.⁸⁷ According to Oppenheim, third states arguably 'retain freedom of action' in cases where there has been no declaration of war.⁸⁸ Stone notes more decisively that 'it is clear from the practice' that where war is not openly intended by the parties, 'third states are free...either to treat the hostilities as a war and assume a neutral attitude, or to take the attitude of the belligerents at its face value and act as far as they can as if no war exists'.⁸⁹ This approach appears to accord most closely with state practice. Norton observes that belligerents since 1945 have tended only to assert rights against non-belligerent states in declared wars (such as the Arab-Israeli and India-Pakistan wars) and in other conflicts in which non-belligerent states formally declared themselves neutral (such as the US and South Vietnamese invasions of Cambodia).⁹⁰ Greenwood also notes that, in cases where a third state has not voluntarily assumed the status of a neutral, '[a]ttempts to exercise belligerent rights under the law of neutrality in conflicts falling short of war have generally met with widespread international resistance'.⁹¹

⁸⁷ See Norton (n 66), 308; Greenwood (n 72), 298-301; J Stone, *Legal Controls of International Conflict* (Stevens, London 1954), 313; D Schindler, 'Aspects Contemporains de la Neutralité' (1967) 121 *Recueil des Cours* 221, 288.

⁸⁸ Lauterpacht (ed), *Oppenheim's International Law* (7 edn) vol II (n 84), 293.

⁸⁹ Stone (n 87), 313.

⁹⁰ Norton (n 66), 257-278.

⁹¹ One example is the hostile reaction to French claims in the Algerian conflict: see Greenwood (n 72), 298.

This analysis is consistent with the general framework of the Geneva Conventions. Common Article 2 provides that the Conventions 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 recognised by one of them.' Article 4B of GCIII refers to 'neutral or non-belligerent Powers' for the purpose of granting prisoner of war protection to individuals from both categories of states, and thus appears implicitly to accept that non-participation in hostilities is a valid position that is distinct from strict neutrality. Similarly, Article 9(2)(b) of Protocol I refers to 'a neutral or other State which is not a Party to that conflict'.⁹² This supports the argument that strict neutrality is voluntary in armed conflicts that do not constitute declared wars; for if neutrality were obligatory for all third states in all armed conflicts, there would be no possibility of a third status of non-belligerency.⁹³

On balance, the current state of the law appears to be that all third states are automatically neutral in declared wars, but in other armed conflicts the law of neutrality applies only where third states voluntarily assume an official neutral stance. In both declared and undeclared wars, third states retain the right to assist the victim state in an exercise of collective self-defence.

⁹² See also Articles 19 and 31.

⁹³ This interpretation does not diminish the protection granted to individuals from non-belligerent states, but merely imposes additional obligations on neutral states in relation to the conflict (eg GCIV, arts 9, 11, 24, 36, 61 and 140, and ch XII) and removes certain protections for neutral individuals found in belligerent territory (eg *ibid*, art 4).

B. Content of the law of neutrality

1 The two-dimensional nature of the law of neutrality

The law of neutrality is often described as two-dimensional in nature.⁹⁴ The first dimension governs the rights and duties of neutral *states vis-à-vis* belligerent *states*. It obliges neutrals to adopt an attitude of complete impartiality towards belligerents and thus to refrain from committing any act that directly or indirectly favours one belligerent's prosecution of the war. In addition, the first dimension obliges belligerents to respect the sovereignty of neutrals. The second dimension of neutrality law, on the other hand, governs the relationship between neutral *individuals* and belligerent *states*. As states and individuals were not, and could not be, bound by obligations to each other under classic international law, the law of neutrality does not impose direct obligations on neutral individuals and belligerent states *vis-à-vis* each other.⁹⁵ Instead, neutrality law regulates the relationship between neutral individuals and belligerent states *indirectly*, by imposing obligations on neutral states to control certain private activities in state territory which may favour one belligerent in the war.

The second dimension of the law of neutrality obliges neutral states not to allow their territory to be used as a base for hostile operations by belligerents. Articles 4, 5 and 6 of the Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V), which represent customary law, provide:

⁹⁴ See, eg, Hall, *Neutrals* (n 4), 20-21.

⁹⁵ *ibid*, 21.

4. Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents
5. A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory. It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory.⁹⁶
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.⁹⁷

Thus, Article 4 prohibits states from officially forming or recruiting corps of combatants to assist a belligerent, whilst Article 5 requires states to take positive steps to prevent such activities on the part of private individuals in state territory. The Report presented by the Second Commission of the Hague Conference describes Article 5 as 'the logical and necessary counterpart of Articles 2 to 4'.⁹⁸

Although it is not explicitly stated in Article 5, it is generally accepted that this provision obliges a neutral state to exercise due diligence to prevent the private activities in question.⁹⁹ As Stone explains, the duty of prevention on a neutral state 'is not absolute, but according to his power';¹⁰⁰ it is an obligation of diligent conduct, not one of result. Article 6 makes it clear, however, that Hague V imposes no duty on neutral states to prevent individuals from departing the state in an unorganised fashion ('separately' or '*isolément*') to fight for a belligerent.¹⁰¹ Individuals may be considered to be crossing state borders separately 'when there exists between them

⁹⁶ Articles 2 and 3 prohibit *belligerents* from carrying out certain activities on neutral state territory.

⁹⁷ Hague V (n 12).

⁹⁸ JB Scott (ed), *Reports to the Hague Conferences of 1899 & 1907* (Clarendon Press, Oxford 1917), 541; see also I Brownlie, 'Volunteers and the Law of War and Neutrality' (1956) 5 ICLQ 570, 571.

⁹⁹ See H Kelsen, *Principles of International Law* (Rinehart, New York 1952), 161; J Kunz, 'Sanctions in International Law' (1956) 50 AJIL 514, 527; Borchard (n 14), §§ 86-87, 107; Thomas and Thomas (n 29), 154-156; RE Curtis, 'The Law of Hostile Military Expeditions as Applied by the United States' (1914) 8 AJIL 1, 35; see also cases in Moore, *US Arbitrations* (n 14), 4027-4056.

¹⁰⁰ Stone (n 87), 391.

¹⁰¹ See H Lauterpacht (ed), *Oppenheim's International Law* (8 edn Longmans, Green, London 1955), 704; Brownlie, 'Volunteers' (n 98), 571.

no bond of a known or obvious organisation, even when a number of them pass the frontier simultaneously'.¹⁰² Moreover, consistent with the two-dimensional nature of neutrality law, Hague V imposes no duty on neutral individuals themselves.

2 The law of neutrality & modern PMSCs

It follows from the above analysis that neutral states in international armed conflict are under a duty to prevent, within state territory, the organisation and recruitment of PMSC personnel to work as combatants for a belligerent. PMSC personnel will fall within this formulation if they are hired by a belligerent to provide services that are reasonably likely to entail direct participation in hostilities. Chapter V of this Thesis critically examined the question of when PMSC personnel will qualify as taking a direct part in hostilities, with reference to the four categories of PMSC contract identified in Chapter I.¹⁰³ Applying that analysis to the present context, a neutral home state's preventive obligation under Article 5 of Hague V will apply to all PMSC contracts for offensive combat services, as well as to armed security contracts where the protected object is or is likely to become a military objective. The preventive obligation will not ordinarily apply to contracts involving military/security expertise (such as advice, training, intelligence and weapons maintenance), unless the services relate directly to a specific tactical operation. Finally, military support contracts will

¹⁰² Scott (ed), 542.

¹⁰³ See Chapter V, text accompanying notes 8-34. That discussion related to the question of whether an individual is 'recruited...in order to fight' in an armed conflict (for the purposes of international mercenary law), which is essentially analogous to the question of whether an individual is recruited as a combatant to assist a belligerent in an armed conflict (for the purposes of neutrality law).

not generally entail direct participation in hostilities and therefore will not trigger the home state's preventive obligation under Hague V.¹⁰⁴

This analysis raises the interesting question of what constitutes recruitment and organisation of PMSC personnel 'on the territory of' a neutral power for the purposes of Hague V. As discussed in Chapter I, PMSCs often use a database of names to recruit and organise a team of contractors from around the world in order to perform a particular contract. Many foreign contractors may not even enter the home state of the PMSC, but may travel straight from their own home state to the state in which the contract is to be performed (the host state). Nonetheless, for the purposes of the preventive obligation in Article 5 of Hague V, the organisation and recruitment of the PMSC personnel can be said to occur on the territory of the home state if the contract is concluded by a PMSC that is based or incorporated in that state.

Like the obligation not to 'tolerate' egregious interventions, discussed above in Part II, the obligation not to 'allow' a particular non-neutral activity arises at the moment that the state becomes aware, or ought to become aware, that the activity is occurring or that there is a serious risk that the activity will occur in the future. In

¹⁰⁴ In rare cases, however, military support services may entail direct participation in hostilities, such as the transportation of ammunition to an active firing position at the frontline: see ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (June 2009).

certain cases, actual knowledge may be inferred from the surrounding circumstances.¹⁰⁵

Article 8 of Hague XIII imposes a further duty on neutral states which may be relevant to the home state of a PMSC:

A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war.¹⁰⁶

This effectively obliges neutral states to prevent PMSCs from servicing the military vessels (including naval vessels and aircraft) of belligerents within state territory.

Aside from the two duties identified above, the Hague Conventions demand very little of neutral states in the way of control over private individuals. They impose no duty on states to prevent individuals from providing *indirect* assistance to belligerents, such as the loan of money or the provision of commercial services to belligerents. They do not require neutral states to prevent individuals within state territory from transporting enemy troops for commercial purposes,¹⁰⁷ nor do they require neutral states to prevent their licensed pilots from working on belligerent

¹⁰⁵ See Brownlie, 'Volunteers' (n 98), 574; Stone (n 87), 570.

¹⁰⁶ Convention Concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 Oct 1907, entered into force 26 Jan 1910) 205 Consol TS 395 (Hague XIII). This obligation originated from the Treaty of Washington (8 May 1871) (applied in the *Alabama Claims* arbitrations between the US and Britain), which imposed an obligation on neutral states to use due diligence to prevent the specified activities.

¹⁰⁷ See Lauterpacht (ed), *Oppenheim's International Law* (7 edn) vol I (n 64), 746-747.

warships.¹⁰⁸ The neutral state bears no responsibility under international law for these private, non-neutral acts.¹⁰⁹ Moreover, although the Hague Conventions prohibit neutral states from officially delivering war materials to belligerents, they do not require neutral states to prohibit such delivery by private persons.¹¹⁰

3 Positive action to discharge the obligations

In the past, states usually discharged their obligations under neutrality law by enacting domestic neutrality legislation, which stipulated the acts that states believed would compromise their neutrality and equipped states with the means of prosecuting and punishing those who committed such acts.¹¹¹ Although a large number of states still have neutrality legislation on their statute books, such as the US Neutrality Act 1794 and the UK Foreign Enlistment Act 1870, this legislation is outdated and ineffective in dealing with the modern private security industry. There has never been a successful prosecution in connection with enlistment or recruitment under the UK neutrality legislation,¹¹² and the US has generally pursued a policy of non-enforcement of its neutrality laws relating to enlistment or

¹⁰⁸ Hague XIII (n 106), art 11.

¹⁰⁹ See Hague V (n 12), art 18; Hague XIII (n 106), art 7; C Fenwick, *The Neutrality Laws of the US* (Carnegie Endowment for International Peace, Washington DC 1913), 120-125; Lauterpacht (ed), *Oppenheim's International Law* (7 edn) vol I (n 64), 652-661, 739-745.

¹¹⁰ See Hague V (n 12), art 7, 18; Hague XIII (n 106), art 7; Fenwick (n 109), 120-125; Lauterpacht (ed), *Oppenheim's International Law* (7 edn) vol I (n 64), 652-661, 739-745. Cf Fleck (n 75), 497-498, who argues that state practice has modified this rule under customary law such that mere state *permission* of arms exports is to be considered a non-neutral act.

¹¹¹ See Fenwick (n 109), 14; F Deák and PC Jessup, *A Collection of Neutrality Laws, Regulations and Treaties of Various Countries* (Greenwood Press, Westport 1974).

¹¹² See A Mockler, *The Mercenaries* (MacDonald, London 1969); Foreign Affairs Committee, *Sierra Leone* (First Report, 1998-1999), [92]; 'Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries' (London 1976).

recruitment.¹¹³ A more effective means for neutral states to discharge their obligations would be to establish a licensing scheme for PMSCs, of the kind outlined above in Part II, and to incorporate considerations of neutrality law (*inter alia*) into the criteria against which PMSC contracts are assessed.

IV. International humanitarian law

Chapters IV and V argued that *all* states—including states not party to the armed conflict—have an obligation under Common Article 1 of the Geneva Conventions and customary law to take positive steps to ensure respect for IHL by private actors under their influence or control. This obligation is binding on states ‘in all circumstances’, including times of peace as well as times of armed conflict. The home state of a PMSC, like the host state and the hiring state, will ordinarily have some capacity to influence the company’s behaviour in the field, and it follows that the home state has an obligation to take steps within its power to promote company respect for IHL. This is reflected in Part One of the Montreux Document:

14. Home States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs of their nationality, in particular to:
 - a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;
 - b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
 - c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as administrative or other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.¹¹⁴

¹¹³ See Layeb (n 63); J Lobel, 'The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in US Foreign Policy' (1983) 24 Harv Intl LJ 1. In 2007 the US used the Neutrality Act to prosecute offences relating to the overthrow of the Laos government, but those offences did not relate to the obligations of the US under the law of neutrality: see above note 21.

¹¹⁴ Montreux Document (n 59), Part I, [14].

Part Two of the Montreux Document sets out a number of ‘good practices’ to guide the home state in fulfilling its international obligations. As noted in Part II of this Chapter in relation to the norm of non-intervention, the principal recommendation is that states ‘consider establishing’ a licensing scheme for PMSCs based or incorporated in state territory.¹¹⁵ A regulatory regime of this nature would help the home state to fulfil its obligation to ensure respect for IHL, particularly since the government could stipulate minimum screening and training requirements for PMSC personnel and could revoke its authorisation if company personnel misbehaved in the field.

The home state, like other states, also has a specific obligation under the Geneva Conventions to search for and prosecute or extradite persons suspected of grave breaches of IHL in the exercise of universal jurisdiction,¹¹⁶ as well as taking measures to ‘suppress’ non-grave breaches of IHL in international armed conflict.¹¹⁷ These obligations apply over and above the general obligation to ‘suppress’ violations of IHL in international and non-international armed conflict, which is implicit in Common Article 1.¹¹⁸ Effective suppression of non-grave breaches will generally entail (*inter alia*) the enactment of domestic criminal legislation and the prosecution of offenders in the exercise of ordinary criminal jurisdiction, including jurisdiction exercised by a state over its nationals overseas.¹¹⁹ The Montreux Document further

¹¹⁵ *ibid*, Part II, [54].

¹¹⁶ GCI, art 50; GCII, art 51; GCIII, art 130; GCIV, art 147; see also *ibid*, [16].

¹¹⁷ GCI, art 49(3); GCII, art 50(3); GCIII, art 129(3); GCIV, art 146(3); Protocol I, art 86.

¹¹⁸ See Montreux Document (n 59), Part I, [14(c)] (quoted above).

¹¹⁹ See J Pictet (ed), *Commentary, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (ICRC Geneva 1958), 593-594.

suggests that states ‘consider establishing...corporate criminal responsibility for crimes committed by the PMSC’,¹²⁰ as well as providing for ‘non-criminal accountability mechanisms for improper and unlawful conduct of PMSCs and their personnel’.¹²¹

V. Human rights law

A. General human rights law

As discussed in Chapter V, the HRL obligation to ‘ensure’ rights is binding on states only within their jurisdiction, and this notion of jurisdiction is primarily territorial.¹²² The home state of a PMSC therefore has no general obligation under HRL to take positive steps to prevent the company from violating the rights of individuals overseas, unless the home state exercises effective control over the territory in which the company operates or over the particular individual in question. Some commentators have argued that home states should be under an obligation to exercise control to prohibit companies that are based or incorporated in their territory from violating peremptory norms of international law when abroad.¹²³

¹²⁰ Montreux Document (n 59), Part II, [70].

¹²¹ *ibid*, Part II, [71].

¹²² See Chapter V-II(B).

¹²³ See, eg, R McCorquodale and P Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 (4) *Modern L Rev* 598, 615-623; M Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States' in C Scott (ed) *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), ch 18; J de Arechega and A Tanzi, 'International State Responsibility' in M Bedjaoui (ed) *International Law: Achievements and Prospects* (Martinus Nijhoff, London 1991), 359.

Whatever the merits of these arguments, they do not represent the current state of the law.¹²⁴

B. The UN Convention Against Torture

In rare cases a contractor working for a local PMSC might commit acts falling within the UN Convention Against Torture (UNCAT), giving rise to an obligation on the home state to prosecute the contractor if he or she entered any territory under the state's jurisdiction.¹²⁵ The strict definition of torture in Article 1 of the UNCAT is limited to those acts 'by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.' The Titan and CACI contractors implicated in the Abu Ghraib prison scandal operated alongside and with the consent and acquiescence of US soldiers, thus illustrating how PMSC personnel could fall within the UNCAT in extreme cases.¹²⁶

This scenario raises a further question in relation to the provision of effective remedies for victims. Specifically, would the home state have an obligation under Article 14 of the UNCAT to provide domestic procedures by which the victims of PMSC torture committed overseas could sue the hiring state for its involvement in the torture? Article 14 provides:

¹²⁴ See O de Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law' in P Alston (ed) *Non-State Actors and Human Rights* (OUP, Oxford 2005), 235-237.

¹²⁵ UN Convention Against Torture (adopted 10 Dec 1984, entered into force 26 June 1987) 1465 UNTS 85, art 7.

¹²⁶ See GR Fay, 'Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade' (Aug 2004).

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

Unlike other provisions of the UNCAT, Article 14 contains no explicit territorial limitation. An initial draft of the provision included the phrase 'committed in any territory under its jurisdiction' after the word 'torture', but this phrase had disappeared from the text by the time of adoption of the final version of the draft Convention in 1982, and the *travaux préparatoires* contain no explanation for its removal.¹²⁷ The UN Committee Against Torture, the body established under the Convention to review compliance by states parties with their treaty obligations, has interpreted Article 14 as requiring states parties to provide a procedure permitting victims to obtain reparations from those responsible for torture regardless of where it was committed.¹²⁸ However, both the UK House of Lords¹²⁹ and the Court of Appeal of Ontario¹³⁰ have taken a different view.¹³¹ The state of the law is thus unclear and perhaps the best that can be said is that universal civil jurisdiction for torture under Article 14 of the UNCAT is permissive, but not mandatory.

¹²⁷ See A Byrnes, 'Civil Remedies for Torture Committed Abroad' in C Scott (ed) *Torture as Tort* (Hart, Oxford 2001), 545-546.

¹²⁸ UN Committee Against Torture, Conclusions and Recommendations, 34th Sess, UN Doc CAT/C/CR/34/CAN (7 July 2005) 4(g), 5(f), paras 4(g), 5(f); see also C Hall, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad' (2008) 18 (5) EJIL 921.

¹²⁹ *Jones v Ministry of Interior Al-Mamlaka A-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26.

¹³⁰ *Bouzari v Islamic Republic of Iran* [2004] OJ No 2800 Docket No C38295 (Court of Appeal of Ontario).

¹³¹ See also *Al-Adsani v UK* (App no 35763/97) ECHR 21 Nov 2001.

VI. Conclusion

A state that turns a blind eye to PMSCs based or incorporated in its territory does so at its own risk, for in certain circumstances the acts of a PMSC overseas may give rise to the responsibility of the company's home state for a failure to take adequate measures to control company behaviour. Three factors must be established before the home state of a PMSC can incur responsibility in this way: first, an obligation on the state to prevent or punish a particular PMSC activity; second, a failure on the part of the state to take the requisite preventive or penal measures; and third, a specific instance of the prohibited PMSC activity.

Both the norm of non-intervention and the law of neutrality impose due diligence obligations on the home state to prevent the PMSC from undertaking certain activities from state territory and to punish such activities where they occur. The obligation to ensure respect for IHL imposes a further due diligence obligation on the home state to promote PMSC compliance with IHL in the field. Notwithstanding the existence of these obligations, a number of key states—most notably the UK—continue to close their eyes to PMSCs operating from their territory. Diligent measures such as the establishment of a licensing scheme for local PMSCs would help to increase transparency and state control over local PMSCs, whilst also promoting general PMSC compliance with international law in the field. State inaction, on the other hand, would represent a conscious failure to prevent harmful PMSC activities overseas, and in certain circumstances this could give rise to the responsibility of the home state under international law.

Conclusion

The extensive use of PMSCs in recent armed conflicts challenges the conventional wisdom that military and security functions are most effectively and appropriately performed through public forces. In practice, this may reduce the ability of states to control violence and to ensure accountability for misconduct in armed conflict. Yet the widespread outsourcing of military and security activities to PMSCs has *not* entirely undermined the capacity of states to control violence in the international arena, nor has it rendered the traditional state-centred frameworks of international law irrelevant in this context. On the contrary, states retain the capacity to exert significant influence over PMSCs operating in armed conflict, and this enables international law to regulate PMSC activities *indirectly* using states as an intermediary.

The hiring state, the host state and the home state of a PMSC are in a particularly strong position to influence PMSC behaviour in armed conflict. Accordingly, international law imposes a range of obligations on these states to take positive steps to regulate PMSC activities. Inappropriate or harmful conduct by a PMSC employee in armed conflict may, in certain circumstances, give rise to the international responsibility of any or all of these three states. There are essentially two ways in which such responsibility may arise.

The first pathway to state responsibility involves the direct attribution of wrongful PMSC conduct to the hiring state. Aside from those rare cases in which the contractor forms part of the armed forces of the hiring state, such attribution will ordinarily depend upon either Article 5 or Article 8 of the International Law Commission's Articles on State Responsibility (ILC Articles).¹ Article 5 encompasses contractors who are empowered by the law of the hiring state to exercise governmental authority, provided that they are 'acting in that capacity in the particular instance'. Even where this is not the case, the PMSC activities may fall within Article 8, which encompasses contractors who are in fact acting on the instructions or under the direction or control of the hiring state. A close contextual analysis leads to the conclusion that a large proportion of PMSC activities in armed conflict will fall within one of these two provisions.

The second pathway to state responsibility does not involve the direct attribution of PMSC misconduct to a state, nor does it involve state complicity in PMSC misconduct. Rather, it derives from a state's failure to take adequate steps to prevent, investigate, punish or redress the PMSC misconduct. The hiring state, the host state and/or the home state of an errant PMSC may incur responsibility in this way, provided that there is a pre-existing obligation on the relevant state to prevent,

¹ ILC Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001) II (2) YBILC.

investigate, punish or redress the PMSC misconduct in question. Various fields of international law impose pertinent obligations of this nature on states.

As the regime specially tailored to situations of armed conflict, IHL is naturally the first port of call for any consideration of states' obligations to control PMSCs in this context. Of particular importance is the obligation 'to ensure respect' for IHL in Common Article 1, which requires the hiring state, the host state and the home state to take diligent steps within their power to promote PMSC compliance with IHL. This serves as a residual obligation mandating a baseline level of positive state action, over and above any more specific obligations that may bind a particular state in a particular case.

The more general regime of HRL also imposes a number of important obligations on states to take diligent measures to control PMSCs within state jurisdiction. In the unique context of an armed conflict, these general human rights obligations must be interpreted by reference to the rules of IHL. Whilst HRL is applicable primarily to the host state of a PMSC or the occupying power of that state, the hiring state may also be subject to human rights obligations in certain situations entailing effective state control over PMSC activities. States' human rights obligations may be particularly important for victims of PMSC abuses, since HRL offers more advanced procedural safeguards than IHL, coupled with a range of sophisticated international procedures for individual complaint and redress.

In relation to the home state of a PMSC, there is no general obligation on states to regulate the activities of companies based or incorporated in state territory. Nonetheless, in certain situations international law requires positive state action to prevent local companies from engaging in activities that are harmful to other states. In particular, the law of neutrality obliges the home state of a PMSC not to 'allow' non-neutral PMSC activities in international armed conflicts in which the state is neutral, whilst the norm of non-intervention obliges the home state not to 'tolerate' PMSC activities that intervene in the internal affairs of another state. These obligations apply in addition to the general duty 'to ensure respect' for IHL in Common Article 1, which sets a minimum threshold of home state regulation in relation to PMSCs operating in armed conflict. States that turn a blind eye to PMSCs based or incorporated in their territory therefore run the risk of violating their obligations under international law.

In legal terms, international responsibility arises automatically upon the commission of an internationally wrongful act by a state. In practice, however, such responsibility must be invoked by the injured state or some other interested party, such as an individual applicant before a human rights tribunal. The ILC Articles deal only with the invocation of state responsibility by another state or states, but they emphasise that obligations may also exist towards entities other than states, as in the case for 'human rights violations and other breaches of international law where the

primary beneficiary of the obligation breached is not a State.’² The procedures for the presentation and settlement of interstate claims largely resemble those that apply to civil claims in domestic legal systems. Whilst the available means of settling interstate disputes include binding legal procedures such as international arbitration and adjudication, the overwhelming majority of these disputes are resolved through diplomatic negotiations. Parties are often heavily influenced throughout such negotiations by their perceptions of their legal rights and obligations, and a clear articulation by the claimant state of the other state’s obligations can therefore play a critical role.

This Thesis may facilitate the resolution of disputes arising from PMSC misconduct by articulating and critically analysing the content of states’ obligations and the principles that govern state responsibility in such cases. This in turn may help to promote broader accountability within the private security industry. Of course, state responsibility is not sufficient in itself to address the accountability concerns surrounding PMSCs, particularly since it cannot address the accountability of individual contractors or companies *per se* and it lacks powerful enforcement mechanisms. Any effective response to the private security industry should not simply rely on the existing accountability frameworks of international law, but should also develop new domestic and international frameworks targeting a variety of actors including states, PMSCs and their personnel. Nonetheless, this Thesis has

² *ibid*, Commentary to art 28, [3]; see also art 33(2).

demonstrated that the law of state responsibility remains vitally relevant in this area, and a close analysis of states' international obligations and responsibility should constitute a core component of any overall strategy to address the burgeoning private security industry.

Yet the value of this analysis does not lie solely in facilitating the assessment of state responsibility *ex post facto* in relation to particular instances of PMSC misconduct. Ultimately, this analysis may also play an important *prospective* role in promoting general PMSC compliance with international law. The obligations discussed in this Thesis serve to establish basic standards of state conduct in relation to PMSCs operating in armed conflict. These standards can guide states in the development of effective internal laws and policies to regulate the private security industry, scrutinising compliance and rectifying deviance from within. International law routinely frames debates and informs domestic laws and policies, as well as providing principles and mechanisms for resolving disputes; but this is only possible if the content of the relevant international legal principles is clear in the first place. By drawing attention to states' international obligations to regulate PMSCs in armed conflict, critically analysing the content of these obligations, and evaluating recent state practice against these international standards, this Thesis provides the necessary clarity to assist states in formulating their internal laws and policies on private security in accordance with international law.

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