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The Public-Private in Armed Conflict

The Accountability of Private Security Companies

Inger Österdahl

Abstract

This working paper deals with the individual criminal accountability of employees of private security and/or military companies (PSMCs) in armed conflict. From the perspective of international humanitarian law the PSMCs are interesting because they cause theoretical and practical problems to the current legal system. The private character of these companies does not fit in with the presumed public nature of the national armed forces participating in an armed conflict. The difficulties caused by the PSMCs, however, should not be exaggerated. There is plenty of applicable law both within the international humanitarian legal field and in other subsystems of international as well as domestic law of states. The problems are primarily practical, they turn on the implementation of the current international legislation which falters for different reasons with respect to the "private warriors". For the time being, the legal system can remain intact and the "private warriors" can be dealt with as if they were either public warriors - i.e. combatants - or civilians. From the normative point of view it is important that there are no holes in the law that would allow the PSMCs to carry out criminal acts without sanction.

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The Public-Private in Armed Conflict: The Accountability of private security companies

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Contents

1 Introduction

There are lots of forms of accountability. There are lots of forms of legal accountability. This contribution deals with criminal accountability under international humanitarian law. Primarily, it deals with the individual criminal accountability of employees of private security and/or military companies (PSMCs) in armed conflict.

The existence of "private warriors" has become generally visible through the ongoing conflict in Iraq although the rise in the use of PSMCs did not start with Iraq. The use of "private warriors" has a long history, it was not until the nation-states began to form that state armies became the norm. The most recent rise in use of PSMC services started after the end of the Cold War in the beginning of the 1990s.

From the perspective of international humanitarian law the PSMCs are interesting because they cause theoretical and practical problems to the current legal system. Their private character does not fit in with the presumed public nature of the national armed forces participating in an armed conflict.

The theoretical or systematic difficulties caused by the PSMCs should not be exaggerated, however, there is plenty of applicable law both within the international humanitarian legal field and in other sub-systems of international as well as domestic law of states. The problems are primarily practical, they turn on the implementation of the current international legislation which falters for different reasons with respect to the "private warriors". Because the phenomenon of the extensive use of PSMCs is relatively new in this era, the channels for implementing the international obligations vis-à-vis these actors may not be as obvious and open as the procedures for the implementation of the same law with respect to members of the state armies.

From the constitutional legal point of view the use of private military force gives rise to interesting questions on the nature of the state and sovereignty, but theses issues will largely be left out of this contribution.

This contribution will look at some classical issues of international humanitarian law with a bearing on the PSMCs in order to see to what extent the existing law can be applied to the new pri-

vate actors in armed conflict. Since the topic is new not only to the reader but also to the author of the contribution, the presentation will be rather tentative and rudimentary. The topic of the position of the PSMCs in the system of international humanitarian law makes up part of a larger project carried on by the author, generously financed by the Bank of Sweden Centenary Fund (*Riksbankens jubileumsfond*) on some disappearing dichotomies fundamental to humanitarian law (among other legal sub-systems) - namely the public-private, the combatant-civilian, the national-international, and war-peace – and the consequences of their disappearance to the legal system.

2 Civilians and combatants

The natural place to start an investigation of the legal accountability of private security and/or military companies (PSMCs) in armed conflict is in the international humanitarian law field regulating the conduct of international and non-international armed conflict.[1] A central principle in international humanitarian law is the principle of distinction between combatants and civilians; the categories may also be labeled combatants and non-combatants showing that the latter category includes all persons taking no active part in the hostilities, i.e. even members of the armed forces placed *hors de combat*. To a certain extent, international humanitarian law aims at protecting both civilians and combatants although the primary purpose of the distinction is to protect the civilians.

As far as the combatants are concerned, a combatant is defined in Additional Protocol I to the Geneva Conventions as a member of the armed forces of a party to the conflict, i.e. as a person who has the right to participate directly in hostilities.[2] The issue of who actually "participates directly in hostilities" is a big one in current debate on international humanitarian law and the answer has repercussions on the status of PSMC personnel among other things.[3]

[1] Geneva Conventions I-IV of 1949; Additional protocols I and II of 1977; Statute of the International Criminal Court (ICC) of 1998.

[2] Article 43 (2) of Additional Protocol I, relating to the protection of victims of international armed conflicts.

[3] *International Humanitarian Law and The Challenges of Contemporary Armed Conflicts*, 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26-30 November 2007, Doc. No. 30IC/07/8.4, pp 15-17; Nils Melzer, *Interpretative Guid-*

The Red Cross talks of the "civilianization" of the armed forces which contributes to an increasingly blurred distinction between civilian and military functions.[4] The private contractor may risk being regarded as having overstepped the crucial line between civilian and combatant through his or her "direct participation in hostilities", depending on how "direct participation" is defined. If the line is overstepped, the contractor loses his or her protection against direct attack. We will come back to the issue of targeting and protection below.

Civilians under international humanitarian law are all those who are not combatants. Arguably, there is no third category, like unlawful combatants.[5] We will not enter into the heated debate of the status of the potential unlawful combatants here; the issue of PSMCs as unlawful combatants has not arisen so far. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian, according to the First Additional Protocol.[6] Since much of the international humanitarian law is geared to the protection of civilians the distinction and the potential finding that someone is or is not a civilian is very important.

From the point of view of treatment upon capture, the finding that someone is or is not a combatant is equally significant. If captured, a combatant under international humanitarian law is entitled to the status of prisoner of war which entitles him or her to a relatively humane treatment during captivity and release upon the cessation of active hostilities.[7] Should any doubt arise as to whether a person, having committed a belligerent act and having fallen into the hands of the enemy, is entitled to prisoner of war status such a person shall enjoy the protection of the third Geneva Convention until such time as his or her status has been determined by a competent tribunal.[8]

If a person – for instance an employee of a PSMC – is captured and is considered to have participated directly in the hostilities, but

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ance on the Notion of Direct Participation in Hostilities Under international Humanitarian Law, International Committee of the Red Cross (ICRC), Geneva, 2009.

[4] Ibid., p 15.

[5] Knut Dörmann, "The Legal Situation of Unlawful/Unprivileged Combatants", *International Review of the Red Cross (IRCC)*, vol. 85, pp 45-74.

[6] Article 50 (1).

[7] Geneva Convention III.

[8] Article 5 Geneva Convention III.

is not considered a combatant in the formal sense, i.e. not to have a right to participate directly in hostilities, and thus is not considered to be entitled to prisoner of war status, the person will still always be entitled to protection under a general clause in Additional Protocol I to the Geneva Conventions which is considered to have developed into customary law binding on all states whether party to Protocol I or not.[9] It could be noted on the subject of accountability that the status as civilian or combatant does not affect the criminal accountability of the person for potential war crimes.

3 Legitimate targets

As hinted above combatants may be legitimately targeted for attack whereas civilians may not. According to Additional Protocol I, the civilian population as such, as well as individual civilians, shall not be the object of attack.[10] Thus, whether the PSMC personnel are regarded as combatants or civilians is decisive of whether they may be directly attacked or not.

Under the Additional Protocol I, the parties to an armed conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[11] Also, and importantly, the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.[12] As a further specification of military objectives, the First Additional Protocol states that in so far as objects are concerned (as opposed to human beings, i.e. combatants who may be directly targeted), military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[13] It is obvious that there is room for different views as to different aspects of this specification and that "military objective" is not an exact concept. Depending on what tasks

[9] Article 75 Additional Protocol I.
[10] Article 51 (2).
[11] Article 48.
[12] Article 50 (3).
[13] Article 52 (3).

are performed by the PSMCs and on what locations the objects used by the PSMCs may be included in the legitimate military objectives and may thus be directly attacked.

So called collateral – or incidental - damage could also affect PSMCs. Collateral damage follows from what is labelled indiscriminate attacks. Most often, when collateral damage is the subject of general debate the issue concerns the following type of indiscriminate attack: An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilians objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[14]

The presence of civilians is sometimes, illegitimately, used in order to shield military objectives from attack – so called "human shields" – or to shield military operations.[15] Under the First Additional Protocol, the parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.[16] It is unlikely that private contractors would consciously be moved to locations where they would be used as "human shields".

The obvious still deserves to be noted here, namely that the more military objectives and civilians and civilian objects are intermingled, the harder it becomes in reality to distinguish between the military objectives and the civilians in the conduct of military operations. The blurring of the distinction most likely will be to the disadvantage of the civilians. It also deserves to be mentioned that only *excessive* incidental civilian losses are prohibited strictly speaking, in relation to the concrete and direct military advantage anticipated.[17] An effort to minimize the incidental civilian losses are contained in the terms "concrete" and "direct" military advantage. All incidental civilian losses are not prohibited under international humanitarian law, although reprehensible some are seen as almost inevitable. What is to be regarded as excessive is not defined once and for all, so like "military objective", "excessive" is a rather inexact concept.

[14] Article 51 (5) (b).
[15] Article 51 (7).
[16] Article 51 (7).
[17] See Article 57 (2) (a) (iii); and Article 57 (b).

4 Mercenaries

When PSMCs are discussed from the point of view of international humanitarian law the question is sometimes asked whether they should not rightly be categorized as mercenaries. Since mercenary is a loaded concept, the discussion whether PSMCs should be placed in that category or not is not always very fruitful.

Since the adoption of the First Additional Protocol, mercenaries constitute an outcast category of humanitarian law. There are two other international conventions outlawing mercenaries completely. A mercenary, under the Additional Protocol I to the Geneva Conventions, shall not have the right to be a combatant or a prisoner of war, which we have seen would entail certain privileges upon capture.[18] To the extent that the PSMC personnel do not participate directly in the hostilities, the issue of their being mercenaries or not is irrelevant since one element of the definition of a mercenary is that he or she does, in fact, take a direct part in the hostilities.[19] (Though as we know it is not always certain what amounts to "taking a direct part in the hostilities".)

A crux with the definition of a mercenary under the First Additional Protocol is that another element of the definition is that a mercenary is not a member of the armed forces of a party to the conflict.[20] Someone who is not a member of the armed forces of a party to the conflict could never be considered a combatant in the eyes of international humanitarian law in the first place, since, as we just saw, the definition of a combatant is that he or she is a member of the armed forces of a party to a conflict.[21]

Indeed, as Kalshoven and Zegveld write, the provision on mercenaries in the First Additional Protocol does not amount to a genuine exception to the rule that the right to be a prisoner of war ought not to be dependent on the motives which prompt someone to take part in hostilities, since a totally independent mercenary army – which even from a purely theoretical point of view would seem unrealistic to say the least – is not counted among the "armed

[18] Article 47 Additional Protocol I; cf. Geneva Convention III
[19] Article 47 (2) (b).
[20] Article 47 (2) (e).
[21] Article 43 (2); cf. above note 2.

forces of a party to a conflict" and thus no exception to what usually applies to combatants is necessary or in fact possible.[22]

As far as the PSMCs are concerned, to the extent that they participate in the hostilities, the PSMCs would perhaps be considered members of the armed forces of the state who had hired the PSMC; it would be difficult picturing the PSMCs participating in the armed conflict for their own purposes and outside the command of any party to the conflict. On the other hand, certain formalities are needed in order for a person to be considered enlisted in the armed forces of a state and it is far from certain that the states hiring PSMCs have formally enlisted the personnel as members of the state's armed forces.

One element of the definition of a mercenary under the First Additional Protocol which does fit the PSMCs is that in order to be considered a mercenary the person must be motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party.[23] If this was the only criterion, PSMC personnel could easily be categorized as mercenaries to the extent they participate in the hostilities.

Thus, as far as mercenaries are concerned, it would seem as if the private contractors either do not participate directly in the hostilities and therefore are not mercenaries according to the definition in the First Additional Protocol, or the private contractors do participate directly in the hostilities but then it is uncertain whether they should be considered making up part of the armed forces of a party or not if they haven't been formally enlisted. Even if the PSMC employees are considered mercenaries this does not close any discussion on the need for regulation of the PSMCs and most important for our purposes does not affect their accountability for war crimes.

[22] Frits Kalshoven & Liesbeth Zegveld, *Constraints on the Waging of War – An Introduction to International Humanitarian Law*, Geneva: ICRC, 2001, p 90; cf. also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 2004, pp 50-52.
[23] Article 47 (2) (c).

5 Accountability

There is collective and individual accountability for breaches of the Geneva Conventions and their Additional Protocols. The kind of accountability that has been mostly discussed with respect to PSMCs so far is individual criminal accountability, i.e. individual wrongdoers during armed conflict or in relation to an armed conflict being or not being brought before justice. From the legal point of view accountability – or responsibility – makes up part of the mechanisms available for enforcing international humanitarian law.

The legal position of principle is that there is no reason why PSMC personnel should be immune to prosecution for crimes of different magnitudes and kinds. They are just as accountable as any other individual committing a crime, be it a war crime, a human rights crime or a more ordinary crime contained in the domestic law of the state or states concerned.

As far as the international responsibility of the states towards each other is concerned, each state has a duty to see to it that its agents and inhabitants respect the international commitments of the state. Thus, if the US does not bring suspected PSMC criminals before court it may make itself guilty of violating different international agreements in relation to the other parties to the agreement and in particular the party or parties whose citizens have suffered from the actions of the PSMC.

The issue of whether PSMCs are actually brought before court domestically for their potentially criminal actions is not so much a legal issue of principle as a practical and political issue, maybe an economic and tactical one as well.[24] There may be no interest in the home state in bringing the PSMCs before justice at least not at short sight; the PSMC has served the country well. Also, depending on in which state the PSMC is registered there may be no functioning judicial administrative system to take care of any suspects. This is certainly not the case in a state like the US. As a remedy for the lack of institutions in the home state of the PSMC, there may be international institutions or institutions in other states which could try the individuals, at least in principle. Universal jurisdiction applies for war crimes and other serious international crimes.

[24] Cf. Lindsey Cameron, "Private military companies: their status under international humanitarian law and its impact on their regulation", *IRCC*, vol 88, no. 863, Sep. 2006, pp 573-598, p 594.

Collective responsibility would typically be incurred by a state, one or several members of the armed forces of whom would be accused of having violated the Geneva Conventions and Protocols. Also, war crimes committed by PSMCs hired by the state could lead to the state being held responsible for the actions of the PSMCs. The First Additional Protocol states that a party to the conflict is responsible for all acts committed by persons forming part of its armed forces.[25] The First Additional Protocol to the Geneva Conventions states that a party to a conflict which violates the provisions of the Conventions or the Protocol shall, if the case demands, be liable to pay compensation.[26] Even if the PSMCs do not form part of the armed forces of the state who hired them, arguably the state could still become responsible for their misbehaviour under the general international law of state responsibility.

Even if there is no armed conflict, and international humanitarian law in the strict sense of the term therefore does not apply, there are other serious international crimes than war crimes that could hypothetically be committed by PSMCs for which the individual perpetrator as well as the state that hired him or her could become responsible. Examples of such crimes are crimes against humanity and genocide, which it is true would seem unlikely to be carried out by PSMCs. A violation of the prohibition against torture would seem a more likely crime, among the most serious ones, to be committed by a PSMC also outside an armed conflict. Torture counts as a crime both in war and peace. One could think of many other crimes against human rights and ordinary crimes like theft and murder which PSMCs could commit, and which could bring up the responsibility of the state at least if the crimes are committed on a large scale. The collective responsibility of the state does not hinder simultaneous parallel proceedings involving the individual responsibility of some of the actors based on identical facts. A famous case of collective responsibility for genocide is the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro*) in the International Court of Justice (ICJ) in The Hague in which judgment was handed down in 2007 (after thirteen years of proceedings) which went on in parallel with similar proceedings against

[25] Article 91 Additional Protocol I.
[26] Article 91 Additional Protocol I.

individual suspects in the International Criminal Tribunal for the former Yugoslavia, also in the Hague.[27]

The US could be held responsible for the crimes committed for instance by PSMC personnel in Abu Ghraib if Iraq wished to sue the US for violations of international law. Finding a forum for such a trial would not be easy, however, since there is no obvious international court available. Neither the US nor Iraq are parties to the Statute of the ICJ. It is unlikely that any temporary tribunal or claims commission would be created to hear claims by Iraq against the US for compensation due to harm caused by the PSMCs in Abu Ghraib.

Other collective entities that could theoretically incur responsibility for the actions of PSMCs are liberation movements and other kinds of organized non-state armed groups which count as legal subjects under the Geneva Conventions and Additional Protocols, to the extent that PSMCs are hired by non-state armed organizations.

As far as the PSMCs as such are concerned as legal subjects potentially accountable for grave violations of international humanitarian law, this is a slightly more complicated issue from the point of international law. In international law there is currently an extensive debate on the position of (large) business companies in the international legal system and whether they can be held accountable for war crimes and/or crimes against human rights more generally. International law has not yet recognized business companies as subjects of the international legal system.

If one looks closely at the wording of the article in the IVth Geneva Convention on the compulsory punishment of grave breaches of the Convention, the article lays down that effective penal sanctions for "persons" committing war crimes shall be provided for.[28] This is most naturally interpreted as natural persons, but might just as well be interpreted as including also legal persons, for instance business corporations. In domestic law, illegal acts of business corporations might be sanctioned in different ways including through the use of criminal law. In criminal law there is also the institute of complicity in crime which many times could become applicable to

[27] The judgment is available at www.icj-cij.org.
[28] Article 146, paragraph 1.

business corporations who might be said to facilitate or be indirectly involved in war crimes committed by others.

In the respective statutes of the International Criminal Tribunal for the Former Yugoslavia (1993), the Tribunal for Rwanda (1994) and the International Criminal Court (ICC) (1998), however, it is specifically stated that these institutions only have jurisdiction over natural persons. This does not imply that business corporations, like PSMCs, in principle cannot be held accountable under current international humanitarian law, but the lack of provisions making it possible to try them before the international criminal tribunals and court certainly does not ease the implementation or the development of international law on corporate responsibility and it must be interpreted as a sign of reluctance on the part of the states to include business corporations in the target group of international criminal tribunals. As pointed out before, this does not concern the criminal accountability of individual (natural) persons working for the PSMCs. These can clearly be held responsible under the current law.

Representatives of business corporations were tried as individuals for instance before the Nuremberg tribunal (the International Military Tribunal) and the US and UK Military Tribunals after the Second World War so the idea of corporate criminal responsibility in some form is not foreign to international law.

Beside the more theoretical point of the status of business corporations – and other non-state actors – in international law, a concrete gain associated with the possibility of holding the corporation as such criminally responsible would be the large amounts of compensation that they could hypothetically be held liable to pay to the victims of the war crimes.

6 War crimes

What is referred to as ”war crimes” in international humanitarian law are grave breaches of the Geneva Conventions and Additional Protocols.[29] Mere breaches of the Conventions do not constitute “war crimes” in the technical sense, but they still constitute violations of the law. The states parties to the Conventions and the Protocols undertake to suppress all acts contrary to the Conventions,

[29] Cf. Geneva Convention IV Articles 146-147 and Additional Protocol I Article 85.

but the obligation to suppress grave breaches is stronger than the obligation to suppress mere breaches. From a strict point of view the states are obliged to provide "effective penal sanctions" only for the grave breaches of the Conventions and Protocols. With respect to other kinds of breaches than grave breaches, the states are under the obligation to take the "measures necessary for the suppression" of all such acts.[30] In the latter instance, the duty of the state is expressed in more general terms, but the duty remains nevertheless to suppress all breaches of the law in question.

Examples of grave breaches of the Fourth Geneva Convention, i.e. war crimes, are wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, wilfully depriving a protected person of the rights of fair and regular trial, making the civilian population or individual civilians the object of attack, or launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.[31] These examples of war crimes are chosen on the basis that they constitute acts which could be potentially performed by PSMCs. Depending on what kinds of tasks the PSMCs are hired for, their personnel could in theory perform most kinds of war crimes.

In order for the Geneva Conventions and Additional Protocols to be applicable and thus in order for "war crimes" in the true sense of the term to be possible, there has to be an armed conflict. In situations not amounting to armed conflict, crimes potentially committed by PSMCs will not be labeled war crimes, however they will still be crimes of some kind liable to prosecution in some forum.

In order to commit a war crime a person needs not to be a combatant. Civilians in different capacities may also commit war crimes so even if the PSMCs are not considered to be combatants because they do not take direct part in the hostilities, which most often they do not, they may still potentially commit war crimes under the Geneva Convention or Additional Protocols. Just in order to illustrate the fact that others than combatants can commit war

[30] Article 146 Geneva Convention IV, paragraph 4.
[31] Article 147 Geneva Convention IV.

crimes, biological experiments mentioned in the Fourth Geneva Convention are typically performed by medical doctors or scientists and not by combatants. The experiments carried out on human beings by Nazi doctors during World War II constitute the background for the regulation in the Geneva Convention.

A state party to the Geneva Conventions and Protocols are under the obligation to search for persons alleged to have committed or to have ordered to be committed grave breaches of the law and shall bring such persons, regardless of their nationality, before its own courts.[32] Thus, if the US does not bring alleged war criminals among its PSMCs before court the US acts in contravention of its obligations under the Geneva Conventions. In principle, this makes the US accountable towards the other parties to the Geneva Conventions.

It is clearly stated in the Geneva Conventions that no state party shall be allowed to absolve itself or any other party of any liability incurred by itself or by another party in respect of war crimes.[33]

Human rights are also applicable in armed conflict to the extent that the states involved in the conflict have not derogated from their obligations under the relevant treaties.[34] Even if the states have made derogations there is a core of inalienable rights that should always be protected; these rights could also be said to make up part of the body of international humanitarian law. Both human rights (primarily in times of peace) and humanitarian law (in wartime) exist in order to protect certain fundamental humanitarian values. Torture, for instance, mentioned earlier constitutes a human rights violation as well as a grave breach of the Geneva Conventions.

If PSMCs perform acts which amount to crimes against human rights during an armed conflict they may be held guilty – and the state under whose jurisdiction they belong should bring them before court – for these crimes. If the US suspects that their PSMCs have committed human rights crimes the US is under an obligation to investigate and possibly prosecute the suspected criminals. Under the human rights treaties the state party undertakes to respect and to ensure to all individuals subject to its jurisdiction the rights

[32] Article 146 Geneva Convention IV.

[33] Article 148 Geneva Convention IV.

[34] See for instance Article 4 in the International Covenant on Civil and Political Rights of 1996.

recognized in the treaty.[35] It is the victims of the crimes whose rights have been violated, so by punishing the perpetrators, the state protects the rights of the victims and thus fulfils its obligations under the treaty. In principle, just as in case of the conventions on humanitarian law, if the US does not implement its obligations under the human rights treaties the US becomes accountable to the other parties to the convention for not fulfilling its obligations under the convention. Under most general human rights treaties there is a mechanism through which party states may launch complaints against other party states claiming that the other party is not fulfilling its obligations.[36]

In international fora only the state can be held accountable for violations of the human rights treaties. The PSMCs or their personnel cannot be held directly accountable, but the state is held accountable for not seeing to it that the subjects under its jurisdiction respect human rights in their relations with other subjects; the state thus does not sufficiently see to it that the human rights that it has undertaken to implement are actually implemented in practice.

The extraterritorial applicability of human rights obligations, i.e. in our example the issue of whether the US is obliged to protect the human rights of people not only in its own geographical territory but also outside its territory when acts are carried out by agents of the US state, constitutes the subject of an extensive debate in the international legal doctrine and judicial practice currently, but the ground rule must be that states are bound by their human rights obligations also when they act outside their own territory. This is also what the ICJ in The Hague found in its well-known advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 2004.[37] Several cases in the European Court of Human Rights, the UN Human Rights Committee (under the Covenant on Civil and Political Rights) and the Inter-American Commission on Human Rights (under the American Convention on Human Rights) have dealt with this issue.

[35] Cf. Article 2 in the International Covenant on Civil and Political Rights and Article 1 in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (European Convention).

[36] See for instance Article 41 of the International Covenant on Civil and Political Rights and Article 33 of the European Convention.

[37] There are more cases on the extraterritorial applicability of human rights obligations from the UN Human Rights Committee, Inter-American Commission for Human Rights, and the European Court of Human Rights.

If the US in our example does not prosecute suspected human rights violators, which seems to be the case, and if an Iraqi who was the subject of alleged human rights violations would like to get compensation from the US because of the human rights violations he was subjected to, the difficult issue would be where to launch the complaint since all issues of criminal accountability relating to the personnel of the PSMCs are to be decided in US courts. Even if the plaintiff succeeded in locating a proper forum in the US, there are a host of other reasons why pursuing a case in the US would most likely be too cumbersome for any victim of alleged human rights violations in Iraq to carry out. The problems are not primarily of legal principle but of institutions and practice. In the United Kingdom, the House of Lords has issued judgments recently relating to the accountability of the UK for human rights crimes under the European Convention committed by its troops in Iraq.

Other serious international crimes of which the PSMCs could hypothetically make themselves guilty are as mentioned crimes against humanity and genocide. These crimes do not presume the existence of an armed conflict, but may take place either in war or in peace. Considering the serious nature of these crimes and the fact that they have to take place on a large scale – "part of a widespread or systematic attack directed against any civilian population" in the case of crimes against humanity – they are less likely than other crimes to be committed by PSMCs.[38]

The PSMCs could also make themselves guilty of crimes under US law – or under Iraqi law for that matter, in case of Iraq – and in those cases it is difficult from the point of view of law to see why the US would not wish to bring charges against the suspected individuals. Even if the contract between the US and the PSMC stipulates that any criminal proceedings shall be taken care of by the US and not by local courts – or international courts for that matter – just like the agreements between sending states and the states where the troops are deployed usually say, this does not mean that no criminal proceedings shall be undertaken.

[38] See the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the Statute of the Nürnberg Tribunal for a definition of crimes against humanity (Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal; UN General Assembly resolution 95 (I), 11 December 1946.

Of course, inhuman or degrading treatment of people or murder or any other violent crime, or the crime of theft just to take some examples, constitute crimes under US law which the US would normally want to prosecute. The PSMCs cannot enter into a contract with the US state saying that the hired personnel shall enjoy immunity against all criminal prosecution. There is nothing mystical about the status of the PSMCs which the discussion on the supposedly lacking criminal accountability of PSMCs sometimes gives the (false) impression of. There is no reason in law why this particular category of persons should be exempt from accountability.

7 Enforcement of criminal responsibility

As far as international humanitarian law is concerned it is supposed to be enforced mainly in the domestic courts of the individual states. As we have seen, the IVth Geneva Convention stipulates that the party states must enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the convention, i.e. war crimes.[39] What constitutes grave breaches is then defined in the following article, we saw a number of examples of what constitutes grave breaches above. A number of further grave breaches are added to the list of human behaviour at its worst through Additional Protocol I to the Geneva Conventions.[40]

The enforcement system under the Geneva Convention is supposed to be watertight: Each party state, as we have noted earlier, shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, grave breaches of the Convention or Additional Protocol, and shall bring such persons, regardless of their nationality, before its own courts.[41] A state may also, if it prefers, hand such persons over for trial to another state party concerned, provided the latter has made out a prima facie case.[42] Thus, from the point of view of principle there is no way a state could lawfully escape its obligation to enforce the Geneva

[39] Article 146 Geneva Convention IV. The term "war crime" does not explicitly appear until in the Additional Protocol I, Article 85 (5).
[40] Article 85.
[41] Article 146, para. 2 of the Geneva Convention IV; Article 85 (1) of Protocol I.
[42] Article 146, para. 2.

conventions no matter what the nationality of the criminal and no matter where the criminal act was carried out.

As we have also seen above, making international humanitarian law apply to PSMCs, contrary to widespread opinion, it should not be difficult in principle as far as the individual criminal accountability of the employees of the PSMC is concerned. Other aspects of international humanitarian law are more difficult to apply to PSMC employees, for instance to decide whether they should be regarded as civilians, combatants or mercenaries. Their status in the system of international humanitarian law determines how they may be treated themselves which may be very important to the individual employee, but their own status does not affect their capacity to commit war crimes. Both civilians and combatants may, and do, commit war crimes and are thus accountable under international humanitarian law.

The point that the prime locus for the enforcement of humanitarian law is the domestic court is also made in the statute of the International Criminal Court.[43] The preamble to the statute emphasizes that the International Criminal Court shall be complementary to national criminal jurisdictions.[44] Only if the national court is unwilling or unable shall the ICC step in.

In reality, a lot of states, and a lot of courts, are unwilling and/or unable to prosecute war criminals for a lot of different reasons. Obvious cases are states that lack functioning police authorities and judiciaries, such states may for this reason be attractive places in which to register a PMSC. As we saw, under the Geneva Conventions a state may also choose to hand over suspected war criminals to another state party for trial, but unwilling or unable states will probably not take any such measures either. Weak and failed states will be unable and perhaps in some cases unwilling to try war criminals; the kind that has been labeled rogue states in US terminology may be unwilling.

The US itself and other rich and so far "good" states, however, do no not necessarily enforce their humanitarian law obligations either. Had the US prosecuted the PMSC employees involved in the Abu Ghraib mistreatment of prisoners for instance, then the

[43] 17 July 1998, in force 2002.
[44] Tenth preambular para.

discussion of the potential negative impact on warfare of the use of PMSCs may have become much less vivid.

Lack of political will to proceed with investigations or lack of prioritization of cases relating to war crimes in comparison with cases with a more direct bearing on life at home may be reasons why the strict obligations under the Geneva Convention are not followed. Cases implying violations of the Geneva Conventions may be complicated and costly to investigate for different practical reasons which may make these cases swallow up more resources than the domestic system is prepared to invest in them. The perpetrators of the crimes may be difficult to track down, employees of PMSCs as well as the PMSCs themselves are usually not a stable stationary crowd.

The armed forces have their own institutional set-up as far as the prosecution of war criminals is concerned and several members of the US armed forces have been tried for war crimes in Iraq, in contrast to the lack of prosecution of the private contractors. The lack of precedent may be an explanation why the private contractors are not prosecuted, but obviously the situation where employees of PMSCs can perform serious criminal acts unpunished is untenable.

Contracts and agreements may be entered into stipulating that contractors, as well as members of the armed forces, shall only be tried by the courts in their states of origin granting them immunity vis-à-vis the authorities of the state where they are operating. Completely doing away with responsibility for war crimes, however, would be a violation of international law as it stands. In the common Article 1 of the Geneva Conventions and in Article 1 (1) of Additional Protocol I, the states parties undertake to respect and to ensure respect for the Conventions and Protocol in all circumstances.

The other "families" of crimes of which private contractors could make themselves guilty are as mentioned earlier human rights crimes, other international crimes that do not presuppose the existence of an armed conflict (like crimes against humanity and genocide) and crimes under the domestic law of the home state of the contractor. We will not analyze the responsibility of private contractors in relation to these three categories, but in any case the enforcement of the individual criminal responsibility – and sometimes at the domestic level of corporate criminal responsibility – should

mainly take place through the domestic courts. The applicability of international human rights law to the actions of the PSMCs is a slightly more complex issue than the applicability of international humanitarian law which applies to everyone in a situation of armed conflict.

8 Difference international – non-international conflict

What has been said so far about international humanitarian law and its applicability to PMSCs has related to PMSCs working in international armed conflict. There is a big difference in principle between international humanitarian law applicable to international armed conflict and international humanitarian law applicable to domestic armed conflict. The latter is much briefer, much less detailed and places many fewer restrictions on warfare in different respects. The law relating to domestic armed conflict intrudes itself much less upon the parties involved which is natural from the international legal point of view since a domestic, or non-international, conflict typically takes place within the territory of one, sovereign, state between the government forces of that state and dissident armed forces.

The main instrument of international humanitarian law regulating domestic armed conflict is Additional Protocol II to the Geneva Conventions.[45] Protocol II is applicable to conflicts between the armed forces of a state party and dissident armed forces or other organized armed groups, i.e. the archetypical civil war.

One decisive difference between the legal instruments applicable to international armed conflicts and Additional Protocol II with respect to the topic under discussion in this article is the absence of the concept of war crime in Protocol II. There is no provision on the enforcement of the Protocol as we find in the Geneva Conventions nor is there any list of what constitutes grave breaches, or breaches of the Protocol. The fact that most armed conflicts today are domestic, or non-international, conflicts makes the issue of the

[45] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of June 8 1977 (1978).

lack of provisions on criminal accountability for war crimes important.

Also, the concept of combatant is unknown to Additional Protocol II. Civilians are mentioned, but not combatants, and not mercenaries. The issue of the status of the employees of PSMCs in domestic armed conflicts thus turns out differently than it does in the case of international armed conflicts. The status of a person as soldier or civilian in a general sense, however, does not affect his or her capacity to be held responsible for serious crimes even in domestic conflict.

The trend in recent years has been towards convergence between the contents of the law of the two areas international and non-international armed conflict respectively, i.e. through custom and not least judicial practice in the recent international criminal tribunals the great lacunae in the law relating to internal armed conflict are being filled up with norms originating from the body of law regulating international armed conflict.[46]

It is desirable that the two areas of law converge and in particular that domestic armed conflicts are more closely regulated by international humanitarian law, not least since civil wars constitute the majority of wars today and they generally tend to be particularly ruthless.

In fact, The International Criminal Tribunal for Rwanda has found that breaches of Additional Protocol II do constitute "war crimes" although the term is not found in the Protocol itself. The mandate of the International Criminal Tribunal for Rwanda includes the power to prosecute persons having committed serious violations of Protocol II to the Geneva Conventions, among other things, despite the aforementioned lack of criminal legal provisions in Protocol II.[47]

Maybe it should be added that the fact that civil wars are not (yet) as closely regulated by humanitarian law as are international conflicts does not mean that civil wars are not covered by international law at all. Human rights apply as do the provisions on other international crimes and domestic law applies, for instance criminal law. If the services of PSMCs are used, the criminal law of the state

[46] Cf. Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary international humanitarian law,* vols. 1–2, Cambridge; Cambridge University Press 2005.
[47] Article 4 of the Statute of the Tribunal; the Statute is annexed to UN Security Council resolution 955 (1994).

where they are registered and of the state of origin of the employees is also relevant if the issue appears of bringing persons to trial for criminal acts. International law is probably more important than domestic law in order to protect the victims of non-international armed conflict, and soldiers who have laid down their arms, since the domestic law will mainly take the interests into account of the powers that be, i.e. the government who will typically not be favourably disposed to those who try to remove it from power or those who are suspected of sympathizing with its opponents.

The other provision relating to civil wars, in addition to Protocol II to the Geneva Conventions is the common Article 3 of the Geneva Conventions. Before the Additional Protocol, this was the only provision regulating non-international armed conflict.

This shows how recent the humanitarian law regarding civil war is and it also illustrates how strong is the reluctance on the part of states to let international humanitarian law enter the domestic scene; the states fear losing power over their territories due to the humanitarian law which takes all fighting parties' and all civilians' interests into equal account. In order to calm the fears of the states there are all kinds of safeguards in Additional Protocol II, for instance, that nothing in the Protocol shall be invoked for the purpose of affecting the sovereignty of a state or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the state or to defend the national unity and territorial integrity of the state.[48] Also, nothing in the Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the state party in the territory of which that conflict occurs.[49]

Due to the gaps in Protocol II and to the fact that it is not as widely ratified as the other Geneva instruments, common Article 3 has tended to be more in focus with respect to the humanitarian law applicable in domestic conflict than Protocol II, despite the former's relative brevity. Article 3 is applicable to any case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties whereas, as we saw

[48] Article 3 (1) of Protocol II.
[49] Article 3 (2) of Protocol II.

earlier, Article II is only applicable to armed conflicts which take place in the territory of a state party between its armed forces and dissident armed forces or other organized armed groups, thus excluding conflicts between rivaling non-state armed groups or between other actors who cannot be contained within the government/non-government armed group constellation. The greater breadth of Article may have contributed to the stronger focus on Article 3 than on Protocol II; Article 3 is potentially applicable to more conflicts than is Protocol II.

Common Article 3 constitutes a concentrated version of the respective Geneva Conventions and is often called a convention within the convention. It includes the most fundamental rules of the Geneva Conventions. The breadth and relative imprecision of the Article from the point of view of the protected persons can be used in order to expand the contents of the Article through interpretation.

Article 3 states that persons taking no active part in the hostilities shall be treated humanely. This also applies to PSMC employees in an area of armed conflict whether it is they who treat other people or whether it is other people who treat them. Then, Article 3 enumerates acts which are prohibited with respect to the protected persons, like, for instance violence to life and person including cruel treatment and torture, taking of hostages, outrages on personal dignity, in particular humiliating and degrading treatment.[50]

The same obligation on the part of the states to provide effective penal sanctions for grave breaches of the Geneva Conventions applies with respect to Article 3. Thus to the extent that the prohibited acts in Article 3 correspond to the list of grave breaches towards the end of the Convention, employees of PSMCs could hypothetically be held responsible for grave breaches – i.e. war crimes - also in a situation of civil war.[51] As far as the grave breaches involve any kind of violence or cruel treatment of persons the prohibitions in Article 3 should correspond to what amounts to grave breaches. The grave breaches also include the destruction of property which is not included among the prohibitions in Article 3, for instance.

[50] Article 3 (1) (a)-(c).
[51] Article 147 Geneva Convention IV.

It can be added, although this provision is probably of less concern to the employees of PSMCs, that Article 3, furthermore, prohibits the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[52] This provision has been central to cases relating to the military commissions at Guantánamo Bay, decided by the US Supreme Court.[53] The Supreme Court has considered the armed conflict between the US and al-Qaida in Afghanistan to constitute a "'non-international' armed conflict", therefore Article 3 has become applicable to that conflict. The corresponding passage in the Article on grave breaches lays down that it constitutes a grave breach of the Convention willfully to deprive a protected person of the rights of fair and regular trial prescribed in the Convention, i.e. the potential deprivation of the detainees at Guantánamo and elsewhere of fair trial may constitute a war crime.[54] The persons depriving others of fair trial, however, will most likely not be employees of PSMCs, but rather lawyers or other public officials directly employed by the state. It is not unthinkable, however, that even legal services are contracted out so that military tribunals may in time be staffed by people coming from PSMCs.

In Additional Protocol II there is one article on fundamental guarantees relating to the treatment of all persons who do not take a direct part or who have ceased to take part in hostilities.[55] This provision is an expanded slightly more comprehensive version of the common Article 3 of the Geneva Conventions. Thus, if employees of PSMCs would violate any of these fundamental guarantees – which would basically be equal to a grave breach of the Geneva Conventions – they would be responsible for a violation of international humanitarian law. There is no provision obliging the states parties to Protocol II to enact legislation to provide effective penal sanctions for violations – even grave – of Protocol II, but under international law all parties to an international agreement are obliged to put the agreement into practice in good faith so that even without the explicit obligations of the Geneva Conventions it

[52] Article 3 (1) (d).
[53] Cf. Hamdan v Rumsfeld 2006.
[54] Article 147 Geneva Convention IV.
[55] Article 4 Protocol II.

could well be argued that the states are under the duty to punish violators of Protocol II as a measure to implement the agreement. Inversely, states who do not implement Protocol II make themselves guilty of violating the agreement.

As far as the status of the participants in a civil war is concerned, as pointed out above the term combatant does not occur in Protocol II. Thus by definition, an employee of a PSMC could never become a "combatant" in a non-international conflict. The concept of prisoner of war does not occur either which is a logical consequence of the lack of combatants in the formal sense. The closest one comes to the regulations of the treatment of prisoners of war in the third Geneva Convention is the single article in Protocol II on persons who have been deprived of their liberty for reasons related to the armed conflict.[56] The provision on the treatment of persons accordingly deprived of their liberty applies to civilians as well as to those who participate in the armed conflict.

The next provision in Protocol II, on penal prosecutions, applies to the prosecution and punishment of criminal offences related to the armed conflict.[57] The provision provides a number of due process guarantees and considering the fact that it applies in civil war situations it could theoretically also be the non-governmental party to the conflict who carried out the trials.[58] The most important point to remember in the context of the status - or lack thereof - of the participants in the hostilities in a civil war is that the acts carried out during the hostilities are punishable under domestic law, even if they do not amount to grave breaches or indeed any breach at all of the Protocol. There exists no right for the non-governmental armed groups to participate directly in hostilities (there is no right for anyone to participate directly in hostilities, but in practice it will only apply to the non-governmental party or parties to the internal conflict), thus they can be punished for there mere participation in the hostilities. As a consequence, being considered to participate directly in the hostilities is never to the PSMCs employees' advantage in a civil war, except if he or she is on the side of the government in which case he or she will probably not be prosecuted and punished for his or her mere participation (depending on the outcome of the civil war).

[56] Article 5 Protocol II.
[57] Article 6 Protocol II.
[58] Kalshoven & Zegveld, above note 22, p 136.

In an international conflict, as we have seen, direct participation in the armed conflict may lead to prisoner of war status upon capture which is to the advantage of the captured person.

An interesting feature in the context of penal prosecutions under Additional Protocol II is the provision that at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.[59] To the extent that people have performed acts amounting to war crimes, this provision is contrary to the current trend of ending impunity for such crimes as well as other serious human rights violations.

As far as civilians are concerned, this category of persons are explicitly mentioned in Protocol II so the conclusion must be drawn that it is civilians that are protected under this Protocol to the exclusion of combatants. In that sense, one could say that Protocol II only contains half of the kind of provisions normally included in international humanitarian law. As far as the number and contents of the articles on civilians in Protocol II they constitute an extremely abbreviated version – not even half – of the corresponding articles in Additional Protocol I relating to the protection of victims of international armed conflicts.

The most important provision for our purposes is the one stating that the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations and, thus, that the civilian population as such, as well as individual civilians, shall not be the object of attack.[60] Thus, if an employee of a PSMC is considered a civilian, he or she should not be attacked.

It is added that civilians shall enjoy this protection unless and for such time as they take a direct part in hostilities.[61] If a person takes a direct part in hostilities, there is very little protection to get under Additional Protocol II.

It must be remembered that human rights also apply in non-international armed conflict as well as in international armed conflict. If the state on whose territory the conflict takes place derogates from the international human rights treaty by which it is most

[59] Article 6 (5).
[60] Article 13 (1) and (2).
[61] Article 13 (3).

likely bound, then there always remain the hard core of non-derogable rights that always apply. Under the African Charter on Human and Peoples' Rights, the pan-African human rights treaty, no derogations can be made which is of particular significance since many of today's armed conflicts, international as well as non-international, take place in Africa.

9 Conclusion

The conclusion on the criminal accountability of the PSMC employees must be that this is a non-issue in principle, i.e. the PSMC personnel are as accountable as any other person present in a situation of armed conflict. Even though they are foreign to the humanitarian legal system, the "private warriors" can relatively easily be made to fit with the existing categories within the law.

The issue of the implementation of the law on criminal accountability is more of a legal-technical issue on the one hand and a political issue on the other, it is not primarily an issue of the existence or not of legal norms on the whole, because such there are. For the time being, the legal system can remain intact and the "private warriors" can be dealt with as if they were either public warriors - i.e. combatants - or civilians. From the normative point of view it is important that there are no holes in the law that would allow the PSMCs to carry out criminal acts without sanction.

Due to the changing nature of war, some of the difficulties having to do with the position of the "private warriors"' position in the legal system are equally relevant with respect to other warriors already included in the system. The difficulties may have to do with the general blurring of the distinction between combatant and civilian in armed conflict or with the disappearing distinction between national and international conflict and the position of non-state actors in armed conflict more generally.

The way in which the law of contract common in the area of public-private partnerships can and will replace the traditional way of making and implementing criminal law remains to be investigated. So far, ordinary criminal legal tools can be used if the will and the domestic judicial system is there.

If the trend with the states' reliance on PSMCs for making war grows stronger there may be long-term constitutional consequences for the domestic as well as international legal system.

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