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İHL's Remedies for the Legal Status Problem of the "Corporate Warriors"

"Şirket Savaşçılarının" Statü Sorununa İlişkin Uluslararası İnsancıl Hukukun Getirdiği Çözümler

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Abstract

The use of private military and security companies by states, particularly by those in the Middle East and Africa (MENA) region, has remarkably increased in the last decade. With the exponentially increasing use of private military and security companies, an important question arises: Why have many states started to prefer outsourcing one of their essential functions which is the monopoly on the use of force? Apparently, they have some good reasons such as cost efficiency, political non-liability or quicker and more qualified military service procurement. However, with the exponential proliferation of the private military and security companies (PMSCs) as the new actors of the "battlefield", the accustomed rules of war have been changing, and still there are some uncertainties about how to regulate these new actors' status and activities, which may often not be in compliance with the principles and norms of the international humanitarian law. To address these uncertainties, in this paper, the legal framework regarding the PMSCs will be examined. However, the examination will specifically be through the prism of international humanitarian law (IHL). By doing so, it is aimed to identify some remedies for the legal status problem of the PMSCs in this field of international law.

Keywords

Private military and security companies, Modern mercenaries, Privatization of war, Corporate warriors

Öz

Geçtiğimiz on yıl içerisinde özel askeri ve güvenlik şirketlerinin, Orta Doğu ve Kuzey Afrika bölgesindeki devletler başta olmak üzere, devletler tarafından kullanımı kaydadeğer derecede artmıştır. Bu şirketlerin gitgide daha fazla kullanılmasıyla birlikte önemli bir soru ortaya çıkmaktadır: Neden birçok devlet, sahip oldukları meşru kuvvet kullanımı tekeline rağmen böylesi temel bir işlevlerini dışarıya aktarmaktadır? Açıktır ki maliyet verimliliği, siyasi sorumsuzluk, daha hızlı ve nitelikli askeri hizmet temini gibi bazı iyi sebepler bulunmaktadır. Fakat "savaş alanının" gitgide daha yaygın hâle gelen bu yeni aktörleriyle birlikte savaşa ilişkin geleneksel kurallar değişmekte, ayrıca bu yeni aktörlerin statülerinin ve sıklıkla uluslararası insancıl hukukun ilke ve kurallarına uyum gösteremeyebilen faaliyetlerinin nasıl düzenleneceğine ilişkin bazı belirsizlikler hâlâ sürmektedir. Bu makalede, söz konusu belirsizliklere bir çözüm bulabilmek amacıyla özel askeri ve askeri şirketlerine ilişkin yasal çerçeve incelenecektir. Ancak bu inceleme özel olarak uluslararası insancıl hukuk perspektifinden yapılacaktır. Böylelikle, uluslararası hukukun bu alanının özel askeri ve güvenlik şirketlerinin hukuk statü sorununa ilişkin ortaya koyduğu çözümler tespit edilmeye çalışılacaktır.

Anahtar Kelimeler

Özel askeri ve güvenlik şirketleri, Modern paralı askerler, Savaşların özelleşmesi, Şirket savaşçıları

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IHL's Remedies for the Legal Status Problem of the "Corporate Warriors"

I. The Rise of PMSCS and Their Status Problem

In today's world, the use of the private military and security companies (PMSCs) by states¹ has remarkably increased.² Particularly in the last two decades, in many regions of the world from Africa to Asia, the PMSCs have started to take a very active role in the different stages of armed conflicts or security affairs.³ The PMSCs' extensive services are widely used even by the most developed states such as the United States, United Kingdom, France and some other NATO countries.⁴ It is widely known that some powerful American⁵ or Russian PMSCs⁶ have recently been engaged in many military operations in the Middle East. Also, many PMSCs are used by governments for internal matters such as suppressing the rebellion activities⁷ or eliminating the competitors within the ruling elites.⁸ In several cases, the PMSCs have become the prominent components of the security apparatus and could even act like the *de facto* primary armed forces of the states, which had hired them.⁹ As mentioned above, the most major clients of the PMSCs are not confined to the failed or weak states, which cannot depend on their own security forces, also the most developed states often benefit from the PMSCs' services.¹⁰ Moreover, not only the states resort to the use of the PMSCs but also the international organizations, primarily the United Nations. Since the mid-1990s, some PMSCs have taken an active role in providing

- 1 The potential employers comprise not only governments but also business enterprises, humanitarian agencies and militia groups.
- 2 UN ECOSOC 'Report of the Third Meeting of Experts on traditional and new forms of mercenary activity' (18 January 2005) UN Doc. E/CN.4/2005/23.
- 3 Nathaniel Reynolds, 'Putin's Not-So-Secret Mercenaries: Patronage, Geopolitics, and the Wagner Group' (*Carnegie Endowment for International Peace*, 8 July 2019) 3 <<https://carnegieendowment.org/2019/07/08/putin-s-not-so-secret-mercenaries-patronage-geopolitics-and-wagner-group-pub-79442>> accessed 8 December 2019 ; Halit Gülşen, 'Rusya'nın Suriye Müdahalesinde Özel Askeri Şirketlerin Rolü' (*ORSAM*, July 2017), <http://orsam.org.tr/d_hbanaliz/64TR.pdf> accessed 13 December ; Angela McIntyre and Taya Weiss, 'Weak Governments in Search of Strength: Africa's Experience of Mercenaries and Private Military Companies' in Simon Chesterman and Chia Lehnhardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP 2007) 67-81.
- 4 E.L. Galston, 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications For International Humanitarian Law Enforcement' (2008) 49(1) *Harvard International Law Journal* 221,225.
- 5 Editorial, 'Accountability on the Battlefield' *The New York Times* (New York 8 October 2007) <<http://www.nytimes.com/2007/10/08/opinion/08mon2.html>> accessed 17 December 2019.
- 6 Neil Hauer, 'Russia's Mercenary Debacle in Syria' (2018) *Foreign Affairs* <https://www.foreignaffairs.com/articles/syria/2018-02-26/russias-mercenary-debacle-syria?cid=nlc-fa_fatoday-20180226> accessed 1 January 2020.
- 7 Marika Josephides, 'Sierra Leone then and now: The case of private military companies' (*Polity* October 1 2014) <<https://www.polity.org.za/article/sierra-leone-then-and-now-the-case-of-private-military-companies-2014-10-01>> accessed 2 January 2020.
- 8 Ryan Parry and Josh Boswell 'American Mercenaries are torturing Saudi elite rounded up by new crown prince' *Daily Mail* (London 24 November 2017) <<http://www.dailymail.co.uk/news/article-5108651/American-mercenaries-torturing-Saudi-princes.html>> accessed 23 November 2019.
- 9 Mark Calaguas, 'Military Privatization: Efficiency or Anarchy?' (2006) 6(1) *Chicago-Kent Journal of International and Comparative Law* 58, 59-60; "In Angola, the government hired Executive Outcomes (EO), a South African private security firm, to retrain their armed forces and lead them into battle. In the course of the conflict, EO employees piloted Angolan Air Force planes and participated in commando raids" Peter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press 2003) 9.
- 10 S. Yelda Kaya, 'Private contractors in war from the 1990s to the present: A review essay' in Erik-Jan Zürcher (eds) *Fighting for a Living: A Comparative Study of Military Labour 1500-2000* (Amsterdam University Press 2013) 613.

security services under the control of the United Nations (UN) in its peacekeeping operations.¹¹ Therefore, the advent of the global private military industry –in other words, non-state violence- might be one of the most important developments in the modern international security architecture.

To define it simply, the PMSCs are corporate business entities providing professional services that are pertinent to warfare. However, the role of modern PMSCs is not confined to providing combat forces for the armed conflicts. They also provide a wide array of services ranging from advisory roles for strategic planning to providing security, logistical support, military training, facility management, intelligence service and military capacity building. Therefore, it is possible to categorize the PMSCs broadly in three main categories:¹²

1. Supply Firms
2. Private Military Companies (PMCs)
3. Private Security Companies (PSCs)

To define them loosely, supply firms do not engage in direct combat on the battlefield; rather provide logistics, information, infrastructural services and/or technical or operational support for the militaries. Private military companies (PMCs) offer direct military support in armed conflicts. Private security companies (PSCs), as is evident from its name, are mainly responsible for providing security services for their clients without having a direct role in the military attacks. Within the scope of such security services there are a wide range of activities such as monitoring activities, law enforcement, and protection of a government or political leader.

It would be accurate to state that modern PMSCs have emerged after the Cold War had come to the end.¹³ Following the end of the Cold War, the military downsizing of the great military powers paved the way for the rise of the PMSCs, with the expectation for them to fill the vacuums that such military downsizing was leaving behind.¹⁴ Another important factor fostering the emergence of the PMSCs was the traditional global military powers' disengagement from their influence zones in many

11 Galston (n 4) 226.

12 *ibid* 224; Singer, *Corporate Warriors* (n 9); Some other authors divide the companies into five categories: (i) private security companies; (ii) defence producers; (iii) private military companies; (iv) non-statutory forces; and (v) mercenaries. The category (iii) further divided into PMCs which provide consulting; logistics and support; technical services; training; peacekeeping and humanitarian assistance; and combat forces, Herbert Wulf, *Internationalizing and Privatizing War and Peace* (Palgrave Macmillan 2005) 2.

13 Christopher Kinsey, *Corporate Soldiers And International Security: The Rise Of Private Military Companies* (Routledge 2006), 50-51; David Shearer, *Private Armies And Military Intervention Adelphi Paper* (Routledge 1998) 13; Singer, *Corporate Warriors* (n 9) 66-70.

14 Singer, *Corporate Warriors* (n 9) 53; As the same author, Singer, says in his different article: "While they are deployed on a range of global missions and now enmeshed in Iraq, the U.S. military is actually 35% smaller than it was at the height of the Cold War and the British military is as small as it has been since the Napoleonic wars" Peter W Singer, "The Private Military Industry and Iraq: What Have We Learned and Where to Next?" (2004) Geneva Center For the Democratic Control of Armed Forces Policy Paper, 15<<https://gsdrc.org/document-library/the-private-military-industry-and-iraq-what-have-we-learned-and-where-to-next/>> accessed 14 November 2019.

regions such as Africa or the Middle East, which were mainly created under to the circumstances of the Cold War. The power vacuum and reshuffle of the security establishment which emerged after such a disengagement has prompted the states in those regions to the use of the PMSCs in order to survive the conflicts they were undergoing.¹⁵

As some experts and authors suggest, the flood of former/veteran/unemployed soldiers to the military market after the Cold War has provided the required human and expertise resources which also laid the basis for the proliferation of the PMSCs.¹⁶ The PMSCs basically offer the opportunity for many soldiers to have a second career that still keeps them on the ground. In addition to the influx of new soldiers, an enormous release of weaponry including both light weapons and high-ticket items like missile systems and tanks into the global market at much lower costs has been experienced after the Cold War. The main reason behind this was the need of the governments to quickly sell off their arms to raise desperately needed funds.¹⁷ This development facilitated the access of the PMSCs to the required ammunition.

Some commentators suggest that the following factors are also relevant to the increasing demand for the PMSCs: The changing nature of armed conflicts, the increase in expeditionary operations of armed forces, development of military technology and the loss of military expertise due to layoffs.¹⁸

In addition, the rapid globalization process and the neo-liberal trends of the 1990's created opportunities for the development of the private security and military industry on an international scale.¹⁹ Due to the global privatization trend, states have been encouraged or, at least, become more inclined to outsource their military and security functions which previously had been seen as the exclusive province of the state in accordance with the principle of the state's monopoly on the legitimate use of force.²⁰ The economic rationalization of the use of the PMSCs by states has enabled the erosion of such an essential principle of the traditional international law. Of course, the description of "rationalization" here is made in accordance with the

15 Deborah D. Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge University Press 2005) 36,159.

16 Joanna Spear, 'Market Forces the Political Economy of Private Military Companies Economies of Conflict: Private Sector Activity in Armed Conflict' (2006) FAFO-Report 531, 14-16 <<https://www.fafon.no/index.php/zoo-publikasjoner/faforapporter/item/market-forces>> accessed 21 December 2019.

17 Singer, *Corporate Warriors* (n 9) 54.

18 Sam Perlo-Freeman and Elisabeth Sköns, 'The Private Military Service Industry' (2008) SIPRI Insights on Peace and Security No 1, 3 <<https://www.sipri.org/sites/default/files/files/insight/SIPRIInsight0801.pdf>> accessed 22 December 2019.

19 Singer, 'The Private Military Industry and Iraq' (n 14) 2.

20 Bleda R Kurtarcın, *Muharebe Alanının Yeni Aktörleri: Askeri Yükleniciler* (Beta 2017) 119-128; "It seems that Western governments are increasingly keen to move towards this model of the ultra-minimal State and to allow even the provision of force to be assumed by private enterprise on a contractual model in which the rich or the desperate may choose to avail themselves of fortifications at the going rate while the rest take their chances in life." Clive Walker and Dave Whyte, 'Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom' (2005) 54(3) *The International and Comparative Law Quarterly* 651.

neo-liberal approach, which recommends for states to seek the most cost-efficient options in public services.²¹ With the endorsed neo-liberal approach, the governments have become more like-minded to private corporate entities in their assessments of the costs of the public services. They started focusing on the fact that outsourcing of public services would enable them to have the same work done in a shorter duration and/or in a cheaper and/or more qualified way in the private market. As Singer said, such an approach has led the "privatization revolution" even in the exclusive sectors like the military sector,²² and as Walker and Whyte successfully stated, "it appears that nothing is sacrosanct in the onward march of the principles of neo-liberalism."²³

Another important factor for the rapid growth of the PMSCs all around the world is that the PMSCs over time have gained a great amount of wealth and influence on "decision-makers" (government members, parliament members, high ranked officials, diplomats and bureaucrats etc.), and thanks to their great financial power, they could create their lobbying networks in order to convince or enforce decision-makers to accept to hire their services.²⁴ It is also true that the PMSCs are bringing billions of dollars from international markets to their home countries, which makes them valuable export merchants. While the estimated value of the PMSC sector is more than 200 billion USD,²⁵ the financial dimension of the PMSC phenomenon cannot be ignored. For instance, even taking a quick look at the rapidly growing financial capacities and profits of some American PMSCs such as DynCorp, Hulliburton or Blackwater would be illuminating to understand this reality.

The last but not the least factor for the rise of the PMSCs is the vague status of the PMSCs in international law, thus their utility as "ghost armed forces."²⁶ The issue of the vagueness of the PMSCs' status in international law will be elaborated below, so we will not go into details here. We can just say, in short, the vague status of the PMSCs in international law sometimes allow governments to turn the norms and principles of international law around and overcome the problem of the legal liability, transparency and accountability for their actions. In addition, the use of the PMSCs furnishes governments with a "flexible" foreign policy tool which can avoid the internal oversight mechanisms and deflect criticism of the international community. This is what Avant calls "foreign policy by proxy."²⁷

21 Singer, *Corporate Warriors* (n 9) 53; F Schreier and M Caparini 'Privatising Security: Law, Practice and Governance of Private Military and Security Companies' (2005) Geneva Center For the Democratic Control of Armed Forces Occasional Paper 6 <http://iskran.ru/cd_data/disk2/tr/003.pdf> accessed 17 November 2019.

22 Singer, *Corporate Warrior* (n 9) 66–70.

23 Walker and Whyte (n 20) 651.

24 Freeman and Sköns (n 18) 15.

25 Dyfed Loesche, 'Contracted Security' (*Statista*, 2 March 2016) <<https://www.statista.com/chart/4440/private-military-and-security-company-sector/>> accessed 27 December 2019.

26 What we mean with this term is that this legal vagueness allows some powerful states to implement their aggressive international political agendas without facing legal troubles.

27 Avant, (n 15) 152-154.

As conclusion, because of the aforementioned reasons, contemporarily, the states have been incentivized to share their monopoly on the legitimate use of force with the PMSCs. It must also be noted that the aforementioned reasons are not exhaustive. Notably, the use of the PMSCs by the states is an outstanding and growing phenomenon and has been rationalized by multiple reasons, mostly the economic ones.

However, the economic motives behind the use of the PMSCs incentivize governments to turn a blind eye to the danger that the vagueness of the status of the PMSCs pose, the biggest of which seems to be the ability to turn the legal responsibilities stemming from international humanitarian law (IHL) around. There is no specific international convention or any other binding international law source neither determining the status of PMSCs nor stipulating clear rules regarding the use of the PMSCs. Therefore, it is vital to discuss this issue and seek more clarity on the status of the PMSCs in international law so as to prevent possible IHL violations such as the incident that happened in September 2007 when 17 Iraqi civilians were shot and killed by the employees of the United States-based PMSC, Blackwater²⁸ or when the guards working for Unity Resources Group, an Australian-run private security firm registered in Singapore, killed two Iraqi civilians.²⁹ The overall lack of an international legal framework regulating the conduct of the PMSCs should be of deep concern for maintaining the global law and order because leaving this issue completely to the mercy of domestic jurisdiction does not ensure the realization of justice.³⁰ A further proof of this reality is the fact that only one PMSC contractor out of many contractors which have served in Iraq and Afghanistan has ever been prosecuted,³¹ whereas thousands of the PMSC members have taken direct part in the military operations in Iraq and Afghanistan and too many violations of human rights and war crimes they have committed have been exposed so far.³²

So as not to solely rely on domestic jurisdiction of the states and for international law to play a part in holding the PMSCs accountable for their violations of human rights and crimes, there must be a nexus between their legal obligations and international law. This nexus can be created in a variety of ways. The first way that comes to mind is to argue their international legal personality (ILP), thus their direct liability in case of breaching the norms of international law. However, the ILP in international law is an

28 The initial US Department of State 'spot report' on the incident 'SAF attack on COM team' (2018) <<http://i.a.cnn.com/cnn/2007/images/10/01/blackwater.report.pdf>> accessed 5 April 2019 .

29 Andrew E Kramer and James Glanz, 'U.S. Guards Kill 2 Iraqi Women in New Shooting' *The New York Times* (New York 10 October 2007) <<https://www.nytimes.com/2007/10/10/world/middleeast/10iraq.html>> accessed 10 March 2018.

30 According to Peter W Singer, not only can such firms take on a new name and corporate structure when they are challenged, but attempts to eliminate the firms through national legislation tend only to drive them and their clients further underground, away from public oversight, see Peter W Singer 'War, profits, and the Vacuum of Law: Privatized Military Firms and International Law' (2004) 42 Col JTL 521, 535.

31 Galston (n 4) 229-230.

32 See Elzbieta Karska, 'Human Rights Violations Committed By Private Military And Security Companies: An International Law Analysis' (2016) 17(3) *España Juridico: Journal of Law* <http://psm.du.edu/media/documents/reports_and_stats/journal_articles/reports_journal_author_k_karska_human_rights_violations_private_military.pdf> accessed 14 November 2019.

elusive concept in international law. Traditionally, states have been considered to be the only subjects of international law, although it is now acknowledged that they are no longer the exclusive subjects of contemporary international law.³³ Nevertheless, this acknowledgement could not lead to a uniform and general definition of the ILP that encompasses the non-state actors along with states and the discussions around this concept in the doctrine are still highly confusing.³⁴ In order to accommodate non-state actors to the ILP doctrine accurately, some have argued that the quality of a subject of international law is to have the capacity of being a subject of rights and obligations created and recognized by international law,³⁵ while some others have depended on the classification of the two different types of ILP, namely original and limited personalities.³⁶ The ILP discussions about private corporations first started during the 1960s in the context of their rights against the waves of nationalization, however the focus of these discussions shifted to their alleged responsibilities in respect of the human rights in the 1990s.³⁷ A considerable part of the doctrine does not acknowledge the ILP of corporations.³⁸ On the other hand, a growing and substantial part of the doctrine considers that at least multinational corporations have acquired a limited ILP.³⁹ However, even if this "partial ILP" approach is accepted, it should be taken into consideration that such a personality is a functional personality that is attributed to corporations just for the specific purposes required by some particular fields of international law such as international investment law or human rights law. That is to say, the acknowledgement of the partial ILP of corporations does not change the fact that the contemporary international law still does not impose generally accepted obligations on corporations.

- 33 "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States" *Reparation for Injuries Suffered in The Service of the Nations* (Advisory Opinion) [1949] ICJ Rep 174 178; "The international organizations are subjects of international law which do not, unlike States, possess a general competence. The international organizations . . . are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.," *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 1996, para 25.
- 34 Vincent Chetail, 'The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward' in Denis Alland and others (eds), *Unity and Diversity of International Law: Essays in Honour of Prof. Pierre-Marie Dupuy*, (Martinus Nijhoff 2014) 107.
- 35 Hersch Lauterpacht, 'The Subjects of international Law' in E Lauterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht vol. 1: The General Works*, (Cambridge University Press 1970) 147; A Orakhelashvili, 'The Position Of The Individual in International Law' (2001) 31 *California Western International Law Journal* 241, 256; PK Menon, 'The Subjects of Modern International Law' (1990) 3 *Hague Yearbook of International Law* 30,84; C Okeke, *Con- troversial Subjects of Contemporary International Law* (Rotterdam University Press 1974) 19.
- 36 Chetail (n 34) 110.
- 37 Ibid.
- 38 See F Rigaux, 'Transnational Corporations' in M. Bedjaoui (eds) *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers 1991) 129; L Henkin, "international Law: Politics, Values and Functions", *Recueil des cours de l'Académie de droit international*, 126, 1989, 199; Antonio Cassese, *International Law in a Divided World* (Oxford University Press 1986) 103; Hans W. Baade, 'The Legal Effects of Codes of Conduct for Multinational Enterprises' (1979) 22(11) *German Yearbook of International Law* 11, 16.
- 39 Pierre M Dupuy, 'Retour Sur La Théorie Des Sujets Du Droit International' in Gaetano Arangio-Ruiz (ed), *Studi Di Diritto Internazionale In Onore Di Gaetano Arangio-Ruiz* (Editoriale Scientifica 2004) 74 and 84; DA Ijalaye, *The Extension of Corporate Personality in International Law* (Oceana, 1978) 221–246; W Friedmann, *The Changing Structure of International Law* (Stevens and Sons 1964) 223.

Of course, the attribution of the ILP is not the only way for corporations, including the PMSCs, to have the capacity to bear some obligations in international law.⁴⁰ Some experts could go as far as even arguing that “because the state is responsible for certain acts of private actors, those actors can also be held responsible for that same conduct under international law”.⁴¹

Moreover, in addition to their direct obligations, the state responsibility might also come into play under certain circumstances to provide remedies for the violations of international legal norms by corporations. The 2001, Articles on State Responsibility of the International Law Commission (ILC) confirms this possibility.⁴² However, as Clapham stated accurately, counting on the fact that the rules for state responsibility would apply where the PMSCs’ activities are controlled by the state fails to capture the full picture about the conduct of the PMSCs.⁴³

Another way to address the legal status problem of the PMSCs is the soft law regulations. Although such regulations do not have a binding force and their capability as a source of international law is controversial, one should not underestimate the role of soft law in regulating the conduct of particularly private corporations. Theretofore, many codes of conduct have been produced by the international community having attempted to draw a clear international legal framework for the conduct of corporations.⁴⁴ These codes of conducts are particularly useful for promoting a common understanding among the international community and paving the way for future conventional and binding regulations. The Guiding Principles on Business and Human Rights, which was endorsed with a wide consensus among states, is one of the good examples of such soft law instruments.⁴⁵ The Guiding Principles acknowledge that “business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”⁴⁶ It is recognized that the human rights obligations of corporations can exist independently of States’ abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations.⁴⁷

More significantly, there are important soft law regulations exclusively for the PMSCs: and The International Code of Conduct for Private Security Providers’

40 A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 68-69.

41 S Ratner, ‘Corporations and Human Rights’ (2001) 111(3) Yale Law Journal 443, 497; Cristina Baez and others, ‘Multinational Enterprises and Human Rights’ (2000) 8 U Miami Int’l & Comp L Rev 183, 254.

42 Articles 4, 5 and 8 of the articles on State responsibility: ILC, ‘Report of the International Law Commission on the Work of Its Fifty-third Session’, (10 August 2001 UN Doc) A/56/10.

43 Clapham (n 40) 302.

44 See Norbert Horn ‘International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives’ (1981) 30 American University Law Review 923.

45 UNCHR Res (6 July 2011) UN Doc A/HRC/17/4.

46 UNCHR ‘Guiding Principles on Business and Human Rights Principle’ (6 July 2011) UN Doc A/HRC/17/4 Principle 11.

47 *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 2011, p. 13.

Association (ICOC)⁴⁸ and International Committee of the Red Cross's (ICRC) Montreux Document (On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict).⁴⁹ The former is the fruit of a multi-stakeholder initiative launched by Switzerland and sets international law and human rights standards for the PMSCs. Remarkably, ICOC has been signed by 58 PMSCs and hundreds of other companies are committed to operate in accordance with this code.⁵⁰ The latter elaborates how international law should apply to the PMSCs and is supported by 55 states. Due to its more intergovernmental characteristic, it would be accurate to claim that the Montreux Document has more significance than the former. With the Montreux Document, for the first time, an intergovernmental statement clearly articulates the most pertinent international legal obligations with regard to the PMSCs and also proves that the PMSCs do not operate in a complete legal vacuum. Of particular importance, the Montreux Document underlines that the "PMSCs are obliged to comply with international humanitarian law or human rights law"⁵¹ and clearly states that the status of the PMSCs "is determined by international humanitarian law, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved."⁵²

The determination of the status of the PMSCs by IHL, as the Montreux Document points out, seems to be the most reasonable way for identifying their international law obligations. In this way, one does not have to wait out a final conclusion of the lengthy ILP discussions or the debates on whether corporations incur general international law obligations. Moreover, one can claim direct and binding international law responsibilities of the PMSCs without solely relying on the state responsibility or soft law instruments. Therefore, we will narrow down our scope of study to the IHL norms, while not neglecting the necessity of a more advanced and general international legal framework for the conduct of the PMSCs.

II. Are PMSCs "Mercenaries 2.0?"⁵³

Regarding the status of the PMSCs, the first and foremost question seems to be whether they can be considered as a new kind of mercenaries and their status in international law can be determined in comparison with the status of mercenaries.⁵⁴

48 ICoCA, 'The International Code of Conduct for Private Security Service Providers' (9 November 2010) <www.icoca.ch/en/the_icoc> accessed 12 December 2019.

49 ICRC 'Montreux Document' (17 September 2008) <www.icrc.org/en/doc/assets/files/other/icrc_002_0996.pdf> accessed 13 December 2019.

50 ICoCA "The Association" <<https://www.icoca.ch/en/association>> accessed 14 December 2019.

51 ICRC 'Montreux Document' (n 49) Article 22 and 25.

52 Ibid Article 23.

53 We borrow the term of "Mercenaries 2.0" from E.L. Gaston's article of which title is "Mercenarism 2.0? The Rise of the private Security Industry and Its Implications for International Humanitarian Law Enforcement" first mentioned in *supra*note 4.

54 Kurtarcan (n 20) 287-288.

The negative reputation of the PMSCs, which stems from their frequent violations of the IHL norms, leads some commentators to compare the PMSCs with mercenaries, which are also notorious and little respected by the international community.⁵⁵

The use of mercenaries by states had a long history which dates back even to the ancient ages.⁵⁶ After they had been used by states in wars and conflicts for centuries,⁵⁷ in the modern age, the states finally and widely agreed on the fact that the use of mercenaries must be prohibited. It was realized and acknowledged by the international community that mercenaries were prolonging wars, thus its sufferings, and also, they were conceptually not in compliance with the developments and recently established liability mechanisms in the law of war of the 20th century. Therefore, from the 1950s onwards, the rapidly growing negative reputation of mercenaries -mainly because of their rogue operations particularly in Africa during the decolonization period-⁵⁸ have prompted the states to agree on banning the use of mercenaries. The strong will of the international community in this direction has been materialized with a few international agreements, namely the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I),⁵⁹ the Convention for the Elimination of Mercenarism in Africa⁶⁰ and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (International Convention).⁶¹ Because of their global scope, we prefer to focus on the International Convention and the Additional Protocol I as the main reference points.

The International Convention signed in 1989 is the most comprehensive and latest international agreement which corresponded to the final nail in the mercenaries' coffin in international law, mainly because it clearly outlawed the recruitment, use, financing or training of the mercenaries. The International Convention enabled the prosecution of the persons acting as mercenaries. Prior to the International Convention, Additional Protocol I stipulated in its Article 47 that a mercenary shall not have the right to be a combatant or a prisoner of war without outlawing the conduct or mercenaries thoroughly.

55 Doug Brooks, 'Messiahs or Mercenaries? The Future Of International Private Military Services' (2007) 7(4) *International Peacekeeping* 129, 135.

56 Fred Rosen, *Contract Warriors: How Mercenaries Changed History and the War On Terrorism* (Alpha Books 2005) 143.

57 Janice E Thomson, *Mercenaries, Pirates, And Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton University Press 1994) 31-32.

58 McIntyre and Weiss (n 3) 67; Singer, *Corporate Warriors* (n 9) 37.

59 ICRC 'Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)' (8 June 1977) <<https://ihl-databases.icrc.org/ihl/INTRO/470>> accessed 18 December 2019.

60 Organization of African Unity, OAU Convention for the Elimination of Mercenarism in Africa (3 July 1977) CM/817 (XXIX) Annex II Rev.1 <https://au.int/sites/default/files/treaties/7768-treaty-0009_-_oau_convention_for_the_elimination_of_mercenarism_in_africa_e.pdf> accessed 19 December 2019.

61 UNGA 'The International Convention against the Recruitment, Use, Financing and Training of Mercenaries' (4 December 1989) A/RES/44/34.

According to the definition of the Additional Protocol I to the Geneva Conventions, mercenaries are

“specially recruited locally or abroad in order to fight in an armed conflict; do, in fact, take a direct part in the hostilities; are motivated to take part in the hostilities essentially by the desire for private gain and, in fact, are 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; are neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; are not members of the armed forces of a Party to the conflict; and have not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.”

The International Convention retains the main elements of the definition made by the Additional Protocol I, however, adds a moral element (specific purpose of the action) to that. As per the International Convention, mercenary is

“someone who is specifically recruited for the purpose of participating in a concerted act of violence aimed at overthrowing a government or undermining the territorial integrity of a state, is motivated by the desire for private gain and material compensation, is neither a national nor a resident of the state against which such [an] act is directed, has not been sent by a state on official duty, and is not a member of the armed forces of the state on whose territory the act is undertaken.”

No doubt, the greatest difference between the abovementioned definitions is that the latter stipulates mercenaries to have the purpose of overthrowing a government or undermining the territorial integrity of a state, while the Additional Protocol I does not set such a condition. In addition, there are some other minor differences such as the fact that the amount of the material gain of mercenaries matters in the first definition while it is not specified in the latter.

Then, upon these definitions, we can sum up the main features of mercenaries. Accordingly, they are:

- Recruited locally or abroad,
- Taking a direct part in the hostilities,
- Motivated by the desire of private and material gain,
- Neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict,
- Not been sent by a state on official duty,
- Not a member of an armed force which is a party to the conflict.

Based on the main features of mercenaries which are common in the International Convention and the Additional Protocol I, it would not be wrong to argue that there are crucial differences between mercenaries and the PMSCs. First of all, many PMSCs have only logistical or security-related roles, hence they do not necessarily meet the

requirement of being specifically recruited to take a direct part in the hostilities. As Avant states accurately, “today’s PMSCs do not so much provide the foot soldiers, but more often act as supporters, trainers, and force multipliers for local forces”.⁶² Therefore, only some PMCs can be covered by this definition.⁶³

Second, there is no obstacle for the members of the PMSCs to be the nationals of a party to the conflict or residents of the territory controlled by a party to the conflict. Also, it is possible for them to be considered as a part of the armed forces, which is a party to the conflict as long as they take orders directly from those armed forces.⁶⁴

Some commentators also argue that it would also be difficult to claim that the PMSC contractors’ motivation is solely a desire for substantial financial gain. For example, it is argued that it is also possible for some former soldiers to be motivated with the desire for an extensive service to their countries.⁶⁵

In short, it is crystal clear that mercenaries and the PMSCs might differ substantially in many points. It would be far-fetched to argue that the agreements exclusively regulating to the use of mercenaries can apply to the PMSCs. The provisions of those agreements are clearly inadequate for the purpose of regulating to the conduct of the PMSCs.⁶⁶ Indeed, the PMSCs have a different nature and dynamics, and thus they cannot be handled like individual mercenaries, since they have evolved into business enterprises.⁶⁷

III. Civilian or Combatant?

Within the current international legal order, many of the constraints on the use of force and conduct of armed conflicts are based on state-centric perceptions. At best, there are some exclusive regulations for some other non-state elements such as mercenaries. The PMSCs are not among those elements yet, in spite of their increasingly advanced military capabilities and power. Therefore, the misconduct of the PMSCs is a great problem to be addressed by international law. Any reductionist approach to see the PMSCs merely as other kinds of corporations hired by the states through private contracts for some services is not plausible anymore. As long as their legal status in international law, thus the boundaries of their military activities are not

62 Avant (n 15) 30.

63 Michael Scheimer, ‘Separating Private Military Companies From Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support the Reflects Customary International Law’ (2009) 24(3) *American University International Law Review* 611, 626.

64 *Ibid.*, 628.

65 Galston (n 4) 233.

66 Lindsey Cameron, ‘Private military companies and their status under international humanitarian law and its impact on their regulation’ (2006) (863) *International Review of the Red Cross* 573, 578.

67 Simon Chesterman and Chia Lehnardt, ‘Introductions’ in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP 2007) 7.

clarified through a certain legal framework, the risk of the violation of the international law norms by them will increase. It is apparent that such an ambiguity paves the way for the emergence of critical legal complications. Those legal complications are attempted to be addressed mainly by IHL because the most actual and pathetic problems arising out of the activities of the PMSCs fall within the IHL's scope.⁶⁸ The advanced capabilities of the PMSCs may sometimes cause the violation of the IHL norms via state-like violence and mostly, the PMSCs might not be held effectively accountable for those violations, which would not be the case for state agents. That is to say, the PMSCs hired by the states can provide a "corporate shield" against the responsibilities of those states for IHL violations, as it is difficult to attribute the contractors' activities to the states and the prosecution of them is at the domestic jurisdiction's mercy.⁶⁹

However, in the absence of any discrete regulation pertinent to the PMSCs, some of the current rules and concepts of IHL offer us some help for regulating the activities of the PMSCs. In this regard, the most relevant rules are those regarding combatants and civilians. The categorization of combatants and civilians constitutes one of the main pillars of the "law of war," because the combatant status grants armed forces in warfare some prerogatives:

- Those who have the combatant status have the right to participate directly in hostilities while those who have the civilian status do not have the same right. When civilians take part in direct hostilities, they could be subject to criminal jurisdiction.⁷⁰
- On the other hand, civilians cannot be targeted in military attacks while it is legal to target combatants.⁷¹
- Another important issue is the "prisoner of war (POW)" status. Combatants, in principle, have the right to be treated as the POWs once they are captured by enemy forces, while civilians, in principle, do not have the same right.

The definition of the combatant status is made by the Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex, the Geneva Convention (III) relative to the Treatment of Prisoners of War and Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I). The Article 43

68 For example see Hamida Ghafour, 'Afghans Are Fed Up with Security Firms' (*LA Times*, 27 September 2004) <<https://www.latimes.com/archives/la-xpm-2004-sep-27-fg-mercs27-story.html>> accessed 18 December 2019; Andrea Weigl, 'Passaro Will Serve 8 Years for Beating' (*News&Observer*, 1 February 2017) <<https://www.newsobserver.com/497/story/543038.html>> accessed 13 November 2019.

69 Louise Doswald-Beck, 'Private Military Companies Under International Humanitarian Law' in Simon Chesterman and Chia Lehnhardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP, 2007), Chapter 7.

70 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (12 August 1949) 75 UNTS 135 art 4(A)(1),(2),(3) and (6); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3 art 43 and 44(1).

71 Additional Protocol I (n 70) art 51(4).

(1) of the Additional Protocol I stipulates that members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants and they have the right to participate in direct hostilities. In addition to that, whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces, it shall notify the other parties to the conflict.⁷² In other words, to fall within the category of combatants, there are five main features: Being an armed group, being an organized group, operating in compliance with the rules of international law applicable in armed conflicts, being under a command chain of a party to the conflict and being responsible for the conduct of its subordinates.

The Third Convention, in its Article 4, further elaborates the definition of the combatant status and expands its boundaries with stating who can be granted the POW status. According to the relevant provisions, combatants are not limited to the armed forces of the states. Even some militia groups or volunteer forces are granted the POW status under some specific circumstances, as it can be seen in Article 4 (A) (4).

In conclusion, the combatant status is linked either to the membership in the armed forces of a party to the conflict or to the membership of a militia or volunteer force that belongs to a party to the conflict and fulfills some specific criteria shown in the Third Convention.

It is important to note that there is no certain rule about who can be considered as members of the regular armed forces of the states, so it is determined by states and purely a matter of domestic laws. It is generally recognized that the combatant status can be acquired *de jure* or *de facto* for the armed groups which are not officially a part of the armed forces of a state. However, regarding the acquirement of the combatant status, there is a substantial divergence between Article 4(A)(2) of the Third Convention and Article 43 of the Additional Protocol I: The former suggests that being formally incorporated into the armed forces of a state is necessary, while the latter suggests that it is enough to be under the command chain of the armed forces of a state without being formally incorporated. Literally, the Third Convention sets a higher threshold.⁷³

In most cases, it is impossible to claim that the PMSCs are formally incorporated into the armed forces of a state, even though members of some PMSCs may be carrying out conventional military functions or in practice, seem to act in intensive coordination with the armed forces of a state. Indeed, it is not very frequent to see the PMSCs which are incorporated into the armed forces. There are only some instances

⁷² Ibid art 43.

⁷³ Ahmet Hamdi Topal, 'Uluslararası Hukuk Açısından Özel Askerî Şirketler ve Şirket Çalışanlarının Statüsü' (2011) 60(4) AUHFD 963, 994.

such as the members of the South African Executive Outcome who were officially incorporated into the armed forces of Sierra Leone during its operations.⁷⁴ After all, if the PMSCs were incorporated to the armed forces of a state, then that would solve all of the legal issues and their activities would be considered as the activities of the armed forces to which they are incorporated. However, in most cases, the states deliberately would rather not incorporate the PMSCs into their armed forces in order to avoid any potential responsibility for the illegal activities of the PMSCs or the covert operations that they would perform.

The second possibility presented by the Third Convention in its Article 4(A) is that the PMSCs might be considered as militia or volunteer corps fighting on behalf of the armed forces of a party to conflict. Nevertheless, this option is problematic too. The PMSCs often do not meet the criteria put by Article 4A (2): They do not necessarily carry arms openly and wear a fixed distinctive sign recognizable at a distance.⁷⁵ Also, some commentators argue that the teleological interpretation of Article 4A (2) would be an obstacle for justifying the use of this provision and granting the PMSCs the combatant status.⁷⁶ Therefore, it is unlikely to claim that the PMSCs can be fully covered by this category of combatants.

In short, just because the PMSCs make contracts with states, and thereby reinforce their armed forces' military activities, they cannot be granted the combatant status by default. To acquire this status, the PMSCs need either to be officially incorporated into the armed forces of a state party to conflict or, at least, operate under the command chain of them as a militia group which is being commanded by a person responsible for his subordinates, carrying a fixed distinctive sign recognizable at a distance, carrying arms openly and conducting its operations in accordance with the laws and customs of war.

While it must be acknowledged that some PMSCs can meet the abovementioned criteria, such PMSCs would be constituting just a tiny portion of the PMSCs, as supply firms and most PSCs are inherently outside this category and even all of the PMCs would not satisfy the abovementioned requirements to be granted the combatant status. For instance, in most cases, supply firms do not engage in direct hostilities at all. So, case-by-case analysis is required to determine if a PMSC can be granted the combatant status or not.

Hence, it makes sense to argue that most of the PMSCs must be granted civilian status when they are not granted the combatant status because the civilian status is

74 J.C. Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder' (1998) 34(1) *Stanford Journal of International Law* 75, 124.

75 Michael N Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2005) 5(2) *Chicago Journal of International Law* 511, 527ff.

76 Cameron (n 66) 586.

defined in Article 50(1) of the Additional Protocol I as “all persons who do not belong to the categories of combatant as listed in the Geneva Conventions.” However, civilians must be divided into two categories: Civilians accompanying the armed forces and regular civilians.

The former is defined in Article 4(4) of the Geneva Convention (III). According to Article 4(4), civilians accompanying the armed forces carry out some services for the armed forces without being members thereof and do not take part in direct hostilities beyond personal self-defense. Not only is it forbidden for them to take part in direct hostilities, but also they are not allowed to carry arms. In case they participate in direct hostilities, they would be stripped of the protection provided them by IHL.

It must be noted that civilians accompanying the armed forces should not be confused with the non-combatant status which covers the members of the armed forces party to a conflict who do not carry arms or are not authorized to engage in armed confrontations.⁷⁷ In other words, non-combatants are the integral parts of the armed forces in order to provide some services such as healthcare, religious services and so on, while civilians accompanying the armed forces are not the official members of the armed forces. Therefore, the non-combatant status is not a matter of discussion for the PMSCs as almost none of them have been incorporated into the armed forces. They usually operate as the private companies which are hired by the states for some certain services and carry out the outsourced tasks on their own capacities.

Obviously, there is no way for the PMCs to be labeled as civilians accompanying the armed forces, because their task is simply to take part in direct hostilities. The same applies for PSCs too, because they must carry weapons in the line of their duties. So, only the supply firms might fall within the realm of this category. The Third Geneva Convention stipulates that civilians may perform tasks such as supplying the armed forces with food and shelter but still retain their civilian status. It means that the services provided by the employees of the supply firms may not be perceived as civilians accompanying the armed forces. However, there is a crucial condition which is that the employees of supply firms must be provided an identity card for that purpose.⁷⁸

On the other hand, it is highly important to define “the direct participation in hostilities,” as it is the clincher while determining whether members of the supply firms can be granted the civilians accompanying the armed forces status. Some confusion might arise when some of the tasks that the supply firms carry out are in the grey zone.⁷⁹ Article 67 (1)(e) of the Additional Protocol I classifies “direct participation in hostilities” and “acts harmful to the adverse party” as two different

77 First Geneva Convention (22 August 1864) art 2.

78 Emanuela-Chiara Gillard, ‘Business Goes to War: Private Military/ Security Companies and International Humanitarian Law’ (2006) 88(863) *International Review of the Red Cross* 525, 539.

79 Cameron (n 66) 589.

concepts. In this respect, it is suggested that the acts harmful to the adverse party include the acts which contribute to the military capacity of a party to a conflict indirectly with the services such as the production and delivery of arms, construction of facilities like airports, docks etc.⁸⁰ The International Criminal Tribunal for the former Yugoslavia (ICTY) has also adopted the same approach and elaborated this classification. Accordingly,

“carrying or using arms, engaging in military activities, participating assaults against commodities or military equipment of the adverse party, delivering military intelligence for immediate use, delivering arms directly to frontlines; functioning as safeguard, intelligence officer, sentinel or observer for armed forces party to a conflict”

are considered as the direct participation in hostilities. As it can be seen, the activities perceived as the direct participation in hostilities do not necessarily have to be offensive activities and a wide spectrum of activities could be perceived to fall under this category. As Cameron accurately states that “the problems posed by the lack of distinction between offensive and defensive attacks are best illustrated by the use of private military companies as security guards.”⁸¹ Another puzzling instance is that some supply firms gather and deliver intelligence for immediate use, while some do it for general use. Remembering ICTY’s classification, the fact whether the intelligence is gathered for immediate use or not could matter while classifying that activity as the direct or indirect participation in hostilities. Such cases have been discussed in detail by some analysts.⁸²

Despite all of the confusing points, our conclusion is that at least some activities contributing to the military efforts of a party to a conflict such as selling items to that party, gathering and delivering “general” military intelligence; providing food, drinks and other basic goods; delivering arms and military equipment, being in charge of the selection and training of military staff and maintaining arms cannot be perceived as the direct participation in hostilities.⁸³ Notably, the International Committee of Red Cross (ICRC) suggests that the direct causation between the military action and the harm to the adverse party is a constitutive element of the direct participation in hostilities.⁸⁴ Also, ICRC’s admonition that “there should be a clear distinction between the direct participation in hostilities and participation in the war effort” must be kept in mind with respect to this issue.⁸⁵

80 Topal (n 73) 1007.

81 Cameron (n 66) 589.

82 Alexandre Faite, ‘Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law’ (2004) 4(2) 1, 7.

83 Doswald-Beck (n 69) 130.

84 Nils Melzer, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ (ICRC, December 2009) 51 <www.icrc.org/en/war-and-law/contemporary-challenges-for-ihl/participation-hostilities> accessed 12 November 2019.

85 ICRC Commentary on P I Article 51.3 (1987) para 1944.

In conclusion, many supply firms do not have direct participation in hostilities even if in some cases, it is difficult to decide if their activities fall within the realm of the direct participation in hostilities or not. Then, they can be labeled as civilians accompanying the armed forces. When they are considered as civilians, they shall enjoy the general protection for civilians against the dangers arising out of the military operations. For instance, the indiscriminate attacks to them would be prohibited and when they are captured by enemy forces, they would be accorded the POW status. In return for these protections, they would not be allowed to take a direct part in hostilities. Such a direct participation would strip them of their protection.

IV. International Criminal Persecution

Since World War II, especially the Nuremberg Trials, it has been accepted that the individual criminal responsibility for international crimes, primarily war crimes, does exist. The individual criminal responsibility does not depend on a person's status, be it a civilian or combatant. All people are equally capable of committing and being prosecuted for war crimes and grave breaches of the Geneva Conventions.⁸⁶ Therefore, the conclusion is simple: Regardless of the debates revolving around the status of the PMSCs, their members would be held responsible for the war crimes they commit and accused of their direct commission of international crimes.

When members of the PMSCs commit war crimes, it would not be confined to the individual responsibility of those members and the command chain as well would be taken into consideration, as the PMSCs can sometimes operate in intensive coordination with the official armed forces. Generally speaking, the *de facto control over the actions of subordinate* test, which was put by the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁸⁷ can also apply to the PMSCs. Accordingly, any commander who has *de facto* control over the actions of its subordinate PMSC members could also be held responsible for their actions.

On the other hand, the utility of the International Criminal Court (ICC) would be limited to the responsibilities of natural persons who are members of a PMSC, as Article 25(1) of Rome Statute clearly stipulates that “the Court shall have jurisdiction over natural persons pursuant to this Statute.” The corporate liability is nowhere

86 This applies for non-international and international armed conflicts. The most recent affirmation of this principle is given by the ICTR in *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) para 444.

87 *Prosecutor v Mucic et al* (Appeals Chamber) IT-96-21 (20 February 2001) para 192-194: “Under Article 7(3), a commander or superior is . . . the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate’s crime or to punish the perpetrators of the crime after the crime is committed.” “The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. . . [W]hereas formal appointment is an important aspect of the exercise of command authority or superior authority, the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility. Accordingly, the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of the subordinates.”

mentioned in the Statute,⁸⁸ although it did exist in the draft statute.⁸⁹ Moreover, there have been some attempts for the inclusion of a crime of "mercenarism" in the jurisdiction of the ICC and an expansion of the definition of mercenaries in a way to cover the PMSCs as well but those attempts have been met with the response that is inclined to preserve the legitimacy of the PMSCs.⁹⁰

It must be noted that the Montreaux Document emphasizes that the states have a specific obligation to hold members of the PMSCs accountable for their international crimes and grave breaches of the 1949 Geneva Conventions.⁹¹ In fact, aside from this issue, state responsibility for the activities of the PMSCs can be invoked under some other circumstances too. In general, the states are considered to be responsible for the harmful activities of non-state actors which carry out their activities under the auspices of or with the support of those states. Since the states have undertaken certain duties and responsibilities under IHL, these responsibilities cannot be avoided just because of the transfer of some core functions of the states to the PMSCs.⁹² ICRC Commentary to Article 91 of Additional Protocol I states that a state will similarly be responsible for the violations of a private actor if a state "has not taken such preventive or repressive measures as could reasonably be expected to have been taken in the circumstances."⁹³ The "effective control" test set out in the International Court of Justice's (ICJ) decision in the Nicaragua Case⁹⁴ or the "overall control" test set out in the Tadic Case⁹⁵ are implemented in order to identify the circumstances which would entail state responsibility. However, these concepts will not be elaborated on here, as the purpose of this article is just to focus on the direct international obligations of the PMSCs.⁹⁶

V. Conclusion & Recommendations

The phenomenon of privatization of the military functions by the states is not a new phenomenon and even dates back to the late-seventeenth and early-eighteenth centuries. Piracy is a good example of that. In those centuries, private actors could flourish thanks to their political-economic usefulness for the states.⁹⁷ Again for similar reasons, in today's world, many states resort to the assistance of the PMSCs

88 Stephen Kabel, 'Our Business Is People (Even If It Kills Them)' (2004) 12 *Tulane Journal of International and Comparative Law* 461, 476-480.

89 UNGA 'ICC Draft Statute' (1998) A/Conf.183/2/Add.1 art 23.

90 Clapham (n 40) 301

91 ICRC 'Montreaux Document' (n 49) Explanatory Comments.

92 Doswald-Beck (n 69) 18.

93 Y Sandoz and others (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), 1057.

94 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1984] ICJ Rep 392.

95 For details see Stefan A. G. Talmon, 'The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *International and Comparative Law Quarterly* 493.

96 For a detailed study about state responsibility for the activities of the PMSCs, see Hannah Tomkin, *State Control over Private Military and Security Companies in Armed Conflict* (Cambridge University Press 2011) 54-260.

97 Bryan Mabee, 'Pirates, privateers and the political economy of private violence' (2009) 21(2) *Global Change, Peace & Security* 139, 140.

in many fields even though they have outlawed mercenaries and delegitimized some other forms of non-state violence.⁹⁸ Hence, it can be argued that the state practice tends to accept the PMSCs as a part of the international security system. Therefore, from a realistic point of view, it would be unreasonable to suggest a ban of the use of the PMSCs. The most reasonable solution is to address grave concerns regarding the misconduct of the PMSCs and set a clear and effective international legal framework to constrain their harmful activities.

The primary concern is the legal complications arising out of the vague status of the PMSCs in international law. Even though the current IHL rules and concepts are mostly capable of identifying the responsibilities of the PMSCs in warfare, the question of which authority will primarily and more effectively prosecute the PMSCs and their members does not have a clear answer. The historical record of the states in this regard is not promising for securing justice. It seems that the PMSC members often benefit from the uncertainty of “who will investigate, prosecute, and punish crimes committed by the PMSCs and/or their employees; and how, when, where.”⁹⁹ In fact, in most of the states there are no distinct laws regulating the PMSC activities as of yet.¹⁰⁰ Even when the crimes that the PMSC members commit can be prosecuted by the domestic laws, the states which have jurisdiction over those crimes are usually either unwilling or unable to take any action.

The second concern is that the growing involvement of the PMSCs in the military industry and armed conflicts creates a “class of corporations with a directly vested interest in the perpetuation of such conflicts.”¹⁰¹ Therefore, the PMSCs themselves may sometimes pose a great obstacle to maintaining or establishing peace. The other risks stemming from the corporate nature of PMSCs are listed as “private employees, as opposed to soldiers, can refuse to go into dangerous situations or may simply choose to leave their jobs. Companies may go bankrupt, and profit seeking business practices such as ‘just in time’ supply may be inappropriate in a war situation, where capacity may be urgently needed.”¹⁰²

In order to set a clear and effective international legal framework which might address the abovementioned concerns, the ideal solution seems to be the adoption of a comprehensive international convention regulating the conduct of PMSCs.¹⁰³ From

98 Scheimer (n 63) 637.

99 Singer, ‘The Private Military Industry and Iraq’ (n 14) 11-14.

100 Ibid.

101 Freeman and Sköns (n 18) 14.

102 Ibid.

103 Todd Milliard, ‘Overcoming Post-Colonial Myopia: A Call To Recognize And Regulate Private Military Companies’ (2003) 176 *Military Law Review* 1, 1ff; C Holmqvist, ‘Private Security Companies: The Case for Regulation’ (2005) (9) *Stockholm International Peace Research Institute Policy Paper*; F Schreier and M Caparini, ‘Privatising Security: Law, Practice and Governance of Private Military and Security Companies’ (2005) (6) *Geneva Centre for the Democratic Control of Armed Forces Occasional Paper*; Singer, ‘The Private Military Industry and Iraq’ (n 14).

a broad perspective, setting up an international legal framework is necessary and plausible for governments in the long-term because that would prevent the PMSCs from undermining the sovereignty of states with their rampantly undisciplined activities.¹⁰⁴ Considering the wide scope of the PMSC activities, apparently, the IHL concepts like civilians, combatants or mercenaries are not sufficient to bring about a complete solution.¹⁰⁵ Such a convention should particularly emphasize the direct international law obligations of the PMSCs¹⁰⁶ and cover all kind of activities of the PMSCs, including the logistical ones. It would also be very effective for such a convention to set up an international registration and licensing system for PMSCs.¹⁰⁷ That kind of a licensing system would be of help for avoiding the recruitment of "some true bad apples who do not best represent the government or the public interest."¹⁰⁸

Nevertheless, the materialization of such a convention seems very difficult given the current lack of a consensus on this issue among states, even though the UN Human Rights Commission for establishing a Working Group on private military companies at its April 2005 session was a promising step. That Working Group is mandated specifically to address all types of the PMSCs and to "prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities."¹⁰⁹ However, until the realization of such a general international legal framework, the determination of the status and identification of the international law responsibilities of the PMSCs by IHL seems to be the most likely way of rebuking the presumption that the PMSCs are operating in a complete legal vacuum.

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104 "As it is observed, PMSCs sometimes tend to cooperate with rogue actors such as warlords. An outstanding instance of this phenomenon can be observed in some PMSCs' cooperation with local warlords in Afghanistan. Arguably, their cooperation with local warlords has undermined the disarmament progress." Galston (n 4) 239.

105 For opposite view see: Ellen Frye, 'Private Military Firms In The New World Order: How Redefining 'Mercenary' Can Tame The 'Dogs Of War' (2005) 73(6) Fordham Law Review 2607. She proposes to redefine mercenaries so that PMSC operatives fall within the definition of a mercenary and are criminalized under the UN Mercenary Convention.

106 House of Commons *Private Military Companies: Options for Regulations* (Cm 577, 2002) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228598/0577.pdf> accessed 21 November 2019; Singer, *Corporate Warriors* (n 9) 241; Cameron (n 66) 597.

107 Scheimer (n 63) 643.

108 Singer, 'The Private Military Industry and Iraq' (n 14) 8.

109 'The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination' UNCHR (7 April 2005) E/CN_4/RES/2005/2.

Bibliography

- Avant D D, *The Market for Force: The Consequences of Privatizing Security* (Cambridge University Press 2005) 36, 159.
- Baade H W, 'The Legal Effects of Codes of Conduct for Multinational Enterprises' (1979) 22(11) German Yearbook of International Law 11, 16.
- Baez C and others, 'Multinational Enterprises and Human Rights' (2000) 8 U Miami Int'l & Comp L Rev 183, 254.
- Bleda R Kurtarcan, *Muharebe Alanının Yeni Aktörleri: Askeri Yükleniciler* (Beta 2017) 119-128.
- Brooks D, 'Messiahs or Mercenaries? The Future Of International Private Military Services' (2007) 7(4) International Peacekeeping 129, 135.
- Calaguas M, 'Military Privatization: Efficiency or Anarchy?' (2006) 6(1) Chicago-Kent Journal of International and Comparative Law 58, 59-60.
- Cameron L, 'Private military companies and their status under international humanitarian law and its impact on their regulation' (2006) (863) *International Review of the Red Cross* 573, 578.
- Chesterman S and Lehnardt C, 'Introductions' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP 2007).
- Chetail V, 'The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward' in Denis Alland and others (eds), *Unity and Diversity of International Law: Essays in Honour of Prof. Pierre-Marie Dupuy*, (Martinus Nijhoff 2014).
- Clapham A, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006).
- Doswald-Beck L, 'Private Military Companies Under International Humanitarian Law' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP, 2007).
- Dupuy P M, 'Retour Sur La Théorie Des Sujets Du Droit International' in Gaetano Arangio-Ruiz (ed), *Studi Di Diritto Internazionale In Onore Di Gaetano Arangio-Ruiz* (Editoriale Scientifica 2004) 74 and 84.
- Editorial, 'Accountability on the Battlefield' *The New York Times* (New York 8 October 2007) <<http://www.nytimes.com/2007/10/08/opinion/08mon2.html>> accessed 17 December 2019.
- F Schreier and M Caparini, 'Privatising Security: Law, Practice and Governance of Private Military and Security Companies' (2005) (6) Geneva Centre for the Democratic Control of Armed Forces Occasional Paper.
- Faite A, 'Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law' (2004) 4(2) 1, 7.
- Friedmann W, *The Changing Structure of International Law* (Stevens and Sons 1964) 223.
- Frye E, 'Private Military Firms In The New World Order: How Redefining 'Mercenary' Can Tame The 'Dogs Of War' (2005) 73(6) Fordham Law Review 2607.
- Galston EL, 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications For International Humanitarian Law Enforcement' (2008) 49(1) Harvard International Law Journal 221, 225.
- Ghafour H, 'Afghans Are Fed Up with Security Firms' (*LA Times*, 27 September 2004) <<https://www.latimes.com/archives/la-xpm-2004-sep-27-fg-mercs27-story.html>> accessed 18 December 2019.

- Gillard E-C, 'Business Goes to War: Private Military/ Security Companies and International Humanitarian Law' (2006) 88(863) *International Review of the Red Cross* 525, 539.
- Gülşen H, 'Rusya'nın Suriye Müdahalesinde Özel Askeri Şirketlerin Rolü' (*ORSAM*, July 2017), <http://orsam.org.tr/d_hbanaliz/64TR.pdf> accessed 13 December.
- Hauer N, 'Russia's Mercenary Debacle in Syria' (2018) *Foreign Affairs* <https://www.foreignaffairs.com/articles/syria/2018-02-26/russias-mercenary-debacle-syria?cid=nlc-fa_fatoday-20180226> accessed 1 January 2020.
- Holmqvist C, 'Private Security Companies: The Case for Regulation' (2005) (9) *Stockholm International Peace Research Institute Policy Paper*.
- Horn N 'International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives' (1981) 30 *American University Law Review* 923.
- House of Commons *Private Military Companies: Options for Regulations* (Cm 577, 2002) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228598/0577.pdf> accessed 21 November 2019.
- ICoCA "The Association" <<https://www.icoca.ch/en/association>> accessed 14 December 2019.
- ICoCA, 'The International Code of Conduct for Private Security Service Providers' (9 November 2010) <www.icoca.ch/en/the_icoc> accessed 12 December 2019.
- ICRC 'Montreaux Document' (17 September 2008) <www.icrc.org/en/doc/assets/files/other/icrc_002_0996.pdf> accessed 13 December 2019.
- ICRC 'Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)' (8 June 1977) <<https://ihl-databases.icrc.org/ihl/INTRO/470>> accessed 18 December 2019.
- Ijalaye DA, *The Extension of Corporate Personality in International Law* (Oceana, 1978) 221–246.
- Josephides M, 'Sierra Leone then and now: The case of private military companies' (*Polity* October 1 2014) <<https://www.polity.org.za/article/sierra-leone-then-and-now-the-case-of-private-military-companies-2014-10-01>> accessed 2 January 2020.
- Kabel S, 'Our Business Is People (Even If It Kills Them)' (2004) 12 *Tulane Journal of International and Comparative Law* 461, 476-480.
- Karska E, 'Human Rights Violations Committed By Private Military And Security Companies: An International Law Analysis' (2016) 17(3) *Espaço Jurídico: Journal of Law* <http://psm.du.edu/media/documents/reports_and_stats/journal_articles/reports_journal_author_k_karska_human_rights_violations_private_military.pdf> accessed 14 November 2019.
- Kaya S Y, 'Private contractors in war from the 1990s to the present: A review essay' in Erik-Jan Zürcher (eds) *Fighting for a Living: A Comparative Study of Military Labour 1500-2000* (Amsterdam University Press 2013).
- Kinsey C, *Corporate Soldiers And International Security: The Rise Of Private Military Companies* (Routledge 2006), 50-51; David Shearer, *Private Armies And Military Intervention Adelphi Paper* (Routledge 1998).
- Kramer A E and Glanz J, 'U.S. Guards Kill 2 Iraqi Women in New Shooting' *The New York Times* (New York 10 October 2007) <<https://www.nytimes.com/2007/10/10/world/middleeast/10iraq.html>> accessed 10 March 2018.

- Lauterpacht H, 'The Subjects of international Law' in E Lauterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht vol. 1: The General Works*, (Cambridge University Press 1970) 147
- Loesche D, 'Contracted Security' (*Statista*, 2 March 2016) <<https://www.statista.com/chart/4440/private-military-and-security-company-sector/>> accessed 27 December 2019.
- Mabee B, 'Pirates, privateers and the political economy of private violence' (2009) 21(2) *Global Change, Peace & Security* 139, 140.
- McIntyre A and Weiss T, 'Weak Governments in Search of Strength: Africa's Experience of Mercenaries and Private Military Companies' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP 2007).
- Melzer N, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (*ICRC*, December 2009) 51 <www.icrc.org/en/war-and-law/contemporary-challenges-for-ihl/participation-hostilities> accessed 12 November 2019.
- Menon PK, 'The Subjects of Modern International Law' (1990) 3 *Hague Yearbook of International Law* 30,84; C Okeke, *Con- troversial Subjects of Contemporary International Law* (Rotterdam University Press 1974).
- Milliard T, 'Overcoming Post-Colonial Myopia: A Call To Recognize And Regulate Private Military Companies' (2003) 176 *Military Law Review* 1, 1ff
- Orakhelashvili A, 'The Position Of The Individual in International Law' (2001) 31 *California Western International Law Journal* 241, 256.
- Organization of African Unity, OAU Convention for the Elimination of Mercenarism in Africa (3 July 1977) CM/817 (XXIX) Annex II Rev.1 <https://au.int/sites/default/files/treaties/7768-treaty-0009_-_oau_convention_for_the_elimination_of_mercenarism_in_africa_e.pdf> accessed 19 December 2019.
- Parry R and Boswell J 'American Mercenaries are torturing Saudi elite rounded up by new crown prince' *Daily Mail* (London 24 November 2017) <<http://www.dailymail.co.uk/news/article-5108651/American-mercenaries-torturing-Saudi-princes.html>> accessed 23 November 2019.
- Perlo-Freeman S and Sköns E, 'The Private Military Service Industry' (2008) *SIPRI Insights on Peace and Security* No 1, 3 < <https://www.sipri.org/sites/default/files/files/insight/SIPRIInsight0801.pdf> > accessed 22 December 2019.
- Ratner S, 'Corporations and Human Rights' (2001) 111(3) *Yale Law Journal* 443, 497.
- Reynolds N, 'Putin's Not-So-Secret Mercenaries: Patronage, Geopolitics, and the Wagner Group' (*Carnegie Endowment for International Peace*, 8 July 2019) 3 <<https://carnegieendowment.org/2019/07/08/putin-s-not-so-secret-mercenaries-patronage-geopolitics-and-wagner-group-pub-79442>> accessed 8 December 2019.
- Rigaux F, 'Transnational Corporations' in M. Bedjaoui (eds) *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers 1991) 129; L Henkin, "international Law: Politics, Values and Functions", *Recueil des cours de l'Académie de droit international*, 126, 1989, 199; Antonio Cassese, *International Law in a Divided World* (Oxford University Press 1986).
- Rosen F, *Contract Warriors: How Mercenaries Changed History and the War On Terrorism* (Alpha Books 2005).

- Sandoz Y and others (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), 1057.
- Scheimer M, 'Separating Private Military Companies From Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support the Reflects Customary International Law' (2009) 24(3) *American University International Law Review* 611, 626.
- Schmitt M N, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2005) 5(2) *Chicago Journal of International Law* 511, 527ff.
- Schreier F and Caparini M 'Privatising Security: Law, Practice and Governance of Private Military and Security Companies' (2005) Geneva Center For the Democratic Control of Armed Forces Occasional Paper 6 <http://iskran.ru/cd_data/disk2/rr/003.pdf> accessed 17 November 2019.
- Singer P W 'War, profits, and the Vacuum of Law: Privatized Military Firms and International Law' (2004) 42 *Col JTL* 521, 535.
- Singer P W, 'The Private Military Industry and Iraq: What Have We Learned and Where to Next?' (2004) Geneva Center For the Democratic Control of Armed Forces Policy Paper, 15 <<https://gsdrc.org/document-library/the-private-military-industry-and-iraq-what-have-we-learned-and-where-to-next/>> accessed 14 November 2019.
- Singer P, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press 2003) 9.
- Spear J, 'Market Forces the Political Economy of Private Military Companies Economies of Conflict: Private Sector Activity in Armed Conflict' (2006) FAFO-Report 531, 14–16 <<https://www.faf.no/index.php/zoo-publikasjoner/afro-rapporter/item/market-forces>> accessed 21 December 2019.
- Talmon S A G, 'The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *International and Comparative Law Quarterly* 493.
- The initial US Department of State 'spot report' on the incident 'SAF attack on COM team' (2018) <<http://i.a.cnn.net/cnn/2007/images/10/01/blackwater.report.pdf>> accessed 5 April 2019.
- Thomson J E, *Mercenaries, Pirates, And Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton University Press 1994) 31-32.
- Tomkin H, *State Control over Private Military and Security Companies in Armed Conflict* (Cambridge University Press 2011) 54-260.
- Topal A H, 'Uluslararası Hukuk Açısından Özel Askerî Şirketler ve Şirket Çalışanlarının Statüsü' (2011) 60(4) *AUHFD* 963, 994.
- Walker C and Whyte D, 'Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom' (2005) 54(3) *The International and Comparative Law Quarterly* 651.
- Weigl A, 'Passaro Will Serve 8 Years for Beating' (*News&Observer*, 1 February 2017) <<https://www.newsobserver.com/497/story/543038.html>> accessed 13 November 2019.
- Wulf H, *Internationalizing and Privatizing War and Peace* (Palgrave Macmillan 2005).
- Zarate J.-C., 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder' (1998) 34(1) *Stanford Journal of International Law* 75, 124.

Legislations and Other Sources

Articles 4, 5 and 8 of the articles on State responsibility: ILC, 'Report of the International Law Commission on the Work of Its Fifty-third Session', (10 August 2001 UN Doc) A/56/10.

First Geneva Convention (22 August 1864) art 2.

Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (12 August 1949) 75 UNTS 135 art 4(A)(1), (2), (3) and (6).

ICRC Commentary on P I Article 51.3 (1987) para 1944

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3 art 43 and 44(1).

Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 2011, p. 13.

UN ECOSOC 'Report of the Third Meeting of Experts on traditional and new forms of mercenary activity' (18 January 2005) UN Doc. E/CN.4/2005/23.

UNCHR (7 April 2005) E/CN_4/RES/2005/2.

UNCHR 'Guiding Principles on Business and Human Rights Principle' (6 July 2011) UN Doc A/HRC/17/4 Principle 11.

UNCHR Res (6 July 2011) UN Doc A/HRC/17/4.

UNGA 'ICC Draft Statute' (1998) A/Conf.183/2/Add.1 art 23.

UNGA 'The International Convention against the Recruitment, Use, Financing and Training of Mercenaries' (4 December 1989) A/RES/44/34.

Table of Cases

ICTR in Prosecutor v Akayesu (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) para 444.

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 1996 para 25.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [1984] ICJ Rep 392.

Reparation for Injuries Suffered in The Service of the Nations (Advisory Opinion) [1949] ICJ Rep 174 178.

Prosecutor v Mucic et al (Appeals Chamber) IT-96-21 (20 February 2001) para 192-194.