PRIVATE MILITARY AND SECURITY COMPANIES AND INTERNATIONAL HUMANITARIAN LAW

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SUMMARY

1. INTRODUCTION

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One of the most noticeable consequences of the aggression by the United States and the United Kingdom towards Iraq in 2003 was the emergence onto the international scene of a phenomenon that, although not absolutely new, had never had the visibility seen in that conflict: we are referring to the proliferation of private companies entrusted to carry out military and security functions on the ground, very often paid for by the occupying governments themselves or, more indirectly, by private companies normally based in western countries. Soon the media was reporting on the abuses committed by these armed actors, who seemed to have a "licence to kill" and acted with complete legal impunity. Perhaps the most characteristic case took place on 16th September 2007, when private security forces from the company *Blackwater*[1] that were accompanying an American convoy in Iraq killed 17 civilians, including several women and children, in circumstances that did not justify the use of force, as there had been no prior aggression or threats.[2] This was just the tip of the iceberg of a booming business that was opaque and hardly studied by academia until then. This was a phenomenon whose origins go back to the fall of the Soviet Empire and the wars in the Balkans and was present in many other conflicts apart from Iraq, most clearly in the conflict in Afghanistan.

These private military and security companies (PMSCs) are reminiscent in the collective imaginary of the old, but never disappeared, mercenaries. However, they are something new and unknown in legal rules that have governed armed conflicts since the end of the Second World War. The rules of international humanitarian law constitute a self-sufficient system and have the ability to adapt to new, real situations

[1] Because of the scandal, *Blackwater Worldwide* was renamed *Xe Services*. See *The New York Times* of 14th February 2009 at http://www.nytimes.com/2009/02/14/us/14blackwater.html (consulted in September 2009). However, its main shareholder director continued to be Eric Prince, its headquarters continued to be in North Carolina and the company continues to receive contracts from the American State Department.

[2] UN Press Release: Working Group on the Use of Mercenaries expresses concern over the killing of Iraqi civilians involving employees of private security company, 25th September 2007.

that each new armed conflict entails: new methods and means of combat, new public actors (warring factions, national liberations movements), new atrocities etc. that do not fall outside the law in force, nor to which can be applied the old legal adage according to which "everything which is not forbidden is allowed". The same can be said of these new actors, in this case non-governmental, who are at least "present" and often "participate" in international and non-international armed conflicts: they are governed by international humanitarian law, although it is necessary to study with what scope and to what extent. Certainly numerous voices have called for new international regulation of this phenomenon (e.g. Gómez del Prado and Torroja 2011, 15-16), which until now has not been possible. As we will see in the following pages, on one hand the United Nations Working Group that is studying this question has proposed a draft of a potential convention to the Human Rights Council, which has been received with noticeable coolness by member states. On the other hand, as proposed by the Swiss government and with the cooperation of the International Committee of the Red Cross (ICRC), some soft law documents have been drafted, aimed at the self-regulation of these companies and the states related to them; documents that have no pretension to legality or make up for the absence of a binding code. In any case, in view of the lack of these new rules of the game that will accommodate and place the necessary limits on PMSCs, we can only apply the current rules of international humanitarian law, *mutatis mutandis*, to these companies and their employees.

This is the purpose of this research: to analyse how and to what extent the PMSC phenomenon is covered and what rules of international humanitarian law apply to it. To do this we have divided the work into three major parts. The first, as an introduction, reviews the traditional phenomenon of mercenarism and how the response to it by international humanitarian law has not only been slow, it has also not been very useful for modern private contractors. In the second part we deal with the origin, proliferation and purposes of private military and security companies, and with the differences that distinguish them from traditional mercenarism. We will also attempt to explain what the legal regulation should be for these people within the context of their participation in armed conflicts, a question that does not have a clear answer and that is probably one of the strongest arguments in favour of an *ad hoc* regulation of the phenomenon. Finally, the second chapter closes with a brief analysis of the various initiatives for regulation that we have referred to in the previous paragraph. The third part of the study thoroughly analyses the principles and rules of international humanitarian law that are affected by the presence and participation of

PMSCs in armed conflicts. Taking customary international humanitarian law as identified by the ICRC (Henckaerts and Doswald Beck 2007) as the regulatory basis and taking into account both known practice and the aforementioned regulatory proposals, this chapter identifies the degrees of enforceability of the main rules of international humanitarian law to PMSCs. We end with the relevant conclusions, from which can be drawn a generic duty to respect international humanitarian law both for companies and their employees; a principle that is only excluded in those rules of humanitarian law that can only be applied to sovereign states as such and that must be clarified in others. We will see however that the vast majority of the principles and rules of international humanitarian law are perfectly applicable and must be demanded from PMSCs and their employees.

As the authors of this report we accept joint responsibility for all its contents. However, we should state that Marta Bitorsoli is the main person responsible for chapters 2 and 3, while Jaume Saura was responsible for drafting chapter 4 and the conclusions, as well as for the general supervision.

Barcelona, 31st December 2012

2. THE PHENOMENON OF MERCENARISM AND ITS HISTORICAL TREATMENT BY INTERNATIONAL LAW

2

2.1 BACKGROUND

The word "mercenary" has its origins in the Latin merces (-edis), reward, and in fact defines someone who works under the direction of a third party in exchange for money. Transferred to the military field, it is a professional soldier who provides his services in exchange for a fee from a third-party state or armed group.

Until the middle of the 20th century, fighting for the fee of the highest bidder did not trouble consciences or public morality; on the contrary, the phenomenon of mercenarism has existed since time immemorial and civilian armies are only an achievement of the 17th and 18th centuries, a consequence of the construction of the nation state and of the French revolution. The practice of recruiting paid combatants was the norm until relatively recently: as early as in the writings of Xenophon and Thucydides we find combatants that nowadays would be defined as mercenaries and that had remarkable success in the conflicts on the Italian Peninsular in the 14th and 15th century. At that time the gentry involved in the numerous territorial conflicts hired combatants organised into real companies, generally at the command of an Italian (*condottiero*) but including "professional combatants", especially soldiers. The monarchies of the 14th and 15th centuries used their help to consolidate the borders of their states.[3]

At the beginning of the 20th century mercenarism was still not perceived as incompatible with state interests, let alone international ones, as can be seen in the regulations for land warfare (1907 Hague Convention), where it only specifies that a mercenary from a neutral state will not be allowed to invoke, if captured, the status of

[3] The system was not free of critics, among them Machiavelli, both in *The Art of War* and *The Prince*.

neutrality in the hostilities of his country of origin. At that time the state sphere was seen as clearly different from the individual sphere, meaning that everything that refers to individuals was subservient to the regulation of states. In a certain way it can be said that mercenaries began to be seen as a potential problem when, with the birth of the right of neutrality, a state that did not wish to be involved in conflicts between third parties was obliged to discourage its own citizens from taking part in the hostilities.

We need to wait until the second half of the 20th century to see the first explicit condemnation of the phenomenon of mercenarism, after its use to stop the free exercise of the right of self-determination of peoples under colonial domination and of governments of recently independent countries. It is in this context that their actions began to be seen as increasingly unacceptable by the international community. Specifically, the hindering of the enormous United Nations mission in Congo, between 1960 and 1964 marked a turning point in the criminalisation of mercenary groups. Indeed, in 1960 the Security Council had established one of the largest and most complex peace missions in its history in order to support the Congolese government in maintaining its territorial integrity and independence, which had just been achieved after a century of Belgian domination. The aims of the mission included the protection of the recently formed government from the interference of outside forces, among them mercenaries, and to preserve the territorial integrity of the Congo from the secessionist aspirations of Katanga. In this context, Res. 161 (1961) dated 21st February, "2. *Urges* that measures be taken for the immediate withdrawal and evacuation from the Congo of all military and paramilitary personnel and of the political advisors from Belgium and other countries (...) as well as mercenaries". A few months later, Res. 169 (1961), dated 24th November of the Security Council went a little further:

> 4. "Authorises the General Secretary to take vigorous action, including the use of necessary force if required, for the immediate apprehension, detention prior to their indictment or expulsion of all military and paramilitary personnel and foreign political advisors not under the control of the United Nations, as well as mercenaries..."

This and other cases in which mercenaries were involved, their participation in the civil war in Nigeria for example, led the General Assembly to condemn the use of mercenaries to violate the territorial integrity of third-party states. In its "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" [Resolution 2625

(XXV) of 1970], the Assembly established the obligation of states to prohibit the training of organised armed groups for the purpose of intervention in other countries within its borders:

> "Every state has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands including mercenaries, for incursion into the territory of another state".

We can see, however, that the reference to mercenarism is instrumental: what is substantively condemned is aggression and mercenaries are just one of several means to this end. However, the wave of condemnation of mercenarism led to, on one hand, the drafting of article 47 in the Additional Protocols to the Geneva Conventions (1977), which as we will see excludes mercenaries from the category of combatants and therefore, from the right to hold the condition of prisoner of war if captured. And on the other hand it led to the opening of negotiations regarding the future United Nations Convention that finally saw the light of day in 1989. This was a convention that was ineffective as soon as it was created as we will see later, insofar as at the time of its adoption mercenarism had already managed to adapt to the new economic situation and started to systematically organise military services in the form of companies, in the majority of cases according to the Japanese *Just In Time* model*:* an increase in productivity through the reduction of management costs (Romani 2008).

Therefore, in the international legal system as a whole we can find definitions and systems of mercenarism both in the branch of international humanitarian law and in the branch of international law on human rights. This dual consideration would provide complete coverage of the specific manifestations of the phenomenon, that is, both in times of peace and of war, if they were really effective. In fact, the rules in question proved to be obsolete and unusable, since there are practically no combatants that fulfil the necessary requirements to be considered mercenaries (requirements that are basically repeated in the two systems of rules).

The legal consequences and the scope of application of the two types of instruments are different: the international conventions that are part of international law on human rights consider mercenarism to be a crime and are applied in times of peace, while Additional Protocol I limits itself to excluding these professionals from the scope of legitimate combatants and is applied to international conflicts. In contrast, there are no

substantial differences regarding the definition and the necessary requirements to be considered a mercenary, as we will see below.

2.2 THE MERCENARISM LEGAL SYSTEM IN INTERNATIONAL HUMANITARIAN LAW

As we have shown, in its origins international humanitarian law does not question mercenarism nor does it place it inside or outside of the law. Therefore, the *Regulations concerning Laws and Customs of Land Warfare*, contained in the Fourth Convention of The Hague of 1907 limited itself to establishing that any individual that takes part in hostilities under the command of a state other than of his nationality would be treated as a soldier of the state for which he was providing services and in the event of capture would not be able to benefit from the neutrality of his home state.[4]

The same indifference regarding mercenaries was still visible in 1949 in the drafting of the Third Geneva Convention, which allowed any individual that joins an organised armed group that, without being the armed forces of the state, meets the requirements of its art. 4 to enjoy the right of prisoner-of-war status.

Things changed, as we have seen, from the 1960s on, when armies of mercenaries used against national liberation movements and recently independent countries attracted the attention of the international community, whose condemnation would lead to articles 46 and 47 of Additional Protocol I, which excluded mercenaries and spies from the scope of legitimate combatants. However, unlike spies (which are not officially defined) in the scope of international humanitarian law, art. 47.2 of Protocol I requires the simultaneous fulfilment of the following conditions in order to be considered a mercenary:

> a) is especially recruited locally or abroad in order to fight in an armed conflict;
> b) does, in fact, take a direct part in the hostilities;
> c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or

[4] In contrast, the same convention dedicates three articles to spies, which is another of the categories stigmatised in classic international humanitarian law.

paid to combatants of similar ranks and functions in the armed forces of that Party;

d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

e) is not a member of the armed forces of a Party to the conflict; and

f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

As we have already stated, the only consequence that the Protocol establishes if an individual fulfils (simultaneously and concurrently) all of the requirements to be considered a mercenary, is that of being outside the definition of a legitimate combatant, meaning that: a) he may not benefit from the application of prisoner-of-war status, and b) will not have the cover established for legal acts of war. The latter consequence is not trivial, if we consider that therefore mercenaries can be tried by ordinary criminal or military courts for their illegal acts. At least in theory, because in practice there are application problems, especially the establishment of the competent jurisdiction and the will to try these individuals, often nationals from very influential world powers, making this option virtually impossible.

It should be stated that no mention is made of mercenaries in Protocol II, which is dedicated to the protection of victims of non-international armed conflicts. This is understandable taking into account that Protocol II does not provide for the figure of the prisoner of war: if this figure does not exist, it does not appear necessary to exclude it for the case of mercenaries. In any case, Protocol II, when it is applicable, is enforceable against all armed actors involved in a non-international armed conflict, regardless of whether they are governmental or not.

Also, article 47 of Protocol I has been included in the study on international humanitarian law by the Red Cross,[5] which considers it a customary rule, despite the fact that some states involved in the use of mercenaries (modern mercenaries) have abstained from ratifying the Protocol.[6]

[5] Rule 108. Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial.

[6] The United States has declared that it does not consider the provisions of art. 47 AP I to be customary, as can be seen in the comments on rule 108 by the Study on Customary Law in question (Henckaerts and Doswald-Beck 2007, 445-449).

2.3 MERCENARIES IN GENERAL INTERNATIONAL LAW

Mercenaries have not only been the object of attention in laws of war dedicated to international conflicts, but also in treaties of international law regarding human rights (relating to the prevention of practices contrary to these rights), both globally and regionally. In this context we can see both treaties by the United Nations (1989) and by the Organisation for African Unity (1977), which classify mercenarism as a crime, unlike in Protocol I. This criminalisation reflects the condemnation of mercenaries at the time that these treaties were produced, although with a seemingly much more biased tenor: the condemnation of mercenarism is not absolute but rather conditional upon a certain final use of mercenaries, insofar as private troops must hinder a national liberation movement.

2.3.1 THE CONVENTION FOR THE ELIMINATION OF MERCENARISM IN AFRICA

The Convention, which appeared in Libreville in 1977, came into force in 1985 and today has thirty state parties (including Libya but not the Ivory Coast, two countries where mercenaries have recently been used). We should remember that this is an instrument created by a regional organisation, meaning that it only binds those states in the African region that have finalised its ratification process. It represents the most aggressive legal instrument against mercenaries and mercenarism, which it defines as a crime against security and peace in Africa.

It is useful to stress that this convention establishes that the crime can be committed by individuals, organised groups, state representatives and states themselves. However, it makes it clear from its first article what the purpose of the criminal act is (an attempt to counteract a self-determination movement or the territorial integrity of a state using armed violence), and the scope of the criminalisation also varies depending on the definition given to the group against which mercenaries are used and practically all forms of violence from the outside (aggression) are banned. In contrast, national violence, for or against a rebel or insurrectional group, insofar as it does not threaten the principle of self-determination or the territorial integrity of a state, would not exclude the use of mercenaries, at least as far as the Convention establishes.

Regarding the definition of mercenary, there are no major differences between this text and Protocol I, adopted the same year. In accordance with article 1, a mercenary is understood to be any person that:

a) has been especially recruited locally or abroad in order to fight in an armed conflict;

b) does, in fact, take a direct part in the hostilities;

c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation;

d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

e) is not a member of the armed forces of a Party to the conflict; and

f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

As we can see, the most substantive difference is based on the provision that here it is not necessary that the material compensation (although it must exist: letter *c*) be "substantially in excess of that promised or paid to combatants of similar ranks and functions". In fact, this provision of art. 47 of Protocol I had been fruitlessly opposed by numerous African states during their preparatory work. In this sense therefore, the definition of mercenary proposed here is broader than that of Protocol I and also, in part, broader than Convention of 1989.

Along with the definition of "mercenary", article 1 of the treaty establishes the "crime of mercenarism" as the carrying out of a series of acts with the aim of opposing by armed violence a process of self-determination, stability, or territorial integrity of another state, committed by an individual, group or association, but also by a state or its representatives. Said acts are:

(a) Shelters, organizes, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries;

(b) Enlists, enrolls or tries to enroll in the said bands;

(c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above-mentioned forces.

Finally, the Convention establishes positive obligations for the state parties, both in terms of the prevention of mercenarism (e.g. stopping its nationals or residents from embarking on mercenary activities or preventing the entrance and transport of people or goods used for mercenarism) and so that they can adopt internal criminal and jurisdictional measures to provide a specific response to what is established in the Convention (definition, establishment of jurisdiction, extradition etc.). But always, given the definition of a mercenary that we have referred to, only when there is a foreign component in the use of force.

2.3.2 INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES

This treaty was adopted by the United Nations in 1989 after nine years of debates and preparatory work. The matter had first been examined in the General Assembly in 1979, thanks to the initiative by Nigeria and after the approval of the treaties that we have just examined. As we have already seen, the drive towards the drafting of this treaty was the use of mercenaries in national liberation wars and in the destabilisation of governments in recently independent states, especially in Africa, and this is clear from the introduction, where we can read that the state parties:

> *"Being aware of the recruitment, use, financing and training of mercenaries for activities which violate principles of international law such as those of sovereign equality, political independence, territorial integrity of States and self-determination of peoples".*

As well as obliging state parties not to recruit, use, finance or train mercenaries and to prohibit such activities, the Convention obliged them to extradite or try any mercenaries found in their territory, regardless of the crime that they had committed there or in another state party. Its greatest singularity is of having combined two complementary approaches: on one hand defining crimes committed by mercenaries and on the other criminalizing the illegal conduct of anyone that promoted or organised such activities. In reality, the treaty follows the blueprint of the United Nations conventions on the fight against and prevention of the most serious violations of human rights (racial discrimination, torture, forced disappearances) and establishes the principle of "extradite or prosecute", which is typical for international crimes.

The requirements established in the first article to be considered a mercenary are the same as Protocol I. In other words, despite the criticisms in the preparatory work, the requirement of payment substantially in excess of that paid to combatants of similar ranks is retained here.

The purpose of the second paragraph of article 1 is to offer an alternative definition of a mercenary (it states that a mercenary "shall *also* be understood as any person *in any other situation*") as a person who:

> *a*) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
>
> > i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
> >
> > ii) Undermining the territorial integrity of a State;
>
> *b*) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
>
> *c*) Is neither a national nor a resident of the State against which such an act is directed;

Probably because the problem of fulfilling all the concurrent requirements demanded until then had already been noticed, this is a definition that is partly simplified compared to what we have seen before. However, it is also based on the aim: the definition is only valid if the mercenary act is aimed at overthrowing a government or undermining its constitutional order or territorial integrity.

Mercenarism is not only criminal in itself, but so are the recruitment, financing, employment and training of mercenaries (article 2). Therefore the requirement of direct participation in acts of war is not essential for the criminalisation of mercenarism, but rather that those that promote these activities and those that stay in the rear-guard are also open to incrimination.

Finally, the UN Convention also establishes positive and preventative obligations for states, which must take action internally by modifying their own criminal legislation by common agreement.

Despite these virtues, this Convention is not sufficient to deal with the phenomenon of PMSCs either, as it establishes the same system of requirements of progressive integration, which are very unlikely to be fulfilled by contractors and, like the African Convention, the specific aim of opposing self-determination.

Also, the Convention was only able to enter into force on 20th October 2001, after the ratification of the 22nd state party and currently only has the support of 32 states, for which it represents a binding international rights instrument. This is a frankly disappointing figure.

* * *

The existing legal instruments are not used to regulate the phenomenon of the provision of military services in the form of companies. There could be some potential in the few cases of traditional mercenarism that still occur, but the low participation of states, especially regarding the second instrument, their technical limits and the no less important institutional forgetfulness that they suffer from, make them ineffective instruments in practice. As we will see later, the lack of effectiveness is due above all to the distance that exists between traditional mercenarism and the new phenomenon of contractors.

In the following pages we will see what specifically distinguishes traditional mercenaries from modern contractors, whose employment appears to be increasingly more common and widespread by governments of private international companies of different kinds and including international organisations, even NGOs.

The same United Nations and international Red Cross agencies have not rejected the use of this type of force for the protection of their installations and personnel and/or to facilitate access for them to locations controlled by armed groups. The use of private military professionals has been proposed even to improve the quality of the peace missions under the command of the Security Council: The Secretary-General himself, Kofi Annan admitted that he had examined this possibility in the Rwanda case although he later dismissed it, stating that the world was not ready "to privatise peace".[7]
In short, the growing use of contractors to carry out functions with a very wide scope appears to be the translation in military terms of the wave of privatisation that has spread across each sector since the 1990s, also adapting to the new global market situation. In this context it is necessary to clarify the legal status of contractors, what their obligations are under international humanitarian law, when they are applied and

[7] Cited in *Private military Companies: Options for Regulations*, Report by the House of Commons, 12th February 2002.

above all how to make their responsibility enforceable in the event of breaches and who has legal competence.

3. CHARACTERISATION OF THE PHENOMENON OF PRIVATE MILITARY AND SECURITY COMPANIES (PMSCs)

Now that we have analysed the traditional and only partially eliminated phenomenon of mercenarism, in this section we are going to examine three related questions connected to the characterisation of the new international private companies that specialise in providing security services, often including military components: their origins, concept and functions, the status that they and their workers must have in international humanitarian law, and the proposals that are starting to proliferate for their regulation.

3.1 THE CONTEMPORARY PHENOMENON OF PMSCs

The term *Private Military and Security Companies* (PMSCs) that we use in this report is neither peaceful nor uniform. The term refers to the common phenomenon of modern contractors, about which unconditional consensus has yet to be reached, especially regarding the use of the term *military*. Far from being merely a terminological problem, legally defining a term means outlining the lines of responsibilities, of duties and of obligations; in short, the legal status.

Therefore, since the start of the debate about the phenomenon in question, one of the greatest difficulties has been finding terminology that is peacefully accepted. This is an obstacle that is the direct consequence of the variety of the interests involved, both of the states, whose position varies noticeably according to whether they are the senders or recipients of these companies, and of the companies themselves.

As corroboration, we only need to look at the differences between the definitions proposed in pseudo-normative texts that we will refer to at the end of this section. For example art. 2 of the Draft of the United Nations Working Group defines PMSCs as:

> "a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities".

This is not very far away from that provided by the Montreux Document, with the addition of the description of the services that these companies can provide:

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

However, in the subsequent Code of Conduct, draw up within the same framework as the Document (the Swiss Initiative), any reference to a military character disappears and a definition is proposed that all companies from Xe Services to Prosegur fulfil:

> "Private Security Companies and Private Security Service Providers (hereinafter jointly called "PSCs") – any company, in accordance with the provisions of this Code, *whose business activities include the provision of security services either on its own behalf or on behalf of another, irrespective of how such Company describes itself*".

Outside of these semi-official texts, a definition that is capable of reflecting the phenomenology of PMSCs could be that of "legally established private companies that offer services of armed assistance, advice, support and security, either as an alternative channel or as a complement to the armed forces of the state that contracts them, within the context of an armed conflict" (Güell Peris 2009, 217-218). The wide range of purposes that the definition of PMSCs recognises appears useful to us, as well as the specification of the military context and the contribution to the military force that these companies provide. However, we believe that it is unnecessarily restrictive in its reference to "the state" as the only possible contracting agent for these companies.

Private military and security companies are characterised by their hybrid nature, which is the result of the synthesis between the military nature of the functions that they carry out, traditionally part of the hard core of state functions (security and defence) and the commercial nature of the contracting and provision of services. It should be remembered that the object of study of this report is limited to those cases where they intervene directly in combat, carry out military functions alongside regular armies or security missions that are highly likely to change from passive-defensive to active, with the consequent used of armed force.

What they are therefore, are organisations in the form of companies that provide military, security or similar services. Notwithstanding the general comments above, later each specific manifestation will be the result of the combination of a series of variables, especially the functions carried out, the context of the operation, the contracting client etc. Among other things, this means that there is a large difference between the aims of private companies and states, a difference that is far from trivial when it is necessary to respect the regulatory principles on the conduct of hostilities: the aim of state armed forces is to obtain military victories and they are obliged to choose the means that will potentially cause the least harm possible, in terms of the suffering of people and of impact on the territory. For private companies, their main objective is naturally that of obtaining the greatest possible benefit, in order to achieve the targets of the party that has contracted them. It is no coincidence that often they have not hesitated to hire "cheap" personnel, from less developed countries, putting aside their professionalism regarding security or their training in humanitarian matters (Bondia 2009, 155).

This leads us directly to the importance of the interpretation supplied by international humanitarian law in this report, whose very tenets are threatened due to the presence of military professionals, supplied with arms and often without any identifying signs in very tense situations or in conflict itself.

That said, we should make one point before continuing. Given the extreme internal diversity of the phenomenon of the private military industry (and that military acceptance is already helping to delimit the system), it would appear useful to diversify even more depending on the specific degree or participation or involvement in military operations, regarding the range of the services provided; in short, regarding the concept of "direct participation in hostilities". These variables would function as a

parameter to establish different *species* within the PMSC *genus*, which should not be overlooked when establishing their legal treatment.

3.1.1 A BRIEF HISTORICAL OVERVIEW

If we wish to establish the transition from traditional mercenarism to the new military industry as a line for didactic purposes, we would need at least three fundamental landmarks. The first would have to be set in the same years as when the criticisms of mercenarism intensified, the 1960s. In fact, as early as this first stage the profitability of military professionals began to become apparent and the first cases of organisation into companies appeared. For example, in 1967, David Stirling, an ex-commando from the Special Air Services founded *Watchguard*, a private company that supplied mercenaries, whose record includes the management of Omani troops in the repression of the Marxist Dhofar Rebellion between 1965 -1970 (Rene Naba 2007).

It would be in the 1980s when, once the wave of condemnation that surrounded mercenaries because of their interventions in national liberations had died down that mercenarism would go through a fundamental restructuring process, in order to obtain legal protection through the placement of military and security services within the advanced service sector. During these years we can see the leap forward in quality that opened the way for their organisation as companies and their placement in the services market.

The recruitment of private companies by developing countries or those with scarce resources then began to acquire a structural character for the training of their own armed forces, as well as for the maintenance of public order. This led to the first explicit, direct participation in hostilities, and this is where the second critical moment occurs, in the case of the South African company *Executive Outcomes* in the context of the Angola conflict. In 1992, the recently created[8] South African company was contracted by the government of Angola to fight against UNITA (the National Union for the Total Independence of Angola) and retake the region of Soyo, which was rich in natural resources and at that time under control of the group.

[8] *Executive Outcomes* was created in 1989 by Eeben Barlow, ex-officer of the "Civil Cooperation Bureau", a unit of the South African army that carried out undercover operations and even assassinations. Barlow benefitted from the enormous number of qualified personnel available on the market after the restructuring of the South African Defence Force, as a consequence of the end of wars with Namibia and Angola and the fall of the apartheid regime.

Although cases of contracting PMSCs for direct and explicit participation in conflicts were not repeated[9], a fact that caused talk about the disappearance of *combat ready* companies, their use has actually multiplied over the years, although at a more underground level.

Finally PMSCs reached their apex in the wars (and especially in the post-war periods) in Iraq and Afghanistan, when suddenly the attention of the international community was focused on contractors and their use, although this was no more than the tip of the iceberg of a phenomenon that was already widely implemented. The incidents that these companies and their contractors have been involved in, together with the mass deployment[10] of private forces in the so-called *wars against terrorism* could no longer go unnoticed.

3.1.2 FACTORS THAT CONTRIBUTE TO THE DEVELOPMENT OF PMSCs

In addition to the evolution that we have just examined, a set of circumstances has contributed to the development of these companies from different perspectives. We could list these factors that, diachronically, have contributed to the growth of PMSCs (Saura 2010, 3-4).

Firstly, the dismantling of the former USSR and the end of the cold war, with the subsequent reduction in armies, left a large number of professional soldiers and arms available on the market. This surplus of personnel and armaments is, historically, in keeping with the neoliberal privatisation of the 1990s, which also took place in the security sector and represented another fundamental factor for the growth of the private military industry.

Another element, which continues to play a fundamental role, was the nature of conflicts and of the means of combat. Indeed, the armament technology sector is dominated by numerous PMSCs, which specialise in the development, management and maintenance of new weapons, making their services almost essential for the most modern and powerful armies.

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[9] *Executive Outcomes* and *Sandline International* were the most active companies in the 1990s, taking part directly in some conflicts. Sandline was created at the beginning of the 1990s and has been involved in the conflicts in Papua New Guinea in 1997, Sierra Leone in 1998 and Liberia in 2003.

[10] It was estimated that in 2009 the various agencies of the US Defence Department had contracted over 182,000 contractors in Iraq, including 118,000 Iraqis, 21,000 Americans and around 40,000 contractors from third-party countries (Pozo Serrano 2009, 375).

To this we need to add the change that has been taking place in the conduct of hostilities: these are no longer, only sporadically, international wars, but more often internal conflicts or high-tension situations within the borders of just one state. Therefore, although conflicts may not go beyond borders, the interests involved come from different countries or areas of influence; this is no coincidence, as conflicts occur in countries that are particularly rich in natural resources or that arouse the interest of world powers due to their geostrategic importance.

In these scenarios, using private forces enables the presence and control of an area without it being necessary to deploy an "official" contingent, thereby masking the real size of an intervention and of the corresponding military aid costs. This makes it possible to control an area or help the party closest to its own interests without affecting the degree of public acceptance of a government or break delicate international balances.

3.2 PURPOSES AND CLASSIFICATION OF PMSCs

One of the first experts on the private military industry, Peter Singer (Singer 2007, 191), identified three types of companies depending on the missions they carried out. In very general terms, these were *military provider firms*, when, strictly speaking, they provide military services, *military consulting firms*, if they specialise in combat assistance and advice and finally *military support firms*, regarding those that provide logistic support.

After the scandals in Iraq and Afghanistan and the supposed reduction in the use of PMSCs, there has been talk about the end of companies in the first category, although in reality this was premature, as can be seen from the continuous calls for the regulation of companies by the United Nations Working Group dealing with the subject.[11] The truth is that they are not explicitly contracted to carry out military services strictly speaking, as their true role often goes beyond what is established in contracts.

[11] "Mercenaries still pose a serious threat to human rights, warns UN expert body", April 2011, http://www.unog.ch (consulted in September 2012). This is the working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination. Hereinafter the "United Nations Working Group". Contact address: *wgmercenaries@ohchr.org*.

Reality itself demonstrates that they have not disappeared, insofar as the conditions that have led to the current sizes of the phenomenon still persist, and these have been joined by others that comprise very fertile ground for the growth of these companies. For example, the need to control geopolitical and economically strategic areas through the training of military forces "on-site"[12], the revolutions of what is known as the "Arab spring", where unofficial support for one party or another can be guaranteed by using private forces (in Libya there has been enormous use of contractors by both parties to the conflict, even after the conflict, so much so that the United Nations Working Group has expressed its concern several times)[13], the change in the perception of "security" from that of a public asset to private merchandise, which is what justifies the proliferation of private forces in each country (it is enough to simply look around an airport or even a simple shopping centre), the increasingly frequent contracting of PMSCs even by international organisations and NGOs for their humanitarian missions, and finally the market for the security and protection of ships on the sea routes most threatened by the presence of pirates.[14]

Having detailed the above regarding classification, we should emphasise that there are still companies that are strictly military and not just concerned with security and that classifying them into different types could be useful insofar as the missions that they may carry out are also a defining factor in the legal status of those used and the possible responsibility of the company itself, paying particular attention to those that provide combat support services.

However, any classification will have to be interpreted in light of its educational purpose and not as isolated behaviour, since on the ground specific occurrences do not always match what is planned. The commonly accepted classification of PMSCs nowadays distinguishes between military and security companies, although internally the associations to which the companies belong reject any military classification, perhaps because that would bring them closer to the concept of mercenaries, which

[12] The US State Department has recently created the US *Army African Regional Command,* which is playing an important role regarding advice and assistance in the reforms of African armies in the framework of the Security Sector Reform (McFate, 2008, 646).

[13] For more information, visit the website about the declarations of the Group: http://www.ohchr.org/en/NewsEvents/Pages/NewsSearch.aspx?SID=Mercenaries (consulted in September 2012)

[14] Regarding this last point, see the recent report *Piracy in Somalia: Excuse or Geopolitical Opportunity?*, Centre Delás, October 2012.

they wish to keep away from in order to maintain their legitimacy. Also, classifying them as military companies represents a recognition of the need for stricter regulation, understanding perfectly the inadequacy of mere self-regulation.

As a consequence of this division, the roles of *security*, generally speaking, would be:

- Protection and security of both people and locations
- Surveillance and transport
- Logistical assistance and advice
- Risk management
- Assistance to humanitarian organisations in conflict, post-conflict and high-tension zones

Whereas *military* roles would be the following:

- Management and maintenance of high-technology arms and/or computer systems
- Training of military forces
- Auxiliary military functions
- Espionage
- Protection of private companies of various kinds or of official missions in armed-conflict zones, whether international or not

In reality, the last role of protection in high-risk zones is in limbo between both categories (security and military) due to the likelihood of using armed force to fulfil the assigned aims.[15]

This is just one example of the variety of roles for which PMSCs can be contracted and can be used to give an idea of how broad the military and security service sector is.

[15] For example, those that specialise in the reconstruction of post-Saddam Iraq or the exploitation of natural resources. In some cases this latter phenomenon achieves a recognised state dimension: in Angola the law establishes that only extraction or exploitation companies that have their own armed forces for protection can work there.

Therefore, these groups exist in a grey area between combatants, non-state actors and civilians in conflict or high-tension situations. This is not a clear line of the attribution of responsibility for any possible illegal acts and whether their presence breaks the respect for the basic principle of distinction.

However, admitting that the privatisation of security (including military security) is a phenomenon that can no longer be eliminated, it is urgent to act upon the call for full respect of international humanitarian law and for human rights by these actors, establishing clear paradigms for responsibility in the event of violations.

3.3 MERCENARIES VERSUS CONTRACTORS

It is remote, but the possibility cannot be dismissed that a contractor of a PMSC fulfils the provisions of the definition of a mercenary that we have examined above and that basically covers those cases of the contracting by one of the warring parties of a single individual to provide his military services to the conflict.

Firstly, the main motivation that the rules take into consideration for the recruiting of mercenaries is financial compensation, which must also be "substantially in excess" of the compensation of a soldier of a similar rank (except in the African Convention). This does not take into consideration the fact that there are still illegitimate combatants whose motivation lies in ideological drives or that the wages for many contractors from developing countries are not very different from their regular colleagues. In any case, there is no doubt that both PMSCs and their contractors are motivated, first and foremost, by profit and that some of them, a minority, are very well paid.

A second obstacle to the use of that definition is its aim-based nature for the condemnation of mercenarism: only if it is connected to foreign aggressions of any kind can the 1977 and 1989 be applied. Which perfectly fits the cases of Iraq and Afghanistan for example, and even in some cases a coup d'état promoted from abroad with the participation of contractors (Equatorial Guinea). However, this excludes other purely or essentially national situations.

The requirement for direct participation in hostilities is also restrictive, a concept that, as it was not clearly established in the international humanitarian law system, it is now

extremely difficult to define the scenarios of modern warfare techniques[16]. This means excluding from the sphere of mercenarism anything that provides services alongside armed forces, by carrying out secondary roles that are not strictly military but are highly strategic. It would also be necessary to exclude all those that carry out roles that are clearly related to protection and defence, although in certain contexts they could easily result in the use of armed violence.

Finally, we should note that formally mercenaries were directly contracted by warring parties, while modern private contractors are employees of PMSCs. Certainly Protocol I also states that they could be contracted "on behalf of it [the party to the conflict]" which could cover the cases in which a PMSC has been contracted by a state, but on the other hand it would continue to be of no use to us for those situations, which are completely unheard of, in which the contractor is another private company, a mining industry for example that operates within the context of an armed conflict. Or, possibly, that the contracting party is a non-state warring party.

In short, many of the situations in which PMSCs and their contractors currently intervene do not fulfil the traditional definition of mercenaries, although the definition cannot be considered as completely useless to cover some contemporary situations.

Therefore, once it has been demonstrated that current contractors cannot be assimilated into the definition of traditional mercenaries, we should state that they can be seen as their evolution, or should we say their adaptation, to the global-international market.

To end, we also need to stress that the allocation of such delicate roles to private companies is likely to contaminate the state monopoly of the use of force and even the monopoly of taking decisions based solely and exclusively on public interests. Also, what Singer calls "the political importance of the legislative vacuum" can be hidden behind the lack of regulation of the phenomenon, that is, a utilitarian return from said absence from which many governments have benefitted (Singer 2004). To give one example, it is precisely this vagueness that allows the US government to continue contracting a company such as *DynCorp*, with a more than doubtful past since the wars in the Balkans, for numerous reconstruction and protection projects in post-Saddam

[16] The vagueness of the concept of direct participation makes it necessary to analyse facts on a case-by-case basis, that is, a reconstruction and interpretation of each supposition of fact. Significantly, art. 49 of Protocol I limits himself to establishing that mere participation in a war effort is *not* considered as direct participation.

Iraq and Afghanistan, or that allows the company *Blackwater* to continue providing services after changing its name.

3.4 IMPLICATIONS OF PMSC PHENOMENA: THEIR REGULATION BY INTERNATIONAL HUMANITARIAN LAW

The principle of distinction, which is the cornerstone of all of the rules of international humanitarian law as a whole, is under serious threat in view of the lack of clarity regarding the legal status of private military contractors; both because of the fact that private armed forces carry out functions in conflict and high-tension contexts and because they often work in areas that are densely populated by civilians.

The current draft of humanitarian law does not distinguish *tertium genus* between what is a civilian and what is a combatant, as demonstrated in article 50 of AP I, which, operating *de residuo*, classifies as a civilian anyone that does not fulfil the requirements of a combatant. Therefore, the treatment that someone may be subjected to in the event of capture will be determined depending on their belonging to one or other category, along with the protection system and the applicable responsibility.

No other category is considered and their potential establishment is not legally covered, such as that of "illegal combatant", designed for the prisoners of Guantanamo Bay with the exclusive aim of stopping them enjoying prisoner-of-war status, and also not enjoying the rights and guarantees that are established for civilians that commit illegal acts in a war context.

In view of the laws of war, a combatant is considered to be anyone who is authorised to participate directly in hostilities, meaning that they will have immunity for illegal acts of war unless they constitute a serious violation of international humanitarian law or another kind of international crime. Combatants are also military objectives and in the event of capture will be considered to be prisoners of war. Mercenaries and spies, by virtue of articles 46 and 47 of AP I, are outside of the definition of legitimate combatants meaning that contractor-mercenary relationship would confine the employees of PMSCs within the boundaries of what is considered to be civilian.

This is the landscape, therefore, that has been the basis for the debate about the legal status of private military contractors, which has seen various positions confront each other, all constructed through integration: into combatants on one hand and into

traditional mercenaries on the other, meaning that its paradigm of responsibility would be the same as civilians that have taken part in hostilities, and finally into full civilians. We can see in general terms what the theory is that supports each of the proposed options, which are not mutually exclusive but rather react to different *de facto* situations on the ground.

3.4.1 INTEGRATION INTO THE ARMED FORCES

According to the Montreux Document, which we shall refer to below: "employees of the companies will be protected as civilians *unless they are incorporated into the regular armed forces of a state"*. Therefore, the only possibility to be considered combatants and subjected to the rules of international humanitarian law would be those people who were contracted directly by a state, which through a formal document incorporated them into its armed forces.

In order to arrive at this solution it would be necessary to extensively interpret articles 4 a, 1) and 2)[17] of the 3rd Geneva Convention (prisoners of war) and article 43 and 44 of the 1st Additional Protocol (dedicated to armed forces and combatants, and prisoners of war respectively). Forces, groups and armed and organised units will be considered combatants, including paramilitary bodies or armed services responsible for ensuring public order and that are hierarchically below the authority of a commander responsible to one of the parties to the conflict, which are subject to a system of internal discipline *and whose incorporation into the armed forces has been accredited by the state with the relevant notification to the adversary*. The disciplinary system would therefore be that of the regular forces. The official incorporation document would have to record the will of the contractors to submit to the disciplinary system of the army

[17] "Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: 1) Members of the armed forces of a Party to the conflict as well as members of militias and volunteer corps forming part of such armed forces, 2) members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions: a) That of being commanded by a person responsible for his subordinates; b) That of having a fixed distinctive sign recognisable at a distance; c) That of carrying arms openly; d) That of conducting their operations in accordance with the laws and customs of war."

and to the technical coordination regulations between regular and private forces in the field.

Therefore, the possibility that contractors would find themselves subjected to international humanitarian law through this channel, in the very optimistic scenario that the contracting government integrates them into its armed forces, would only cover a very small part of PMSCs. According to the legal consultant of the Red Cross, Gillard, barely 20% of these companies are contracted by states, the British at least in light of the data provided by the director of the IPOA (Gillard 2006, 532)[18]. We dare to state that the percentage of cases in which the formal requirement of the "incorporation" and of the "notification" has also been fulfilled is very low, if not derisory.

In fact the governments that resort to the use of private armed forces to provide services alongside their armies, also in non-peaceable contexts classifiable as international armed conflicts always do so for mere support operations, leaving, at least in theory, official military personnel for armed service.

In any case, through this operation of responsibility for the acts of employees, in the final analysis this would fall upon the contracting state, which would be faced with the grounds that it is the same as the outsourcing of functions to companies. If it is true that through the incorporation into the armed forces the duty of respecting international law by employees is extended, said intention cannot be drawn from the attitude of governments.

3.4.2 INTEGRATION INTO VOLUNTARY BODIES OR OTHER MILITIAS BELONGING TO ONE OF THE PARTIES TO A CONFLICT

The article subject to extensive interpretation here is 4.a) 2 of the 3rd Geneva Convention, which refers to armed personnel not officially integrated into armed forces and that requires the fulfilment of four requirements: being part of an organisation that is commanded by a person responsible for his subordinates, of having an internal discipline system, of having a fixed distinctive sign recognisable at a distance to be distinguishable from the civilian population at all times and of carrying arms openly. A prerequisite would be that the group belong to one of the parties to the conflict. The

[18] However, according to Gillard, the percentage rises in the case of the US government and its agencies (Gillard 2006, 532.).

historical ratio of this provision was the possibility of granting prisoner-of-war status to partisans, which could therefore fit within the sector of combatants.

The connection between the voluntary militia (which in this case would be the PMSC) and the state would have to be explicit and the International Criminal Tribunal for the former Yugoslavia has ruled on its nature, establishing that the state party to an armed conflict should exercise control over them and that a relationship of dependence between the state and the militia would have to be demonstrated.[19]

In any case of integration into the regular army of a state, these private forces could be considered as combatants and in the final analysis the state would be responsible for the acts of employees, in accordance with article 91 of AP I, and the private military companies would be exempt.

In the majority of cases nowadays, when contracting private military services governmental agencies explicitly establish in their contracts that the functions to be carried out by armed forces are civil in nature, meaning that they are, strictly speaking, excluded from integration into the armed forces. For example, the contract between the US State Department and Blackwater in 2003 for the protection of senior American diplomats Iraq, including Paul Bremer, at the same time as the command of the occupation forces.

3.4.3 INTEGRATION INTO THE PEOPLE THAT ACCOMPANY THE ARMED FORCES

Another proposed option is that of incorporating contractors into the category established in art. 4 A, 4 of the 3rd Geneva Convention[20] and in this case the possibility of benefitting from the prisoner-of-war status in the event of capture would not be lost, insofar as any civilian personnel that accompanies armed forces even if they do not

[19] ICTY, Appeals Chamber, The Prosecutor vs. Dusko Tadic, (IT-94-1), Judgement of 15th July 1999, paras. 93–94. The Tribunal therefore lessens the degree of control required in order to talk about control by a state over an armed group; in fact, the previous case was that of the Contras in Nicaragua and the International Court of Justice established that it must be "effective control" (ICJ, Nicaragua vs. U.S., 1986).

[20] "Any persons that accompany the armed forces without really forming an integral part of them, such as civilian members of military plane crews, war correspondents, suppliers, members of working units or of services responsible for the wellbeing of military personnel, provided that they have received authorisation from the armed forces that they accompany, shall be obliged to provide them with an identity card similar to the attached example for such purpose".

carry out services that represent direct participation in hostilities still assumes the risks derived from this accompaniment. If they participated in acts of war they would lose the protection reserved for civilians for as long as the participation lasted. In this case they could be tried for illegal acts of war, constituting a military objective and could be subjected to internment if considered a threat to the state. In any case, it does not appear that the description of this article matches the figure of armed contractors in any way; it would only be applicable in the event of the outsourcing of logistical or auxiliary functions to a PMSC.

3.4.4 INTEGRATION INTO CIVILIANS

The classification of employees as civilians could be the result of two interpretive operations: one that places them directly in the category of civilians and another that reaches the same conclusion but through the classification of employees as traditional mercenaries who would be treated as civilians insofar as they are not legitimate combatants. Regarding this second alternative, we should remember that is now unlikely that the profile of a contractor matches that of a mercenary, and that also the rule is designed as privative, that is, its aim is not the positive proposition of a legal status but the mere exclusion of the benefit of prisoner-of-war status.

The first option, as we have said, is to consider contractors as civilians purely because they do not fit any of the requirements of "combatant". As we have seen, this would make them likely to be tried by non-military courts for acts that, if they had been committed by combatants, would be legal. However, this solutions causes some concern, as it makes the line between civilian and combatant very subtle and quite unclear, and this line is an essential prerequisite for the respect of the principle of distinction. In effect, the distinction between civilian and military should be as non-discretional as possible, while as a consequence of the application of this theory the presence of numerous armed civilians in high-tension or conflict areas would be accepted as natural.

The participation of civilians in combat is considered and provided for as more of an unusual, pathological fact and not much attention is paid to regulating a phenomenon of this size, despite the fact that it would provide the possibility of trying crimes without

defendants enjoying immunity for legal acts of war. However, the low probability of this transfer has made PMSC associations embrace this latter position, thereby rejecting any military classification. For example, they have classified their functions in hostilities as mere combat support. We have already seen this in the definition in the Montreux Document, which is based on the presumption of the "civilian" character of private contractors. And we only need to look at the web site of the ISOA (International Stability Operation Association) to see the highest category association of PMSCs in the United States where member companies are defined as leaders in the sectors of peace stability operations[21].

Changing the definitions of facts is an abused resource to avoid the punishment provided for in the rules: the US government, for example, has managed to prohibit the outsourcing of functions to PMSCs but only in the case of "superior combat operations"; it appears that neither the outsourcing in Iraq nor in Afghanistan fits this definition.

In any case, for contractors to be responsible for the violations of humanitarian law that they commit and to be cited for the full respect of said rules when they operate in war contexts, it would not necessarily be required to establish an *ex novo* legal system (the rules could be the existing ones for the armed forces), but it would be necessary to eliminate the doubts regarding the status of contractors, which would make it necessary to make an examination on a case-by-case basis of the violations and their authors. The definition phases for a new legal code could be: an unambiguous definition of the companies, of the service they could provide, where and for whom, and establishing a system of direct individual and corporate responsibility, not in a channel that is merely complementary to that of the state.

3.5. INTERNATIONAL REGULATION PROPOSALS

In this section we analyse the most important international regulations proposals that have been put forward so far. Firstly, what is known as the "Swiss Initiative", which

[21] Web site of "International Stability Operations Association": http://www.stability-operations.org (consulted in November 2012).

successively led to the Montreux Document and the subsequent International Code of Conduct. Both texts have the support of numerous states that supply PMSCs, as well as of the main associations for said companies. Secondly we will examine the Draft of a Potential Convention Regarding PMSCs, which has been prepared by the Working Group of the Council of Human Rights of the United Nations.

3.5.1 THE SWISS INITIATIVE

The Montreux Document[22] is the result of an international process initiated by the Swiss government and the International Committee of the Red Cross 2006, with the aim of promoting respect for international humanitarian law and for international law on human rights in all armed conflicts where private military and security companies intervene. It was approved on 17th September 2008 with the agreement of 17 states and by November 2012 it had the support of 44 states (including those that covered 70% of the states of origin of the companies). It also has the support of the European Union.[23] In its preparation period there were also consultations with PMSCs and other civil society actors. In contrast, as the preface to the document itself states, "Neither NGOs nor companies can officially become a party to the Montreux Document (since it is the result of an initiative aimed mainly at reminding states of their responsibility), but we urge them to use it as a reference in their relationships with PMSCs". In short, the sole recipients of the Document were the states that in some way are related to PMSCs, not the companies themselves, at least directly.

The general view of the Document is that there is no legal vacuum that will affect the participation of private companies in armed conflicts, meaning that it limits itself to compiling the rules that are considered applicable to PMSCs and to recommending that they be used as a guide when drafting codes of conduct and internal self-regulation documents. In effect, even recognising that the Document as such is not binding, its authors based it, in part, on the following considerations.

1. That certain well-established rules of international law apply to States in their relations with private military and security companies (PMSCs) and

[22] The Montreux Document about the pertinent legal operations and the good practices of states regarding operations by private military and security companies during armed conflicts.
[23] See the text of the Document and complementary information about the process at http://www.icrc.org/spa/resources/documents/misc/montreux-document-170908.htm (consulted in November 2012). Spain became a party to the document on 20th May 2009.

their operation during armed conflict, in particular under international humanitarian law and human rights law;

2. That this document recalls existing legal obligations of States and PMSCs and their personnel (Part One), and provides States with good practices to promote compliance with international humanitarian law and human rights law during armed conflict (Part Two);[24]

As this final consideration anticipates, the Document is composed of two large parts. In the first ("On pertinent international legal obligations related to operations of private military and security companies") it reminds us of some current international legal obligations that are incumbent upon states in relation to private military and security companies. The obligations described come from various international agreements on international humanitarian law, human rights and customary international law. We will refer to some of these in the following chapter of this report.

The second part ("Good practices related to private military and security companies") aims at guiding states with the final objective of gaining respect for international humanitarian law and human rights by PMSCs, as well as promoting responsible conduct in their relationships with the companies themselves. However, the Document emphasises that such good practices are neither legally mandatory nor exhaustive. It also recognises that "when applying them, the good practices will have to be adapted to the specific situation and the State's legal system and capacity". Also, "they may also need to take into account bilateral agreements between Contracting States and Territorial States".[25]

Both in the "obligations" and in the "good practices" section, the Document distinguishes between the "contracting state" (the state that contracts the services of a PMSC), "territorial state" (a state where a PMSC operates) and "home state" (the state where the PMSC has its headquarters) depending on the nature of the recipient state. Obviously, the same state can fulfil two of these roles, even three, theoretically.

The Document was later (2010) completed with a "Code of Conduct for Private Security Service Providers" prepared by the PMSCs with the support of the Swiss government

[24] See preface to the Document, p. 9.
[25] Montreux Document, p. 18.

and that since the start has had the support of numerous company signatories (58).[26] The Code is composed of 70 articles divided into the preamble, definitions, implementation, general provisions, general commitments, specific principles relating to the conduct of personnel, specific commitments regarding management and governance, and review.

In the preamble to the Code, the signatory companies "endorse the principles of the Montreux Document·, as well as the framework of "Respect, Protect, Remedy" developed by the Special Representative of the Secretary-General of the United Nations on Business and Human Rights". In so doing, the Signatory Companies commit to "the responsible provision of Security Services so as to support the rule of law, respect the human rights of all persons, and protect the interests of their clients" (paragraph 2 and 3 of the preamble).

The Code establishes principles and standards of conduct for PMSCs, although one of the first surprising points is that the companies are not classified as military in any part. In reality, the terminology used in the earlier Montreux Document is noticeably moderated in this second instrument. In effect, any entities that provide one or more of the following services are classified as private security providers:

> "Guarding and protection of persons and objects, such as convoys, facilities, designated sites, property or other places (whether armed or unarmed), or any other activity for which the personnel of companies are required to carry or operate a weapon in the performance of their functions."

Regarding the "code of conduct", no legal obligations or responsibilities are derived directly from the Code either, and its relevance is based more on the public commitment that the companies assume by endorsing it. In short, we have a text whose content would be theoretically acceptable if we take into account the range of conduct regulations, but whose implementation is totally left to the willingness of the companies and that lacks any effective mechanism for accountancy. As an example we can cite paragraphs 66 to 68 of the Code, which establish the duty of the companies to create different grievance procedures to address claims alleging failure by the company to respect the principles contained in the Code brought by personnel or by third

[26] Significantly, the emblem of the IRCC does not appear in this document. See the text at http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_SPA.pdf (consulted in November 2012).

parties; well-intentioned provisions whose real effectiveness will depend on the effective willingness of the company to establish these mechanisms.

3.5.2 DRAFT OF A POTENTIAL CONVENTION REGARDING PMSCs

The UN Working Group was established in 2005 by resolution 2005/2 of the then Human Rights Commission, as the replacement for the Special Representative regarding the subject of mercenaries. The choice to create a group of five experts ensured a greater degree of plurality and demonstrated the importance that the international community attached to the matter.

The mandate of the Group, as established in the resolution, was: to search for and take into account for this purpose the opinion of states, private security companies and international organisations, to watch over the activities of PMSCs in their various forms and manifestations, to analyse the impact of them on the enjoyment of human rights. And, especially:

> To prepare and present specific proposals regarding potential new laws, general guidelines or basic principles that will promote an increase in the protection of human rights, in particular the right of peoples to free determination, when faced with the current and new threats represented by mercenaries or activities related to them (para. 12, letter a).

In compliance with the latter mandate the Working Group has prepared a *Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council,*[27] which was presented to the Human Rights Council in May 2010. The draft was composed of 49 articles, divided into six parts and introduced by a large preamble. In October 2012, through resolution 15/26 of the Human Rights Council, a subsequent Working Group was created in order to take steps towards the specific adoption of the Convention.[28]

In the first part of the Draft (general provisions), the first article highlights the five aims of the Convention draft, from which we can draw the overall vision of the Group about the subject of PMSCs, a very useful tool when interpreting the provisions in the

[27] See annexe to the Report of the Working Group about the use of mercenaries as a means to violate human rights and hinder the exercise of the right of peoples to free determination, Doc. A/HRC/15/25, 5th July 2010.
[28] For an exhaustive analysis of the Draft, see: Gómez del Prado and Torroja Mateu, 2011.

rest of the regulatory text. Specifically it speaks about reaffirming state responsibility regarding the use of force, reiterating that it is its exclusive monopoly, determining the "inherently state functions" that cannot be the object of external contracting, regulating the activities of PMSCs and, to this end, prioritising interstate cooperation regarding the expedition of licences, and, finally, establishing a monitoring mechanism for the activities of PMSCs.

The hard core of the Draft focuses on the determination of the functions, which by being exclusive to the state cannot be delegated to private operators. Article 9 proposes regulating any states that prohibit "the external contracting with PMSCs of functions defined as inherently state functions", including the following, non-exhaustive, list:

> "direct participation in hostilities, war and/or combat operations, the capture of prisoners, legislation, espionage and intelligence work and the transfer of knowledge with military, security and policing applications, the use of arms of mass destruction and the exercise of police duties and other connected activities, especially the powers of arrest or detention, including that of interrogating detainees and any other duties that a state party considers functions that are inherent to the state".

Another question that is fundamental in terms of scope that the Draft orders to possible state parties is that of the regulation of PMSCs, that is, it must be the state authorities that adopt specific legislative, administrative and legal measures so that their companies do not carry out illegal activities.

The choice to aim the Draft at states (and not to companies) was almost compulsory due to the need not to damage the already scant enthusiasm shown towards the Draft by many states. In fact, the principles that the Group proposed was to extend to PMSCs the laws regarding international companies drafted by the then Special Representative about the question of companies and human rights, Ballesteros[29]. And despite this change in direction, we are of the opinion that the principles of the Special Representative John Ruggie[30] would be perfectly applicable to these companies as, we should remind ourselves, the aforementioned Code of Conduct partly admits.

[29] See doc. E/CN.4/Sub.2/2003/12/Rev.2, of 26th August 2003.
[30] See "Guiding Principles on Business and Human Rights", Doc. A/HRC/17/31, of 21st March 2011.

In short, the Draft represents a major step forward in international negotiations towards the regulation of PMSCs, but its capacity for real influence is doubtful. On one hand, state legislation (for those that demand specific application) has already shown itself to be very easily avoided by companies that operate on the international market. On the other, the call for inter-state cooperation will perhaps not be a sufficiently strict measure to avoid this obstacle. Finally, the welcome that the Draft received from the states themselves was not exactly enthusiastic.

The dissuasive power of laws is effective insofar as the penalty provided for their breach represents a real threat to the potential breaching subject, in our case PMSCs. Such as, for example, the possibility of criminally prosecuting any individuals that commit crimes against human rights or humanitarian law, or imposing large fines on the responsible companies. None of the three proposals makes any progress in this direction.

4. IHL PRINCIPLES AND RULES THAT ARE AFFECTED BY THE PRESENCE AND PARTICIPATION OF PMSCs IN ARMED CONFLICTS

4.1 PRESENTATION

As we have indicated, PNSCs are complex companies both in terms of their *structure* and composition and in terms of the *functions* they carry out. And even within the functions that a certain company may assume on behalf of a certain government, private company or any other type of actor, in a context of armed conflict or not, the *specific tasks* entrusted to the people employed on the ground may be very varied: from logistics and administration to operational participation in actions that involve the use of force, including the design and planning of these operations, bureaucratic tasks, translation and interpretation, medical and health care etc. In short, it is highly problematic to give an unambiguous, homogeneous answer to the question arising from the title of this chapter: What principles and rules of international humanitarian law are applicable to private military and security companies and their contractors? The answer must be clarified not only by taking into account the legal status of these companies and individuals that we have referred to in previous pages, but also the specific functions and tasks of each of them in each specific case.

The above reflection leads us to a dual prior assumption. Firstly, we are not going to assess *all* of the activities that PMSCs could potentially carry out on the ground or at their headquarters, just those that occur *in the context of an armed conflict*. This being understood as the *de facto* situations deduced from common article 1 of the Geneva Conventions (international conflicts) and from common article 3 of said Conventions together with article 1 of Additional Protocol II (non-international armed conflicts).

Therefore we intend to exclude the activity of PMSCs "in times of peace"; a time when said activity may still exist and be relevant from an international and humanitarian law point of view. Think, for example, about violations of treaties and international standards on human rights in which these companies could participate (for example, in situations of "internal tensions and disturbances that are not armed conflict"). Or we can focus on the Geneva Conventions, the obligation that state parties have to instruct troops and officials and promote training programmes for the general public regarding international humanitarian law.[31] Would it be possible to extend this obligation to private military and security companies and their managers? Without doubt, we believe it is, but we insist that by focusing on the situation of "armed conflict" we are generally going to exclude these types of considerations from our study.

Secondly, within situations of armed conflict, our study will focus on those operational activities of PMSCs that directly or indirectly, actively or potentially, involve the *use of armed force*. Unless some circumstance connected to the armed conflict expressly requires it (the custody of detainees, the transport of people), our study will focus on those parts of PMSCs that have weapons or that are in the chain of command of individuals that carry weapons. Managers, logistics specialists, administrative clerks, cooks etc. are personnel that, in theory, are excluded from this section, although their role in the work of these companies is not negligible and it is appropriate to wonder about both their legal status and their responsibility with regards to international humanitarian law. For the purposes of conciseness and explanatory clarity we will also exclude these situations.

Having defined the limits above, this chapter will be divided in the following way. Firstly, we will examine the generic duty that PMSCs have to respect international humanitarian law. We will base this obligation both on the *erga omnes* (for all) nature of the rules of humanitarian law and on the acceptance of this commitment by representatives of PMSCs expressed in the Montreux Document and in the International Code of Conduct. Our study will then examine the main legal obligations arising from international humanitarian law in order to then analyse their relevance and/or applicability regarding PMSCs and their contractors. We will refer to the "methods and means of combat" and specifically we will deal with a fundamental principle of the law of The Hague, which is applicable to both international and non-international conflicts, which is the distinction between civilian and military persons

[31] Among the obligations that enter into force "in peacetime" (common article 2 of the four Conventions) we can cite that of "distributing" these texts: art. 47 (1st Convention), 48 (2nd Convention), 127 (3rd Convention) and 144 (4th Convention).

and objectives. Secondly, we will deal with the questions about the limits on the use of certain weapons and armaments in armed conflicts, also irrespective of their international or non-international nature. We will then examine the law of Geneva regarding the protection of victims of armed conflicts (the wounded, sick and shipwrecked, prisoners of war, the civilian population), in order to reach some conclusions about the most recent international criminal law. We do not intend to thoroughly examine each and every one of the rules of international humanitarian law in force, which would exceed the reasonable dimensions of this study, but to limit ourselves to those that have a core nature within the context of this branch of the international system.

As regards our sources, we will take the treaties in force as a reference and, above all, the study by the ICRC on customary international humanitarian law (Henckaerts and Doswald-Beck 2007). These legal sources do not make explicit references to the modern phenomenon of PMSCs, but are essentially aimed at sovereign states and their armies, meaning that one of the challenges of this study is to analyse to what extent they are demandable, directly or indirectly, from these companies. In contrast to the universal regulatory system, we will examine those specific projects aimed at regulating PMSCs (codes of conduct and the draft for a convention cited in the previous section), as well as other texts (academic analyses and expert reports) that will enable us to state the degree of commitment that PMSCs should have to international humanitarian law. Among other documents, we will reference the UN Secretary-General's Bulletin when appropriate regarding the applicability of humanitarian law to peace operations. With all the differences that exist between PMSCs and UN peacekeepers, the fact that both are armed forces present in a conflict, but different to the parties to the conflict, mean that said text is a useful precedent when assessing the degree of applicability of humanitarian law to PMSCs. Finally, whenever possible, we will refer to the practice of PMSCs on the ground in relation to the various analysed sets of rules.

4.2 GENERAL CONSIDERATIONS REGARDING THE OBLIGATION TO RESPECT INTERNATIONAL HUMANITARIAN LAW

Private military and security companies, insofar as they lack the condition of being subject to international law, are not the direct recipients of the principles and rules of international law, including international humanitarian law. However, this formalist approach regarding the role of non-state actors in contemporary international society is being overcome from at least a triple perspective.

Firstly, work has been going on for years based on the special human rights procedures of the UN on the definition of obligations that are demandable from private companies regarding human rights. These guiding principles, which were codified in the latest report by the *Special Representative of the Secretary-General of the United Nations on Human Rights and Transnational Corporations and other Businesses*, John Ruggie,[32] are fully applicable to the companies that provide military and security services. Despite firstly being focused on the regulatory and control conditions of states regarding these companies (principles 1 to 10), they include statements such as "businesses have the duty to respect human rights" (principle 11), "internationally recognised" (principle 12), "in any way" (principle 13) and irrespective of their "size, sector, operational context, owner or structure", although said size or sector is not irrelevant and their "responsibility may vary depending on those factors and the gravity of the negative consequences of the activities of the business on human rights" (principle 14).[33] In the comments in principle 12, about the sources of international law demandable of businesses, the Special Representative clarifies that "in situations of armed conflict, businesses must respect the rules of international humanitarian law."[34] The *International Code of Conduct for Private Security Service Providers* itself in its preamble endorses the framework of "Respect, Protect, Remedy" proposed by the Special Representative and welcomed by the Human Rights Council (paragraphs 2 and 3).[35]

Secondly, the universal nature of the Geneva Conventions and of international humanitarian law make it a standard type of law in common with the legal systems of all the nations on earth, which means that no private actors can escape them in their operational activity any place on earth. According to the study by the ICRC, "the rules of customary international law, which is sometimes called international "binding" law, are mandatory for all states and, when appropriate, for all parties to a conflict, without any need for official endorsement" (Henckaerts and Doswald-Beck 2007, XII). Later it states: "the ICRC recognises with satisfaction that this study has served to demonstrate the universality of humanitarian law. All traditions and civilizations have contributed to this law, which is now part of the common heritage of humanity" (Henckaerts and Doswald-Beck 2007, XIII). If to this universal nature we add the duty that states have

[32] See "Guiding Principles on Business and Human Rights", cit. *supra*.
[33] In our case, there is no doubt about the *capability* that PMSCs have to generate serious negative consequences for human rights as a result of their activities.
[34] See "Guiding Principles…", cit, p. 16.
[35] Although the latest report by Representative Ruggie (2011) is after the Code of Conduct (2010), its principles had been prepared and presented to the Human Rights Council since 2005 and therefore we understand that the endorsement of the Code to the "framework of respect, protect and remedy" must have been a reference to the final version of the Representative.

to incorporate international humanitarian law into their own domestic legal system,[36] we will be able to state that there is no subject of law that is excluded from these rules, regarding their application. Therefore, if international humanitarian law were not directly demandable of PMSCs it would be indirectly, through national channels, both at the headquarters of the company and on the ground.

Finally, the recognition of the principle of the international criminal responsibility of the individual for war crimes reinforces the idea of a universal obligation, in subjective terms, of respect for international humanitarian law. In effect, the Rome Statute describes war crimes as completely independent of any possible membership of the author of the armed forces of the state or of any other organisation.[37] Although at no time is any explicit reference made to possible war crimes by private armed contractors, neither is this possibility dismissed.

In this line, it is no surprise that the Montreux Document, prepared as we have explained earlier as a set of principles and good practices for a varied range of states with strong ties to the main PMSCs, states that:

> 22. *PMSCs are obliged to comply with international humanitarian law* or human rights law imposed upon them by applicable national law, as well as other applicable national law such as criminal law, tax law, immigration law, labour law, and specific regulations on private military or security services.

This is an obligation that, beyond the company itself, is extended to its employees:

> 26. The personnel of PMSCs: a) are obliged, regardless of their status, to comply with *applicable* international humanitarian law;

To which those states that contract these companies must also contribute, although in milder terms:

[36] Common article 1 to the 4th Geneva Convention; and articles 49, 50, 129 and 146 of each of them, among others.
[37] See article 8 of the International Criminal Court Statute of 17th July 1998. Regarding the international criminal responsibility of contractors of private military companies, see section 4.6 of this study, *infra*.

> 3. The contracting states are obliged, *as far as is in their power*, to ensure that the PMSCs they contract respect international humanitarian law.

In effect, the ambiguous caveat "as far as is in their power" seems essentially used to avoid the responsibility of the contracting state, which could excuse itself on the grounds that the company has acted outside of its control or without following its instructions, meaning that it is frankly mistaken and open to criticism. From our point of view, the aforementioned clause is only acceptable if it is interpreted in the sense that there is a presumption that the state has an *obligation of result* relating to the behaviour of PMSCs that work for it (the obligation that humanitarian law will be respected); with the sole exception of when one of the general causes of the exclusion of illegality occurs, as can be found in the codifying process in the drafting of articles by the International Law Commission on the international responsibility of the state (imminent danger, force majeure etc.).[38] The reference to the obligation of contractors to respect "applicable" international humanitarian law could also be interpreted as an attempt to exclude the responsibility of the state. Of course: if it not applicable, it is not demandable from them. The question is how to determine which rules are applicable in each case, hence the importance of listing these demands in the following pages.

A little more succinct, but clearer is paragraph 21 of the *Code of Conduct*, which states:

> Signatory companies *will comply, and will require their personnel to comply*, with applicable law which may include international humanitarian law, and human rights law as imposed upon them by applicable national law, as well as all other applicable international and national law.[39]

The text of the *Draft of a Possible Convention on Private Military and Security Companies for by the Human Rights Council* prepared by the United Nations Working Group on Mercenaries in 2010[40] is also clear. In its article 18 is states

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[38] Draft of Articles on the Responsibility of the State for Internationally Wrongful Acts, adopted by the ILC in its 53rd period of sessions (A/56/10) and annexed by the General Assembly in its Resolution 56/83 of 12th December 2001.

[39] However, it is true that a little later the practical effectiveness of this commitment appears to be diluted: "25. Signatory companies will take reasonable steps to ensure that the goods and services they provide are not used to violate human rights or international humanitarian law and such goods and services are not derived from such violations".

[40] See the report by the Working Group to the Human Rights Council, A/HRC/15/25, dated 10th July 2010, cit. *supra*.

> ... 6. In the case of PMSCs and their personnel providing military and security services under the agreement as a part of armed forces or military units of the state party, the use of force is regulated by the norms of its military and other respective legislation and relevant international humanitarian law and international human rights law.[41]

Previously the draft for a possible convention urges states to ensure that employees of PMScs are "professionally trained" regarding human rights and international humanitarian law (art. 17.2), to take all the necessary steps so that both companies and employees "are responsible (...) and respect and protect international human rights laws and international humanitarian law" (art. 7.1) and that they "ensure" that parties "strictly adhere to relevant norms of international human rights law and international humanitarian law, including through prompt investigation, prosecution and punishment of (their) violations" (art. 17.4). Certainly this a markedly demanding tone ("strictly") compared to the laxness of the previous documents.

In short, we can state a general principal of obligation of companies that operate in the context of armed conflicts, and of their employees, to fully respect international humanitarian law. This general statement should now be organized into specific obligations related to principles and rules of humanitarian law that are particularly relevant. Beyond the consideration of PMSCs as actors in conflicts and subjects to the rules arising from international humanitarian law, it is useful to consider if the *intrinsic characteristics* of these private companies make it possible for some fundamental rules of humanitarian law to be demandable.

4.3 COMBAT METHODS: THE PRINCIPLE OF DISTINCTION

One of the fundamental principles of international humanitarian law, codified in article 35.1 of Protocol I of the Geneva Conventions is as follows:

> In all armed conflicts, the right of the parties to the conflict to choose the methods or means of warfare is not unlimited.

In a practically identical sense, the Secretary-General's Bulletin pronounced on the *Observance of International Humanitarian Law by United Nations Forces,* based on

[41] The exception that the draft of the convention makes is important; that private forces form part of the armed forces or military units of the state party, because the draft does not consider any other possibility for the legal use of force by PMSCs.

the general principle that established "The right of the United Nations forces to choose means and methods of combat is not unlimited" (section 6.1).[42]

Given the abstraction of this fundamental rule, the traditional laws of war establish some specific restrictions both on the right of warring parties to use methods of combat (conduction of hostilities), which we will examine in this section, as well as the means of combat (weapons), which we will analyse in the next section (4.4).

4.3.1 THE PRINCIPLE OF DISTINCTION

Regarding the regulation of methods of combat, and without diminishing the importance of rules such as the prohibition of treachery and of not giving quarter, the principle of distinction stands above any other. The first volume of the work by the ICRC on *Customary International Humanitarian Law* (Henckaerts and Doswald-Beck 2007, 3-87) dedicates its first six "rules" to the principle of distinction between civilians and combatants, and the following four rules to the distinction between military objectives and civilian property. In total, the first 24 rules of the summary are dedicated to different facets of the principle of distinction. Regarding the principle of distinction between civilians and combatants, it includes the first two rules:

> **Rule 1**. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.
>
> **Rule 2**. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

And regarding the distinction between military objectives and civilian objects, there is rule 7:

> **Rule 7**. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.

All of these rules are equally applicable to international and non-international armed conflicts as customary international law, although the distinction between civil objects

[42] Secretary-General's Bulletin, doc. ST/SGB/1999/13, of 6th August 1999.

and military objectives does not appear explained in Additional Protocol II, since "within the framework of an initiative aimed at the adoption of a simplified text" (Henckaerts and Doswald-Beck 2007, 31).

Also, in its Bulletin on the *Observance of International Humanitarian Law by United Nations Forces*, the UN Secretary-General states:

> Section 5.1 the United Nations force shall make a clear distinction at all times between civilians and combatants and between civilian objects and military objectives. Military operations shall be directed only against combatants and military objectives. Attacks on civilians or civilian objects are prohibited.

Again, no type of reference is established regarding the international or non-international nature of the armed conflict in which the UN armed forces find themselves involved, although it could be understood that said clarification is unnecessary since the presence itself of said forces would always internationalise any armed conflict that was initially non-international. Taking into account the "non-warring" nature that UN forces have in principle (the document refers to "blue helmets", not to interventions covered by Chapter VII of the Charter) the above is very relevant for our PMSCs. In effect, as we have seen in previous chapters, these companies avoid the adjective "military" and, rightly or wrongly, often refuse to consider themselves as a "party" to the conflict. Therefore the same could be declared regarding UN peacekeeping operations and this is not an impediment, if they have to use armed force, having to do so in compliance with the principle of distinction.

The documents drafted for a possible regulation of the phenomenon of PMSCs do not make a specific reference to the principle of distinction. In reality, there is practically no mention of any specific precept of The Hague or Geneva Conventions or their Protocols. The Code of Conduct (paras. 30-32) states that the use of force should be avoided, but if it is used it must be "in compliance with applicable law", "proportional" and only as far as is "strictly necessary", only in "self-defence" or that of "third parties" against a threat of death or any other serious threat and complying "with all the national and international obligations that are applicable to the members of the security force of that state". Although the drafting of these paragraphs has more police connotations than military ones, it could be understood that it contains sufficient elements to make the explicit mention of the principle of distinction unnecessary. The

generic references to the obligation of respect for international humanitarian law by these companies are considered sufficient in these instruments and, although this absence seems unjustifiable to us, we can consider them to be provisionally sufficient to declare the fundamental duty that PMSCs have, on any occasion when they use force, to respect the principle of distinction.

Unfortunately, this kind of conduct does not always occur in practice. The infamous Blackwater, now Xe Services, intervened in a high number of incidents with the use of force against unarmed civilians during its years in Iraq. These included the especially infamous acts, mentioned in the introduction, in Nisour Square in Baghdad on 16th September 2007, when a group of contractors opened fire and killed 17 civilian Iraqis, while another 20 suffered varied injuries (Saura 2010, 6). This was not an isolated case for this company. Nor has it been for others in Iraq. Among the companies accused of firing directly at civilians in addition to Blackwater, we should mention the American companies Crescent Security Group (Palou-Loverdos and Armendáriz 2011, 129)[43], Custer Battles (p. 134),[44] Dyncorp Inc. (p. 137), Triple Canopy (p. 175), US Investigative Services (p. 178) and Zapata Inc. (p. 198),[45] the British companies Aegis (p. 202), ArmorGroup (p. 205) and Global Strategies Group (p. 219), as well as the companies Erinys (p. 231) and United Resources Group (p. 237) based in the United Arab Emirates. Irrespective of whether in some cases the attacks on civilians took place within the context of a specific military operation (Fallujah, Kirkuk) or not, there is very little doubt of the full applicability of international humanitarian law to the occupation of Iraq, meaning that we understand that any situation where there is a direct attack by employees of PMSCs on the civilian population or any indiscriminate attack constitutes a violation of humanitarian law, probably classifiable as a war crime.

[43] All of the pages cited below related to the annexes of the extensive report prepared by Palou-Loverdos and Armendáriz (2011).

[44] It is worthwhile including the information that the report provided about one of the incidents that this company was responsible for: "On a mission on 8 November 2004 a PMSC convoy with heavily armed contractors and poorly trained young Kurds shot indiscriminately, smashed into and shot at civilian cars; a subcontracted Kurd guard shot a civilian passenger in a traffic jam; later, the convoy focused on came upon two teenagers by the road and one was gunned down. In another traffic jam, the contractor's pickup truck smashed into, rolled up and over the back of a Sedan full of Iraqis. "*…four former security contractors told NBC News that they watched as innocent Iraqi civilians were fired upon, and one crushed by a truck. The contractors worked for an American company paid by U.S. taxpayers. The four men are all retired military veterans: Capt. Bill Craun, Army Rangers; Sgt. Jim Errante, military police; Cpl. Ernest Colling, U.S. Army; and Will Hough, U.S. Marines. All went to Iraq months ago as private security contractors. They worked for an American company named Custer Battles, hired by the Pentagon to conduct dangerous missions guarding supply convoys. They were so upset by what they saw, three quit after only one or two missions…*" (Palou-Loverdos and Armendáriz 2011, 134).

[45] In this case, the contractors fired upon civilians and armed forces…friends (marines from the United States) in the infamous assault on the city of Fallujah.

Naturally, these kinds of incidents are facilitated when the rules themselves on the awarding of security contracts by the contracting state are lax regarding the scope of the use of force by private security companies. Therefore, Palou-Loverdos and Armendáriz claim that, regarding the conflict and the occupation of Iraq by the United States:

> Initially, according to (...) the Defense Federal Acquisition Regulations Supplement (DFARS), private security contractors were not authorized to use deadly force against enemy armed forces other than in self-defense. In June 2006, however, a rule amendment to the DFARS set out an important exception according to which the U.S. *private contractors were permitted to use deadly force against enemy armed forces in self-defense or "when necessary to execute their security mission to protect assets/persons*, consistent with the mission statement contained in their contract". A similar amendment to the FAR was approved in March 2008 for activities of contractor personnel working outside the U.S. for the Department of State and agencies other than the DoD (Palou-Loverdos and Armendáriz 2011, 199).

The extension of the use of force to situations other than self-defence does not necessarily mean that PMSCs will violate the principle of distinction. There is no impediment, at least in theory, for them to be authorised the first use of firearms provided that their force is solely and exclusively aimed at military personnel and objectives. However, when a private armed force can only use force as a response to a prior attack (and solely to stop or repel said attack) it seems easier to state that said force will be in compliance with the principle of distinction. If not, as has been shown too often during the occupation of Iraq, it is too easy for contractors to confuse civilian with armed actors. In this sense it seems correct, although terribly complicated and probably idealistic that the Draft of a Possible Convention by the UN Working Group includes "the direct participation in hostilities" and "war and/or combat operations" among the functions "inherent to the state", meaning that the state therefore cannot subcontract to a PMSC (art.9). The case explained by Perrin is also encouraging, according to which in 2005 US marines detained members of the personnel of Zapata Engineering in Fallujah for firing, allegedly indiscriminately, against civilians (Perrin 2006, 314).

4.3.2 OTHER RULES RELATED TO THE CONDUCTION OF HOSTILITIES

Together with the rule of distinction the study by the ICRC identifies other fundamental rules relating to the conduction of hostilities; for example:

> Rule 46. Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited.[46]
>
> …
>
> Rule 52. Pillage is prohibited.
>
> Rule 53. The use of starvation of the civilian population as a method of warfare is prohibited.
>
> Rule 54. Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited.
>
> …
>
> Rule 136. Children must not be recruited into armed forces or armed groups.
>
> Rule 137. Children must not be allowed to take part in hostilities.

The first two sets of rules are solidly anchored in international humanitarian law through the Conventions of The Hague of 1907. The prohibition of recruiting child soldiers and their effective participation in hostilities is much more recent, although no less generally accepted by the international community. All of them are clearly applicable to private military companies and their personnel. Therefore the Statute of the International Criminal Court classifies "declaring that no quarter will be given" a war crime (art. 8.2.b.xii –international conflicts- and 8.2.e.x – non-international conflicts-) and does so irrespective of the classification of the individual as a member or not of the regular armed forces. Also, it is significant that the first ruling handed down by the International Criminal Court on 14th March 2012 convicted a "warlord", Thomas Lubanga for recruiting and using child soldiers within the framework of the conflict in the Democratic Republic of the Congo.[47] The *Code of Conduct* of 2010 also prohibits the forced recruitment of minors (para. 41), in the context of a set of steps to protect children against "the worst forms of child labour". The prohibition of pillage, of using

[46] See also art. 6.5 of the Secretary-General's Bulletin: "It is prohibited to order that there be no survivors".
[47] See full text of the ruling at http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf (consulted in October 2012).

starvation as a method of warfare and of destroying assets that are essential for the survival of the civilian population is considered imperative, even in non-international conflicts and, therefore, regarding combatants other than regular armed forces. Despite the fact that both the *Montreux Document* and the subsequent *Code of Conduct* omit these references, they should be considered as fully in force and demandable for armed actors such as PMSCs.

4.4 MEANS OF COMBAT: PROHIBITED ARMS AND WEAPONS

Another of the fields of international humanitarian law where there are no significant differences between internal or international armed forces is means of combat and, specifically, in the determination of prohibited or restricted arms and weapons. This is a matter that "Geneva law" does not deal with and that "Hague law" has tended to regulate in a moral way, through the identification of "inhuman" weapons that it was convenient to regulate or even prohibit, using the technique of international treaties for this purpose.[48] So much so that it is only in art. 35.2 of Additional Protocol I, in the context of international armed conflicts that we find an abstract, generic definition regarding the scope of the law for warring parties when choosing their means of combat.

> It prohibited the use of *arms, projectiles, materials* and methods of warfare of any kind that *cause unnecessary suffering*.[49]

Leaving aside the interpretative difficulties that the terminology used raises, the ICRC is of the opinion that a very similar draft to this very rule[50] is equally applicable to non-international armed conflicts since "the prohibition of using means and methods of warfare of such a kind that cause superfluous injury or unnecessary suffering is included by consensus in the draft of Additional Protocol II, but this was dropped at the last moment as part of a package aimed at the adoption of a simplified text" (Henckaerts and Doswald-Beck 2007, 267). In conclusion, it is still true that, until the reform prepared at the conference for the review Kampala (2010) enters into force that

[48] There is indirect regulation of the phenomenon of means of combat insofar as the "indiscriminate" nature of an attack can be determined by the intrinsic nature of the armament used.

[49] However, it would be unfair to consider that this was a forgotten question until recently, since the Saint Petersburg Declaration of 1868 and some Declarations of The Hague in 1899 made references to prohibited weapons.

[50] "Rule 70. The use of means and methods of warfare which are of a nature to *cause superfluous injury or unnecessary suffering* is prohibited".

article 8 of the International Criminal Court Statute omits any reference to prohibited arms in the context of non-international armed conflicts.[51]

The definition of the fundamental rule is made through specific international treaties, on a weapon-by-weapon basis. Conventional law relating to the prohibition or restriction of the means of combat contains the following landmarks: Protocol for the Prohibition of the Use of Asphyxiating or Poisonous Gases (1925),[52] Convention on the Prohibition of the Development, Production and Stockpiling of Biological and Toxic Weapons (1972),[53] Convention on the Production or the Restriction of Certain Conventional Weapons (1980)[54] with its various protocols (1980, 1995, 1996, 2001, 2003),[55] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction (1993),[56] Convention on the Prohibition of the Use, Production and Stockpiling of Anti-Personnel Mines and on their Destruction (1997),[57] and Convention on Cluster Munitions (2008).[58] The majority of these prohibitions or restrictions of means of combat can be considered as generally binding and are aimed at any actor to an armed conflict, irrespective of the governmental nature or not of said actor or the international nature or not of the conflict. Therefore, regarding the armed forces of the UN, the Secretary-General's Bulletin of 1999 states:

> Section 6.2. The United Nations force shall respect the rules prohibiting or restricting the use of certain weapons (...) These include, in particular, the prohibition on the use of asphyxiating, poisonous or other gases and biological methods of warfare; bullets which explode, expand or flatten easily in the human body; and certain explosive projectiles. The use of

[51] At the request of Belgium, the Conference approved that three new points, ***xiii, xiv and xv*** be included in section e) of paragraph 2 of article 8 of the Rome Statute on the use of certain poisonous arms and bullets that expand, asphyxiating or toxic gases or any other similar liquid, material or device in **non**-international armed conflicts.
[52] 137 state parties. The data below was obtained from the web site of the International Committee of the Red Cross: http://www.icrc.org/ihl (consulted 31st December 2012).
[53] 165 state parties.
[54] 115 state parties.
[55] Between 75 and 111 state parties. The convention and its protocols make reference to the following conventional weapons: non-detectable fragments, mines, booby-traps and incendiary weapons (1980), blinding laser weapons (1995), anti-personnel mines (1996), and explosive remains (2003).
[56] 188 state parties.
[57] 160 state parties.
[58] 77 state parties.

> certain conventional weapons are prohibited at any time and in any place: weapons, such as anti-personnel mines using non-detectable fragments, booby-traps and incendiary weapons.

Along the same line, the compilation and study of the rules of customary international humanitarian law currently in force made by the ICRC supports the customary nature of all these prohibitions[59] with two important exception: anti-personnel mines and incendiary weapons. In particular, regarding the first weapons, taking into account the mass ratification of the Convention of Ottawa and the subsequent practice of states and other armed actors,[60] the tentative draft of rules 81 and 82 are is hard to justify:

> Rule 81. When landmines are used, particular care must be taken to minimize their indiscriminate effects.
>
> Rule 82. A party to the conflict using landmines must record their placement, as far as possible.[61]

This presumption of legality is not inconsequential in the use of anti-personnel mines within the context of our study, since these are inexpensive weapons that are easy to handle and that could be used easily by PMSCs, although for the moment there is no record that this has occurred (although the mercenaries used by Gaddafi have been accused of using this type of prohibited weapon within the context of the disturbances that put an end to the regime in 2011).[62] In contrast, for the moment it does not seem necessary for us to worry about the use by these companies of another kind of weapon that the ICRC prefers not to deal with, in order to strictly abide by what was established by the International Court of Justice in its Advisory Opinion of 1996: nuclear weapons

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[59] Rules 72 to 86 refer to the question of weapons. The weapons considered as absolutely prohibited would be: poisons and poisonous weapons, biological weapons, chemical weapons, expanding bullets, explosive bullets, weapons whose main effect is to injure through the use of non-detectable fragments, booby-traps and blinding laser weapons.

[60] Ciertamente, algunos grupos armados irregulares (como las FARC en Colombia) continúan utilizando minas antipersonal de fabricación casera; y por descontado es cierto que los estados parte no se hallan plenamente al día de sus obligaciones de destrucción de las minas plantadas por el mundo. Sin embargo, es innegable que desde la entrada en vigor de la Convención de Ottawa es irrisorio (en comparación con decenios anteriores) la utilización de minas antipersonal nuevas en los conflictos armados. Vid. *Land Mine Monitor 2011*, en http://www.the-monitor.org/index.php/publications/display?url=lm/2011 (consultado en octubre de 2012).

[61] Something similar could be said about rules 84 and 85 regarding incendiary weapons, which like previous weapons would be restricted in their use, but not prohibited: "Rule 84. If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. Rule 85. The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*." In contrast, it is understandable that the summary of the ICRC makes no reference to the recent conventional prohibition of cluster bombs: the adoption of the Convention was after the publication of the summary and in any case it is still too early to discuss customary law.

[62] See the web site of the Journalistic and Research Information Centre (CIPER) in Chile: http://ciperchile.cl/radar/%C2%BFcual-es-la-diferencia-entre-los-civiles-de-libia-y-los-de-costa-de-marfil/, 1st April 2011 (consulted in October 2012).

(Henckaerts and Doswald-Beck 2007, 285-286).[63] Finally, the prohibition of the use of riot-control agents as a method of warfare is significant (rule 75), both in armed international and non-international conflicts, but excepting internal disturbances.
With the exceptions relating to anti-personnel mines and incendiary weapons (to which we could add cluster bombs, which have been banned more recently), conventional and customary law regarding the means of combat is so clear that the treatment given to it by the Montreux Document seems shocking. Firstly, because it does not include any reference to prohibited weapons in its first part ("Legal Obligations of States"), but only mentions it in the second ("Good Practices for Private Military and Security Companies"). And it does so in vague terms that are hardly assertive. Among the relevant *recommendations* for contracting states of PMSCs regarding the use of weapons by their contractors we find, in the section "Selection of the PMSC", the following good practices:

> 9. *To take into account* whether it maintains *accurate and up-to-date* personnel and property records, *in particular, with regard to weapons and ammunition*, available for inspection on demand by the Contracting State and other appropriate authorities.
>
> (…)
>
> 11. *To take into account* whether the PMSC:
>
> a) *Acquires its equipment, in particular its weapons, lawfully;*
>
> b) *Uses equipment, in particular weapons, that is not prohibited by international law;*

It is at least insufficient, in relation to this final point, that it is recommended that the contracting states of PMSCs simply "take into account" that said companies do not illegally trade in arms or use weapons prohibited by international law. Both obligations, particularly the second for the purposes of our study, should be absolute prohibitions when contracting a company of these characteristics. Along the same line, a little later in the section relating to the "Terms of Contract" of PMSCs, it is recommended:

> 14. To include contractual clauses and performance requirements that ensure respect for relevant national law, international humanitarian law

[63] The draft of a "possible Convention" by the Working Group on mercenaries includes "the use of weapons of mass destruction" among the prohibitions of delegation and outsourcing of functions inherent to the state (art. 9).

> and human rights law by the contracted PMSC. Such clauses (...) *may include*: f) lawful acquisition and use of equipment, in particular weapons.

The Montreux Document is a little stricter, although not strict enough, when its recommendations are focused on territorial states, for the purposes of the granting of authorities, contracting states are recommended:

> 34. *To take into account* whether the PMSC maintains accurate and up-to-date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the Territorial State and other authorities.
>
> 36. *Not to grant* an authorization to a PMSC whose weapons are acquired unlawfully or whose use is prohibited by international law.[64]

And regarding the rules relating to the provision of services by PMSCs and their personnel:

> 44. To have in place appropriate rules on the possession of weapons by PMSCs and their personnel,

Finally, the home states of the PMSCs are only recommended to take into account, for the purposes of the granting of authorisations, if they have acquired their equipment "in particular its weapons, lawfully and whether its use is not prohibited by international law" (para. 64).

All of these rules deserve an extremely negative assessment. If the *Montreux Document* is not very useful as an instrument of self-regulation, its weak provisions relating to the possession and use of means of combat that are prohibited by current international law are outrageous. Although formally its recommendations are solely aimed at states that deal with PMSCs, there is no doubt that its tenor could cover the possession of illegal weapons by these companies.

The *Code of Conduct* of 2010 is more interesting, which contains three paragraphs on the "Management of Weapons", one of which states:

[64] This greater rigour, which from our point of view is correct, is hard to understand and does not appear consistent for the states of the "territory" where the companies operate (para. 36), with what is demanded of the "contracting" state in the aforementioned paragraph 11.

> 57. Signatory companies will neither, and will require that their Personnel do not, *possess nor use weapons or ammunition which are illegal under any applicable law*. Signatory companies will not, and will require that their Personnel not, engage in any illegal weapons transfers and will conduct any weapons transactions…

Although no reference is made to specific prohibited weapons and neither does it assume all of the obligations of the conventions on the prohibition of weapons (it omits the prohibition of stockpiling and the obligation of destruction), at least it states, unambiguously, a principle on the prohibition of the possession, use or transfer of illegal weapons. A principle that is split into two for companies and employees, meaning that they cannot be in possession of illegal weapons even as individuals.[65] For its part, the Draft of a Possible Convention by the UN Working Group is more precise and assertive when stating (art. 10.1):

> Each State Party, without prejudice to its respective conventional obligations, has the duty to respect the principles of international humanitarian law *such as the "basic rules" on the prohibition of certain methods and means of warfare* as set out in article 35 of Additional Protocol I of 1977 to the Geneva Conventions of 1949, that refers to the prohibition of weapons which cause superfluous injury or unnecessary suffering, or which are to cause widespread, long-term and severe damage to the natural environment.

Later, reference is made to the prohibition of any use of weapons of mass destruction (nuclear, chemical or biological) (art. 10.3) and, although any reference to other specific prohibited weapons is omitted, we understand that the reference to general international law in this matter is sufficiently clear to allow us to add the prohibition both of weapons that have already been prohibited or restricted and those that may be prohibited in the future.

In short, prohibited weapons are prohibited for all armed actors in all types of conflicts. The violations by PMSCs of the prohibition of possession or use of illegal weapons are

[65] It is relevant to remember here that some police from the Catalonian Police Force were surprised, using non-regulation weapons for personal defence, such as the Kubotan for example.

not frequent, but they do happen.[66] The UN Working Group mentions having received information about cases of PMSC employees that had used prohibited weapons or experimental ammunition prohibited by international law: A former soldier employed as a "security guard" in Iraq by a PMSC had reported on the use of prohibited ammunition and there were also reports about the use of armour-piercing limited-penetration ammunition (APLP), which are bullets made of alloys that pierce the steel and armour of bulletproof vests and do not go through the body, but burst and cause fatal wounds. Also, in March 2007 US soldiers prohibited the intervention of the company Crescent Security Company at the bases in Iraq after discovering that it had weapons that were prohibited for private security companies.[67] More recently, (October 2012), there have been reports about the use of chemical weapons by the regular armed forces reinforced by mercenaries in post-Gaddafi Libya.[68]

We can also cite the aerial fumigations using weed-killer onto coca crops on the border of Colombia and Ecuador carried out by the PMSC DynCorp. According to Gómez del Prado and Torroja, there are reports that connect said fumigations to genetic injuries in women, as well as an increase in cases of cancer, mutations and major embryonic deformities (Gómez del Prado and Torroja 2011, 32-33). Although it is debatable to what degree this is the use of "weapons" within the context of a "non-international armed conflict", the case illustrates the ability of PMSCs to use means of combat that could be classified as "poisonous weapons", if not that they "cause severe damage to the environment" and that subsequently, within the context of an armed conflict, they would be illegal.

4.5 THE PROTECTION OF VICTIMS IN ARMED CONFLICTS

In this section we will examine the fundamental rules of international humanitarian law relating to the protection of the victims of armed conflicts. Victims of conflicts are

[66] We do not refer here to the possession of weapons by PMScs when their contracts with the government of the day excludes said possibility. See, for example the *Military Times*: "**Contractors say Xe provided forbidden weapons", at:** http://militarytimes.com/news/2009/05/ap_blackwater_xe_weapons_052109/ (consulted in November 2012)

[67] See doc. A/HRC/7/7, 9th January 2008, which in turn cites the press article by Steve Fainaru, "Cutting Costs, Bending Rules, And a Trail to Broken Lives", *Washington Post*, 29th July 2007.

[68] See the web site *Actualidad RT*: "The Libyan city located in Bani Walid remains immersed in chaos. The former bastion of the regime of Muammar Gaddafi is being attacked by militias reinforced by foreign mercenaries and the use of prohibited weapons such as white phosphorous" (http://actualidad.rt.com/actualidad/view/57179-libia-combatientes-extranjeros-bombas-fosforo-gas-nervioso-fuentes-rt, 27th October 2012). Also: "Heavy armed foreign mercenaries used banned chemical weapons to take Bani Walid!" http://www.firstpost.com/topic/organization/united-nations-heavy-armed-foreign-mercenaries-used-banned-chemical-weapons-video-t01Mprg_yWI-55-1.html (consulted in November 2012).

usually understood as those people that have either never participated in it (civilians) or that have stopped doing so because they are *hors de combat* (the wounded, sick, shipwrecked and especially prisoners of war). In essence the four Geneva Conventions of 1949 deal with these subjects, along with their additional protocols as they are updated. Their most important provisions are customary in nature and bind all the warring parties in any kind of armed conflict.

We will begin the summary with a reference to the fundamental guarantees that are applied to all victims generally and we will then focus on the various groups mentioned one by one.

4.5.1 FUNDAMENTAL GUARANTEES

All civilians in the power of one of the parties to a conflict and that do not participate directly in hostilities, along with all people that are *hors de combat*, enjoy a set of "fundamental guarantees" (Henkaerts and Doswald-Beck 2007, 341). Said guarantees are primarily founded in international humanitarian law, both conventional and customary, which as we have said is equally applicable to all the parties to a conflict. They are also founded in international law of human rights, whose hard core is applicable at all times and places, that is, even in the case of "wars" or "in exceptional situations that put the life of a nation in danger and whose existence has been officially declared",[69] because not even in these cases can it be derogated. This dual foundation makes the validity of said guarantees completely undeniable in non-international armed conflicts and not just in international conflicts.

Rules 87 to 105 of the ICRC customary international humanitarian law summary (Henkaerts and Doswald-Beck 2007, 341-435) summarise these fundamental guarantees in the following terms:

> Rule 87. Civilians and persons *hors de combat* must be treated humanely.
>
> Rule 88. Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited.

[69] Regional European and American conventions use the expression "war". The International Civil and Political Rights Pact does not, although these "exceptional situations that put the life of a nation in danger" could perfectly include internal or international armed conflicts.

Rule 89. Murder is prohibited.

Rule 90. Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited.

Rule 91. Corporal punishment is prohibited.

Rule 92. Mutilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited.

Rule 93. Rape and other forms of sexual violence are prohibited.

Rule 94. Slavery and the slave trade in all their forms are prohibited.

Rule 95. Uncompensated or abusive forced labour is prohibited.

Rule 96. The taking of hostages is prohibited.

Rule 97. The use of human shields is prohibited.

Rule 98. Forced disappearance is prohibited.

Rule 99. Arbitrary deprivation of liberty is prohibited.

Rule 100. No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.

Rule 101. No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed.

Rule 102. No one may be convicted of an offence except on the basis of individual criminal responsibility.

Rule 103. Collective punishments are prohibited.

Rule 104. The convictions and religious practices of civilians and persons *hors de combat* must be respected.

Rule 105. Family life must be respected as far as possible.

It is clear that some of these fundamental guarantees are not, nor could be demandable from private military and security companies nor from their contractors. This is the case, for example, of those related to the guarantee of a fair trial (rules 100 to 102) which, due to their nature, only the state authority can provide (and can only be

demanded from). In this sense the "Guiding Principles on Business and Human Rights" by Representative Ruggie demand that states adopt the appropriate steps to *prevent, investigate, punish and provide remedy* for possible abuses of human rights committed by companies "through suitable policies, regulatory activities and submittance to justice" (principle 1). Nothing of the kind is demanded of companies, only that they must "respect" human rights.

Other guarantees, such as the prohibition of carrying out medical experimentation or the duty to respect family life, although theoretically demandable, do not appear to have a very strong influence on the practices of PMSCs. However, most of the cited rules are not only perfectly demandable from non-state armed actors, they are also especially relevant regarding the acts and practices of PMSCs.

Proof of the relevance of these fundamental guarantees regarding atypical actors in an armed conflict is the Secretary-General's Bulletin on the *Observance by United Nations Forces of International Humanitarian Law*. Its Section 7 ("Treatment of Civilians and Persons *Hors de Combat*") refers explicitly to the principle of humane treatment without distinction (7.1) and lists a set of prohibited practices that to a large extent match the customary rules defined by the ICRC: violence against life and homicide, torture and mutilations, collective punishments and reprisals, the taking of hostages, rape, forced prostitution and any form of sexual aggression and slavery (7.2).

In contrast, the *Montreux Document* hardly refers to two abuses (torture and the taking of hostages) in terms of prohibition, while the *Code of Conduct* omits the second and adds references that extend to some degree the principle of humane, non-discriminatory treatment; the prohibition of illegal detentions, the fight against sexual exploitation, the treatment and prohibition of slavery and the prohibition of the worst forms of child labour.

We will focus on some of these practices below for illustrative purposes.

A) INTENTIONAL HOMICIDE

The excessive use of force has been a recurrent accusation made against several private security companies within the context of the Iraqi conflict, and we have referred to these earlier within the framework of the principle of distinction. Actually, depending on the circumstances of the case, these incidents could also be considered as

"intentional homicide". Indeed, the classification of incidents such as the Nisour Square incident in Baghdad as an "indiscriminate attack" means the existence at that time of a context of "armed conflict" or "occupation", in which the private agents used force without distinguishing between aggressors and passers-by. If this classification of the context of the situation was called into question (the war ended, the United Sates returned power to the Iraqi authorities etc.) it would be much more correct to speak of "extrajudicial execution" (Gómez del Prado and Torroja 2011, 28). "The shooting that caused the death of the 72-year-old Australian teacher Kays Juma, when he approached an intersection blocked by a convoy that the [United Resources Group] was protecting" also deserves this classification (Gómez del Prado and Torroja 2011, 29).

These are not isolated cases. In August 2009 Daniel Fitzsimons, a former British paratrooper who worked for the company British Armor Group, while on active service shot and killed two civilians (Paul McGuigan and Darren Hoare) and wounded a third (Arkan Mahdi Saleh). The good news is that thanks to the lifting of immunity from jurisdiction of foreign contractors (and probably to the fact that the victims killed were not Iraqi citizens) Fitzsimons was sentenced to 20 years in prison by an Iraqi criminal court in a judgement made on 28th February 2011 (Palou-Loverdos and Armendáriz 2011, 93-94). Also, among the most surprising cases regarding the practice of PMSCs in recent years is the contracting in 2004 of *Blackwater* employees by the CIA to pursue and kill leaders of Al Qaeda (Saura 2010, 9), which, if it had happened, would fit the definition of intentional homicide like a glove.[70]

B) TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT

We should remember here that the prohibition of torture is absolute in international law and that, although the convention of 1984 is only applicable when the person that commits these acts is an agent of the state,[71] this is not the case with the Universal

[70] Information reported by the *New York Times* (19th August 2009) and compiled by Charlier (Charlier 2010, 15). It is well known that the initiative was not a success and that the killing of Osama bin Laden occurred much later at the hands of US elite corps (the Navy Seals).

[71] Therefore, the Convention against Torture would only be applicable to a private contractor when *de jure* or *de facto* it acts as an agent of the state or under the supervision and with the acquiescence of an agent of the state.

Declaration of Human Rights or the International Covenant on Civil and Political Rights, which prohibit torture irrespective of who the agent is that commits it.[72]

The documents prepared by the Swiss Government in collaboration with companies from the sector are fairly incomplete regarding the fundamental guarantees that PMSCs must respect in relation to the victims of conflicts. However, at least there is unanimity in the rejection of torture and other cruel treatment. The *Montreux Document* establishes a clear prohibition of torture and of the taking of hostages, without excluding other violations of international law:

> 6. Contracting States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

In the prohibition of torture and other cruel treatment, the *Montreux Document* agrees with the *Code of Conduct of* 2010: "35. Signatory Companies will not, and will require that their personnel not, engage in torture or other cruel, inhuman or degrading treatment or punishment. For the avoidance of doubt, torture and other cruel, inhuman or degrading treatment or punishment, as referred to here, includes conduct by a private entity which would constitute torture or other cruel, inhuman or degrading treatment or punishment if committed by a public official.", not even based on the principle of "due obedience" or as a consequence of "exceptional circumstances" (para. 36). Also PMSCs will "report any acts of torture or other cruel, inhuman or degrading treatment or punishment, known to them, or of which they have reasonable suspicion." (para. 37). On paper, these are broad, all-encompassing obligations that are probably a reaction to some of the cases that have placed PMSCs under international public scrutiny.

In recent years, the most emblematic case of torture within a context of armed conflict, specifically in a case of "occupation" of territories, leads us back to Iraq and Abu Ghraib

[72] See General Observation No. 20 (1992) of the Human Rights Committee at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument (consulted in December 2012).

prison. As the UN Working Group reported at the time regarding the question of mercenaries, US soldiers of varying (although low) ranks were sentenced for those acts. However, there is evidence of the participation of at least two private contractors in these acts; individuals who have not suffered any kind of sanction as a consequence of their acts.[73] They were two "interpreters" from the company Titan (John Israel and Adel Nakhla) accused by their victims of up to 20 crimes: torture, cruel, inhuman and degrading treatment, aggression and physical and psychical injuries etc. (Palou-Loverdos and Armendáriz 2011, 171-172). This is not the only company involved in Abu Ghraib and other detention centres. *Sytex Corporation also supplied interrogators and interpreters to places like Camp Cropper and Camp Whitehorse,* who were accused of by the inmates of torture (Palou-Loverdos and Armendáriz 2011, 169). Still in Iraq, the same Working Group supported the allegation of "72 Iraqi citizens" against the company L-3 Services Inc. This company, "a military contractor that had supplied civilian interpreters for US forces in Iraq", had detained these citizens and, in its custody, had tortured and physically and psychologically abused them. In any case, the Working Group welcomed "the decision of the District Court of the United States that the Greenbelt Division of the district of Maryland proceed with the case against L-3 Services".[74]

Finally, the case of torture by members of the US Army against FBI informants that worked for an Iraqi PMSC, Shield Groups Security (SGS) is at least surprising.[75] Donald Vance and Nathan Ertel, employees of the company, suspected that the company might be violating rules regarding the arms trade and informed the FBI. Both were detained by soldiers from the US Army, interrogated as arms traffickers and tortured. Ertel was released after one month and Vance after three months, although from the third week the FBI had confirmed that Vance worked for them (Palou-Loverdos and Armendáriz 2011, 263).

[73] See the "Report of the Working Group about the Use of Mercenaries as a Means to Violate Human Rights and Hinder the Exercise of the Right of Peoples to Free Determination" in docs. A/61/341, paras. 69 and 71, and A/HRC/4/42, para. 35. The individual responsibility of these people does not exclude the United States in accordance with the Convention of 1984 since, despite their private nature, they acted *de facto*, if not *de jure* under the control of the US Army.
[74] See Report of the Working Group in doc. A/65/325, 25th August 2010, para. 25.
[75] Since 2006 the company has been called National Shield Security (NSS).

C) ILLEGAL DETENTION

The *Montreux Document* does not mention at any time that PMSCs and their employees may be entrusted with the function of carrying out "detention" or "arrests", although it does mention on a couple of occasions that they were responsible for the security of "detention centres". In the same way, the *Code of Conduct* would only allow signatory companies to "escort, transport or interrogate detainees" in very specific circumstances (and always respecting the principle of humane treatment and the prohibition of torture) (para. 33). However, this second instrument recognises that on some occasions private contractors might have to "take" or "hold" people, in which case they must deliver "such detained persons to the *competent authority*" (which could be military or civilian depending on the case) "at the earliest opportunity" (para. 34). If they do not do so, they would be committing the crime of illegal detention and even in "the taking of hostages" that the *Code of Conduct* explicitly condemns.

Despite these regulatory prohibitions, PMSC employees may have been involved in the notorious "CIA rendition flights" from the taking of hostages at delivery bases such as Tuzla, Islamabad or Skopie, to their transport and delivery to internment centres in Cairo, Rabat, Bucharest, Amman and Guantanamo (Gómez del Prado and Torroja 2011, 31). DynCorp would be one of the companies most closely involved in said flights and is also accused of committing acts of torture on detainees. Paradoxically, the case came to public attention because of a complaint by the company regarding the non-payment of some large invoices presented to the United States government (Palou-Loverdos and Armendáriz 2011, 138-139).

It has also been stated that private security guards may have held detainees without authorisation from Iraqis within the context of the conflict in the country (aforementioned case against the company L3 Services).[76]

For its part, in its 2011 to the General Assembly, the UN Working Group referred to the situation created on the Ivory Coast after the electoral process at the end of the previous year and indicated the "participation of Liberian mercenaries in serious violations of human rights, such as summary executions, forced disappearances, rapes,

[76] See Report of the Working Group in doc. A/HRC/7/7, 9th January 2008.

torture and other cruel, inhuman or degrading treatment, arbitrary detentions and arrests, arson and looting"[77]

* * *

The above cases illustrate the importance of declaring enforceability regarding the fundamental guarantees of humanitarian law against PMSCs. Now that some of the guarantees that are demandable from all actors, including these companies, in a conflict have been examined we can now move on to detailing the specific rules that are applicable to each of the types of victims that international humanitarian law considers.

4.5.2 SICK, WOUNDED (AND SHIPWRECKED) PEOPLE IN COMBAT

The first two Geneva Conventions deal with the obligations of states regarding the wounded and sick on land (I) and the wounded sick and shipwrecked at sea (II). As well as the fundamental guarantees that are applicable to these people who are *hors de combat*, the summary of customary international humanitarian law of the ICRC identifies three basic rules (Henckaerts and Doswald-Beck 2007, 451-460).

> Rule 109. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction.
>
> Rule 110. The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones.
>
> Rule 111. Each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property.

The first of these provisions is especially relevant for PMSCs. Private security companies that get involved in a real exchange of fire cannot leave aside the obligation, once the combat has ended, to concern themselves about the fate of the sick and wounded of the other group, and, as far as possible, ensure their evacuation to a hospital centre. In addition, insofar as these companies provide services that are not

[77] See Report of the Working Group in doc. A/66/317, 22nd August 2011, para. 8.

limited to security, it is possible that they might have their own medical services, meaning that Rule 110 would also be directly demandable of them. The parallel to the armed forces is clear: although the medical services of an army are designed initially to look after its own soldiers, international humanitarian law imposes the obligation upon it to treat any enemy soldiers that fall into its hands adequately and without discrimination. The same is demandable of any medical services that PMSCs may have, always, as the ICRC says, "as far as possible". Section 9 ("Protection of the wounded, the sick and medical and relief personnel") of the Secretary-General's Bulletin confirms these rules in the following terms:

> 1. Members of armed forces and other persons under custody of United Nations forces that are wounded or sick will be treated with respect and protection in all circumstances. They will be treated with humanity and receive the medical care and attention that their conditions requires, without any kind of unfavourable distinction. Only in the event of the need for urgent medical attention will the establishment of priorities be authorised for treatment.[78]

If said services do not exist or are insufficient, PMSCs should ensure that the ICRC or other independent humanitarian organisations have rapid and unobstructed access to the sick and wounded. There is also no technical impediment against PMSC employees that have the ability to use force from taking reasonable steps to ensure that the wounded and sick under their custody are not subject to ill treatment or pillage by third parties. This is derived from the legal obligation that civilians have to respect the wounded, sick and shipwrecked (Henckaerts and Doswald-Beck 2007, 460).
In this context, the Iraqi conflict gives us some examples of contractors that have neglected their obligation to collect and assist the wounded that they themselves have caused:

> "a number of incidents are identified (....) where PMSC contractors drove away from the scene and failed to report it, often leaving wounded civilians behind. Cases of this kind include the 2007 opening of fire on a truck that was following the PMSC Crescent Group's convoy, leaving wounded Iraqis in the desert; the 2007 opening of fire on a taxi by PMSC Eryns' employees, driving off without checking for survivors; and the case of a U.S. Colonel who committed suicide after denouncing human rights abuses by PMSC

[78] The second paragraph of the same section adds a duty for the armed forces that the ICRC has not considered to be elevated to the condition of customary law: "When circumstances allow, a ceasefire or any other kind of local agreement will be agreed upon to enable the search and identification of persons that are wounded, sick or left for dead in the field of battle and enable their reunion, removal, exchange and transport".

> USIS, including "an incident in which a USIS contractor had apparently witnessed the killing of an innocent Iraqi and had not reported it to anybody higher up the chain" (Palou-Loverdos y Armendáriz 2011, 50 y 129).

Another important aspect of the first two Geneva Conventions (and the fourth) connected to the treatment of the wounded and sick is the *status of personnel and the medical units and their means of transport*. In summary;

> Rule 25. *Medical personnel* exclusively assigned to medical functions must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy.
>
> (…)
>
> Rule 28. Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.
>
> Rule 29. Medical transports assigned exclusively to medical transportation must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.
>
> Rule 30. Attacks *directed against medical and religious personnel and objects* displaying the distinctive emblems of the Geneva Conventions in conformity with international law *are prohibited*.[79]

These are well-established rules in customary law, which have already been established in the 1864 Geneva Convention and the 4th Hague Convention of 1907, among other classic humanitarian law treaties. Their applicability to non-international armed conflicts is implicit because of the reference by common article 3 to "collect and assist" the wounded and sick. These rules are also perfectly summarised in paragraph 3 of section 9 of the Secretary-General's Bulletin. In contrast, both this second group of rules and the first that we have analysed are conspicuous by their absence in the three instruments that we are specifically examining focused on PMSCs: *The Montreux*

[79] Rules 31 and 32 extend the duty to respect and protect "humanitarian relief" personnel and objects" (Henckaerts and Doswald-Beck 2007, 89-124).

Document, the Code of Conduct and the Draft of a Possible Convention. However, it hardly seems debatable that any armed actor that participates in an armed conflict, international or not, has at least the duty to "respect" medical personnel and the objects and means of transport associated with the medical function, as well as being banned from carrying out "direct attacks" against any of them.

The only margin that can be given to PMSCs would refer to the term "protect", since if they have not been specifically entrusted with this function it is doubtful that *active* steps can be demanded of them in order to stop attacks against these units and means of transport by third parties. In this sense, the principles proposed by the Special Representative John Ruggie, who does not demand that private companies "protect" or "promote" human rights can be cited by analogy. It is enough that they are "respected", that is "Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[80]

4.5.3 PRISONERS OF WAR

The debate about prisoners of war and private contractors is traditionally approached from the perspective of the condition of the latter group when they fall into "enemy" hands, whether these are armed forces of a different state to the one the PMSC is working for or any other armed actor, although always within the context of armed international conflicts. The possibility that PMSCs could have direct responsibility regarding the custody of prisoners of war and the implications that this would bring has been studied much less, something that perhaps helps us to understand the absolute confusion on this point in the self-regulatory documents that we have examined in this study. We will analyse this now.

Regarding the "duty" of PMSCs, the *Montreux Document* seems to completely dismiss it. Indeed, in its second *regulatory* paragraph, the document states:

> Contracting States *have an obligation not to contract PMSCs* to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising *the power of the responsible officer*

[80] See doc. A/HRC/17/31, cit., principle No. 13.

> *over prisoner-of-war camps or places of internment of civilians* in accordance with the Geneva Conventions.

In its "explanatory" section, the document explains the reasons for this obligation: the liberty of states "to contract out activities to PMSCs is limited. International humanitarian law requires the state authorities to carry out certain activities themselves, so it would be unlawful to contract them out. The supervision of prisoner-of-war camps and civilian places of internment is an example." To which it immediately adds "*While certain administrative tasks can be outsourced*, overall responsibility must rest with the State authorities."

On this point the *Montreux Document* agrees at least in part with the philosophy of the proposal by the UN Working Group on Mercenaries, in article 9 of their draft of a possible convention, already cited, in the sense that prohibiting the outsourcing to PMSCs of certain functions inherent to the state (although its tenor is much wider than that of the *Montreux Document*):

> Art. 9. Each state party shall define and limit the scope of activities of PMSCs and specifically prohibit the outsourcing to PMSCs of functions which are defined as inherently state functions, including direct participation in hostilities, waging war and/or combat operations, *taking prisoners,* law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction, police powers, especially the *powers of arrest or detention including the interrogation of detainees*, and other functions that a state party considers to be inherently state functions.

However, the agreement is more apparent than real. The details that the *Montreux Document* introduces and that the *Code of Conduct* uses can leave the self-regulation that the document itself has imposed below minimum levels. Indeed, the "custody of prisoners" (without clarifying their civilian or "war" status) is described in the *definition* itself of a private military and security company in the *Montreux Document:*

> "PMSCs" are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and

> operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel;

For its part, we have already mentioned that the Code of Conduct allows the "detention" of people in certain circumstances:

> 33. Signatory companies *will only*, and will require their personnel will only, *guard, transport, or question detainees* if: (a) the company has been specifically contracted to do so by a state; and (b) its personnel are trained in the applicable national and international law.

And in the context of self-defence or of third parties, or the commission of a crime, the code establishes the possibility of "arrest" or "detention" of people (again without specifying whether they are civilians or combatants) before their handover to the competent authorities (para. 34).

Let us try to clarify things. According to the approach of the *Code of Conduct*, it is necessary to distinguish two situations in which the employees of private military and security companies could find themselves: initial arrest or detention and the custody of prisoners of war. The first situation is the hardest to predict, because it could be the consequence of any battle in an armed conflict. In this point, it is essential to remember article 12 of the 3rd Geneva Convention, according to which prisoners of war are in the power of the "enemy power" and not of "individuals or military units that have captured them" and they are and the convention shall be applied to them "from the time they fall into the power of the enemy" (art. 5). Using these terms, the intention is to guarantee that irrespective of the unit or authority of the armed forces that carry out the detention, combatants are prisoners of war from the very first moment and that their situation is the responsibility of the enemy power that detains them. Which appears perfectly applicable to private armed forces, provided that they are acting on behalf of a state. If an enemy combatant is detained, not only must he be immediately handed over to the authorities of the regular army for which it works, as the *Code of Conduct* establishes, it must also treat him as a prisoner of war from the very first moment. According to the 3rd Geneva Convention, the responsibility for ensuring this happens is always the contracting state's and not the PMSC's. The problem arises when a company does not work directly for a government, but for another private company, although this does not relieve PMSCs from the obligation to hand the detainee over to "the competent authority", under penalty of committing illegal detention or the taking

of hostages as we have indicated above. In such a circumstance it would be more difficult to determine the responsibility of a state for these acts.

The second question is related to the prisoner of war custody functions of PMSCs. The *Montreux Document* appears sufficiently clear regarding the legal impossibility of such a function, but only if the contractors (or their representatives) attempted to exercise it exclusively or as the primary responsible parties. In contrast, this leaves the door open for PMSCs to carry out administrative or auxiliary work regarding the custody of prisoners of war or civilian detainees and the *Code of Conduct* is even more ambiguous, as we have just seen. In any case, as we have stated, neither of the texts discounts support work for the custody of prisoners of war and we have already seen employees of PMSCs contracted as "interpreters" on occasions have participated in the commission of acts of torture against civilian detainees. This makes us fear that, once these contractors penetrate the organizational chart of a prisoner-of-war camp, even with apparently auxiliary functions, they can *de facto* carry out other, more central work that may lead them to treat inmates inappropriately. This is what Pereira reported for example regarding certain psychiatrists contracted by the CIA and that had committed torture against people detained in Guantanamo (and therefore probably worthy of prisoner-of-war status, which as we all know has never been recognised) (Pereira 2007, 270). In any case, said illegal treatment would be so for two reasons. First, because torture and abuses are illegal in any circumstance. And secondly, because in accordance with international humanitarian law and as the self-regulation documents produced by PMSCs recognise, it is illegal for PMSCs and their employees to treat prisoners of war in any regard (custody, transfer etc.) in any way that could lead to the generation of these abuses, whether they are really generated or not.

4.5.4 THE OCCUPATION SYSTEM: THE TREATMENT OF THE CIVILIAN POPULATION

The system of military occupation of territories and, in particular, the treatment by the occupying power of the population in this context, is the specific subject of the 4th Geneva Convention of 1949, although it also occupies part of The Hague Convention of 1907 and Additional Protocols I and II. To a large extent, the protection given to the civilian population is incorporated in the limits to the methods of combat and in the establishment of the fundamental guarantees that we have examined earlier. In this section we will refer to some specific rules regarding the following subjects: the confiscation of civil property, the protection of vulnerable groups, civilians deprived of freedom and the displacement of the civil population. In any case, the enforceability of these humanitarian rules to PMSCs and their personnel will depend on the role that

they play within the context of the "occupation" of territories, which art. 7 of the Hague Convention defines as a *de facto* situation:

> "Territory is considered occupied when it is actually placed under the authority of the hostile army".

From the point of view of PMSCs one could think, *a priori*, of three different situations: a) It seems clear that one or more private companies, no matter how many military functions they carry out, are not in legal conditions to be considered the "occupying power" of a territory. It is not possible for them to play this role autonomously. b) In contrast, they can play an auxiliary role to the regular army that is occupying said territory, in which case they would have the same obligations as the army. c) Thirdly, a more complex is the role that can be attributed to PMSCs that operate within a context of an occupied territory without being directly connected to the situation, *viz* because they are not directly contracted by the government of an occupying state or its armed forces, but by a foreign private company that is present in the territory. The answer to the degree of demandability of humanitarian rules must therefore be made on a case-by-case basis, taking into account the varying degrees of strength that connects PMSCs to the common effort of the operation.

A) THE CONFISCATION OF CIVIL PROPERTY

The international humanitarian law summary of the ICRC identifies some fundamental rules relating to the civil property of the enemy (Henckaerts y Doswald-Beck 2007, 196-202):

> Rule 50. The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity.
>
> Rule 51. In occupied territory:
>
> (a) movable public property that can be used for military operations may be confiscated;
>
> (b) immovable public property must be administered according to the rule of usufruct; and
>
> (c) private property must be respected and may not be confiscated except where destruction or seizure of such property is required by imperative military necessity.

These rules raise the question of their applicability to and their demandability of PMSCs as a question of principle, but also the possibility that they fit the exceptional situations that humanitarian law itself establishes. Indeed, rule 50 is presented as a prohibition, but with exceptions, while rule 51 contains three permissive provisions, albeit with limitations. One of the keys of the different statements is the "military" nature of the actions ("imperative military necessity", "military operations"). From this point of view, only PMSCs that act as representatives of the occupying army (the aforementioned scenario *b*) could they be protected by this exception against the prohibition of the "the destruction or seizure of the property of an adversary". In contrast, PMSCs that protect other companies cannot seize or destroy public or private property of any kind under any circumstances, that is, the prohibition of the seizure of civilian property is absolutely demandable of them without exceptions.

More controversial is the duty to "administer immovable public property according to the rule of usufruct", which is based on article 55 of the Hague Convention. This refers to "public buildings, real estate, forests, and agricultural estates belonging to the hostile state, and situated in the occupied country". It says nothing for example about oil exploitation and, although it could be interpreted that art. 55 can be applied *mutatis mutandis* to this type of "public property", the truth is that unlike "forests and agricultural estates" this type of property is not renewable and its apprehension is more similar to "seizure" than to "administration". In this sense, the PMSCs that protect mining industries through contracts granted by occupying powers (in Iraq for example between 2003 and 2004) could be considered as accomplices in the violation of Hague Law.[81]

B) HUMANITARIAN AID

Connected to the prohibition of using starvation as a method of warfare, international humanitarian law obliges the parties to a conflict to allow access of humanitarian aid to the civilian population.

[81] We should remember that in this case, resolution 1546 (2004) of the UN Security Council created a "Development Fund for Iraq", entrusted to the Central Bank of Iraq and under the supervision of an international committee, although in practice it was under the management and control of the occupying forces. The fund was financed above all by the sale of Iraqi oil and its purpose was to meet the humanitarian needs of the people, carry out the reconstruction of the country, continue its disarmament and pay the civil (non-military) administration expenses of Iraq. In short, the resolution gave practically absolute control of the Iraqi economy to the occupying powers, in exchange for a certain level of international supervision that in practice was very superficial.

> Rule 55. The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.

There are numerous occasions when the UN, through the Security Council, has demanded respect for this rule of all types of combatants, both within the context of international conflicts and, especially, non-international ones. The study by the ICRC cites the conflicts in "Afghanistan, Angola, Armenia and Azerbaijan, Bosnia and Herzegovina, Burundi, Georgia, Kosovo, Liberia, the Democratic Republic of Congo, Somalia and Yemen" (Henkaerts and Doswald-Beck 2007, 218). We should mention that in this context the role of PMSCs is not that of a *party* to the conflict that should or should not authorise the free passage of humanitarian aid,[82] but that of an actor that, as a matter of fact, can hinder or facilitate the work of humanitarian agencies. It is only in this sense that PMSCs can be demanded not to hinder the work of these organisations.

C) CIVILIANS DEPRIVED OF LIBERTY

We should remember at this point that the Montreux Document obliges PMSC contracting states not to entrust them with activities that international humanitarian law assigns explicitly to state agents or authorities, such as exercising *the power of the official responsible for "civil internment camps"*, but this does not exclude them from carrying out auxiliary administrative functions.[83] We have also indicated earlier that among the functions inherent to the state that should not be outsourced, the UN Working Group has established "the capture of prisoners (...) policing application, especially the powers of arrest or detention including the interrogation of detainees".[84] According to Palou-Loverdos and Armendáriz, "a number of the activities performed by PMSCs in Iraq, as described above, may fall within the scope of 'inherently state functions', particularly those military-related activities such as detention of persons [and] interrogation of detainees" (Palou-Loverdos and Armendáriz, 2011, 47).

[82] The consent must be given by the state actor or any other that has effective control over the territory where the aid must be given. According to the ICRC, "consent must not be refused on arbitrary grounds. If it is established that a civilian population is threatened with starvation and a humanitarian organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent" (Henkaerts and Doswald-Beck 2007, 219).
[83] See *supra*, section 4.4.3.
[84] See doc. A/HRC/15/25, para. 51.

In this sense there are international humanitarian law obligations that should not be demandable of PMSCs for the simple reason that they should never be entrusted with taking these types of decisions. This would be the case with customary rules identified by the ICRC, such as the obligation to house people deprived of liberty "in premises which are removed from the combat zone and which safeguard their health and hygiene" (Norma 121), give the ICRC, in armed international conflicts, regular access "to all persons deprived of their liberty in order to verify the conditions of their detention and to restore contacts between those persons and their families." (rule 124-A). And, of course, the obligation to release civilian internees "as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities." (rule 128). When the latter rule states that "the persons referred to may continue to be deprived of their liberty if penal proceedings are pending against them or if they are serving a sentence lawfully imposed" it seems clear that this is not a decision that could be the responsibility of private security companies under any circumstances.

In contrast, it is not implausible that, within the context of the *de facto* presence of PMSC contractors in a civilian detention centre, even without the responsibility for the direct custody of these people, circumstances may arise that will oblige said employees to respect certain rules of international humanitarian law, which are essentially the same as the provisions of section 7 of the Secretary-General's Bulletin (Henckaerts and Doswald-Beck 2007, 485-510):

> Rule 118. Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention.
>
> Rule 119. Women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women.
>
> Rule 120. Children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units.
>
> Rule 122. Pillage of the personal belongings of persons deprived of their liberty is prohibited.
>
> Rule 126. Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable.

> Rule 127. The personal convictions and religious practices of persons deprived of their liberty must be respected.

Beyond the cases of torture and abuse and other violations of the "fundamental guarantees" that we have indicated above, not many cases of the violation of these specific humanitarian law rules are known. In conclusion, Perrin cites the case of three members of personnel of a private security company who were sentenced to 10 years in prison by an Afghan court in September 2004 for, among other things "running a private prison and carrying out illegal detentions" (Perrin, 2006, 315).

D) FORCED DISPLACEMENTS OF THE CIVILIAN POPULATION

The forced displacement of the civilian population is prohibited both in international and non-international conflicts, "unless the security of the civilian population itself or imperative military needs so demand". In this event, the prohibition of deporting said population to a territory occupied by the power that forces the relocation is absolute, as is the following duty: "all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated", as well as the duty to respect the specific needs of women, children, the elderly and people with disabilities, and the right to property and of voluntary return when the circumstances that caused the relocation end (rules 129 to 138; Henckaerts and Doswald-Beck, 2007, 546-552).

It seems difficult for the management of a PMSC to automatically take the decision to deport or relocate a civilian population and, if they did so, they would be guilty of a clear exceeding of their functions given that, insofar as it is not a party to a conflict, it may not take the decision nor assess the existence of "imperative military needs". Therefore, if a PMSC collaborated in the execution of this type taken by a warring party (the party that has the responsibility for the decision itself), it would be legally obliged to ensure the humanitarian and special protection measures that we have just indicated. Regrettably, neither the *Montreux Document* nor the *Code of Conduct* mention this.

This is not a hypothetical situation. According to Gómez del Prado and Torroja, "PMSCs are increasingly used in the deportation of migrant people whose papers are not in order" and cite the case of an Angolan migrant who died from asphyxia during

the deportation by plane in the custody of three employees of the security company G4S (Gómez del Prado-Torroja, 2011, 30). They also mention a case in which a PMSC, Triple Canopy, was involved in the transport of illegal migrants in Honduras (Gómez del Prado-Torroja, 2011, 34-35). Although none of these cases took place within the context of an armed conflict where international humanitarian law could be applicable, they allow us to deduce the capability of some PMSCs regarding the displacement of civilian people and the consequent responsibility they have regarding the treatment they dispense.

4.6 INTERNATIONAL INDIVIDUAL CRIMINAL RESPONSIBILITY

Since its beginnings, international individual criminal responsibility has been constructed independently of the responsibility of the state, in the sense that the same criminal act could involve one or the other at the same time. This will depend to what extent the individual is an "organisation of the state" and that it acts in the exercise of its functions (Gramajo 2003, 72). In our case, the attribution of acts carried out by PMSCs and their contractors to a certain state can be of differing complexity depending on various criteria: the territory where the acts take place, the effective control of the activity of PMSCs by a certain state etc. [85] Therefore, irrespective of this possible attribution, individuals are directly responsible for any international crimes that they may commit.

Regarding individual criminal responsibility, both the contractor deployed on the ground and the managers of the private security companies, the first jurisdiction where claims should be made is the state of the territory where the acts took place or, secondly, that of the nationality of the author of the acts. In accordance with the mandate of the Geneva Conventions:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present convention defined in the following article.[86]

Although it may appear unnecessary, we should emphasise the criminal nature, in accordance with any criminal legislation of any country in the world, of the majority of grave violations of human rights and humanitarian law that we have described previously. In reality, the problem does not lie in the classification but in impunity. In

[85] In this sense, it is worthwhile remembering that the International Law Commission considers an act of state according international law to be "the conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction and control of, that state in carrying out the conduct". See art. 8 of the draft of articles on the Responsibility of the State for Internationally Wrongful Acts, document A/56/10, supplement No. 10.

[86] First paragraph of articles 49/50/129/146 of the four Geneva Conventions.

the case of Iraq for example, one of the first decrees of pro-consul Bremer established that the non-Iraqi employees of American PMSCs "are subject to the *Military Extraterritorial Jurisdiction Act*" of 2000 "or to the Uniform Code of Military Justice" amended in 2006 for the practical purposes of exempting them from any responsibility. In this sense, Pastor Palomar (using data from 2008) recognises that on only one occasion has the Code been applied, and although the Military Extraterritorial Jurisdiction Act has been applied 58 times, only in 13 cases have proceedings been opened before an American court (Pastor Palomar 2008, 445-446). In this sense, the claim brought in the United States by Iraqi victims of torture perpetrated at Abu Ghraib by private contractors is excellent news[87] and in the same country there have been homicide proceedings against six agents of the company *Blackwater* for the acts in Nisour Square described earlier. And although in principle the charges were dismissed by a federal court by considering that the rights of the accused had been violated,[88] later the federal court of appeal reopened the case against four of them.[89] In Iraq again, solely due to the massacre in Nisour Square, the government repealed the Bremer decree that made foreign contractors immune from prosecution before Iraqi jurisdiction.

If we attempt to gain access to a higher jurisdiction, whether international or universal, we will come up against some practical problems. We have already stated that the International Criminal Court Statute does not exclude people who lack the formal condition of "combatant" from the authorship of crimes within its competence. In other words, there is nothing to stop a "contractor" or "manager" from being considered a war criminal. The biggest problem lies in the fact that the Statute only includes the gravest international crimes: genocide, crimes against humanity and war crimes. The first two contain some "mass" and "systematic" elements of a kind that are unlikely to match the practical situations individual contractors are responsible for, although perhaps the managers of some of these companies could be responsible for their *policies*. In contrast, war crimes are more specific: for example, they would include the torture and abuse of prisoners of war or civilian detainees, even individual, one-off actions.[90] But so are the majority of crimes that we have described above: indiscriminate attacks or against the civilian population, intentional homicide, the use

[87] See AFP news agency, 30th June 2008: http://afp.google.com/article/ALeqM5gROPg2e2CXQULZxrFLEK1Gz7DstQ (consulted in October 2012).
[88] "Charges dropped against the Blackwater accused", *El País*, 1st January 2010.
[89] See "Ex-Blackwater Guards Face Renewed Charges", *The New York Times*, 22nd April 2011.
[90] In short, the Rome Statute encourages us only to pursue those war crimes that are committed "as part of a plan or policy or as part of a large-scale commission of such crimes". See article 8.1 of the International Criminal Court Statute.

of prohibited weapons, pillage, the seizure of civil property, mass deportation etc. On the other hand, the ICC only has jurisdiction regarding individuals whose nationality states or of the territory where the crimes have been committed are party to the Statute. For example, this would leave any contractors from the United States that have committed criminal acts of this kind in countries like Iraq out of the equation. The case of Afghanistan is different, which has consented to the Statute and where PMSCs also operate (Pastor Palomar 2008, 443) or the case of British citizens; a state that has also ratified the Statute in the country where they are based.

5. CONCLUSIONS

1. The monopoly and centralisation of the legitimate use of force is one of the landmarks of the modern, Westphalian state which since the French revolution has led to the creation of draft armies, made up of citizens at the temporary service of the nation. In reality the figure of the soldier of fortune has never disappeared, nor did it have an especially negative connotation until the 1970s, in the context of their participation on the side of their mother countries in national liberation wars or in connection with coup d'états in recently independent countries. To its discredit, the legal response has been slow, insufficient and a failure. Slow, because it did not exist until 1977 (simultaneously in Protocol I to the Geneva Conventions and in the African Convention) and 1989 (in the United Nations Convention). Insufficient, because it has limited itself by not considering mercenaries as combatants, and therefore possible prisoners of war (Protocol I) and because, when it has wished to "criminalise" mercenarism it has introduced conceptual limitations related to their final use that have reduced their effectiveness (African and Universal Conventions). And finally a failure insofar as the most ambitious and universal convention has barely obtained 32 ratifications and is practically ignored even when perfectly applicable (the recent use of mercenaries in Libya for example).

2. Traditional mercenarism has demonstrated a strong ability to adapt through its conversion into corporate forms, using the rampant privatisation processes in the public sector that began as early as the 1980s. These new types of organisation, which are much more complex, make it difficult, if not impossible for the traditional rules regarding mercenaries to be applicable to them. And given that the phenomenon is here to stay, it is essential to know which regulatory framework will be applied to these companies and their employees.

3. Currently there is no specific, effective regulatory framework for PMSCs. The Swiss initiative has led to two texts (the Montreux Document and the Code of Conduct) with

more questions than answers, especially the latter, and that in any case do not have the aim of having the characteristics of a binding code. It seems more likely that their aim is that, through self-regulation, PMSCs can avoid the enactment of new specific rules that are more effective than the current ones. However, the low effectiveness that these voluntary codes usually have advises against the passive codifying of the international community. In this context, the regulatory draft that the Human Rights Council currently has in its hands must be considered as very positive, although the fact that it is solely aimed at states limits its future effectiveness; an effectiveness that is also in question due to the very resistance of the home states of PMSCs against establishing the regulation of the phenomenon. All of this makes one think that the draft of a possible convention will not succeed, or will do so in a much diluted way. With such a prognosis, it becomes essential to know the degree of current applicability of the rules of international humanitarian law to the phenomenon of PMSCs.

4. There is a general principle that obliges companies that operate within the context of armed conflicts, and their employees, to respect international humanitarian law as fully as their legal and material capabilities allow them to. This general statement should now be organised into specific obligations related to principles and rules of humanitarian law that are particularly relevant. Beyond the consideration of PMSCs as actors in conflicts and subjects to the rules arising from international humanitarian law, it is useful to consider if the *intrinsic characteristics* of these private companies make it possible for some fundamental rules of humanitarian law to be enforceable.

5. In any use of armed force, whether defensive or aggressive, the employees of PMSCs must fully respect the principle of distinction between military objectives and personnel on one hand and people and civilian property on the other. The comprehensive nature of this principle makes it advisable that in their contracts these forces establish the complete prohibition of the use of armed force unless in self-defence or in defence of those that have contracted them. The frequency of flagrant violations of this fundamental obligation is deplorable. The rules of humanitarian law that prohibit no quarter being given, pillage, starving the civilian population or recruiting child soldiers, among others, are also fully applicable to PMSCs.

6. Determining the restrictions and prohibitions regarding arms that should be applied to PMSCs is based on the difficulty posed by the casuistic legal technique used in this sector of the international legal system: weapon by weapon, treaty by treaty. Therefore, it would be necessary to see in each specific case which treaties have been

ratified by each pertinent state (the home state of the company, the state of the contracting party and/or of the territory) to determine what restrictions or prohibitions apply to PMSCs. With two exceptions. First, that it is sufficient for one of these states to have ratified the treaty for it to be applicable to PMSCs. Second, that there are weapons that are considered as absolutely prohibited, in any territory and irrespective of the international or non-international nature of the conflict. These weapons would include at least: poison and poisonous weapons, biological weapons, chemical weapons, explosive bullets, weapons whose main effect is to wound through non-detectable fragments, booby-traps, blinding laser weapons and anti-personnel mines.

7. It is essential that said companies do not illegally traffic weapons or use weapons that are prohibited in international law. Both obligations, particularly the second for the purposes of our study, should be absolute prohibitions when contracting a company of these characteristics. This is one of the points regarding the attempts at self-regulation of the sector that deserves a very negative assessment. In particular, the feeble provisions of the *Montreux Document* regarding the possession and use of means of combat that are prohibited by current international law are outrageous.

8. The protection of victims of a conflict is, generally, extendable to PMSCs in any kind of armed conflict and even in situations of disturbances or violence that do not escalate to armed conflicts. In particular, the prohibition of homicide, torture and other abuses and of illegal detentions are demandable from them at all times and places. However, it is also true that some of these fundamental guarantees are not, nor could be demandable from private military and security companies nor from their contractors. This is the case, for example, of those related to the guarantee of a fair trial which, due to their nature, only the state authority can provide (and can only be demanded from). What can be demanded from PNSCs is that they do not hinder the exercise of these rights by individuals, by restricting access to legal services or destroying or hiding evidence in the process, for example.

9. Regarding prisoners of war and civilian detainees, the ambiguity of the self-regulatory instruments examined in this report again show their weakness regarding the role of PMSCs within the context of the custody of detainees. In our opinion, PMSCs should never take charge, *de jure* or *de facto*, of any person deprived of liberty in the context of an armed conflict. In the event that a company or its employees have any kind of contact with these people, they must fully respect the humanitarian rules relating to their rights. All of this without diminishing the responsibility that states

deserve, which in the context of an armed conflict are always responsible for the fate of prisoners of war.

10. Private security companies that get involved in a real exchange of fire cannot leave aside the obligation, once the combat has ended, to concern themselves about the fate of the sick and wounded of the other group, and, as far as possible, ensure their evacuation to a hospital centre. If said services do not exist or are insufficient, PMSCs should ensure that the ICRC or other independent humanitarian organisations have rapid and unobstructed access to the sick and wounded. Finally, it hardly seems debatable that any armed actor that participates in an armed conflict, international or not, has at least the duty to "respect" medical personnel and the objects and means of transport associated with the medical function, as well as being banned from carrying out "direct attacks" against any of them. Unfortunately, all of these rules are conspicuous by their absence in the three instruments that we have examined and that are aimed at PMSCs: *the Montreux Document, the Code of Conduct and a Draft for a Possible Convention.*

11. PMSCs cannot be the "occupying powers" of a territory, but they can collaborate to some degree in the effort required to occupy territories by foreign powers. The measure of said collaboration will establish the degree of demandability of the humanitarian rules relating to the occupation scenario. In any case, in our opinion what is absolutely demandable from them, and without the exceptions that international humanitarian law establishes for states, is the prohibition of the seizure of civilian property. In contrast, the obligations relating to the internment of civilians and their treatment should not be demandable from them, since, as we have indicated, they should never have these functions or take decisions regarding the location of detention centres or regarding communications between these people and their families. Regarding the work of humanitarian organisations, the only thing that PMSCs can be asked to do is not hinder them.

12. The war crimes likely to be committed by private contractors are crimes according to all criminal legislation systems and, if enormous efforts are not made to safeguard their immunity from prosecution, they should be able to be judged in the state where the crimes were committed or, alternatively, in the country of the contractor or the home country of the company. Immunity from prosecution is not an accident due to legal loopholes; it is the result of complex legal engineering aimed at this objective. The possibility also exists of international trials, insofar as war crimes do not require the

systematic or mass nature of other crimes within the competence of the International Criminal Court such as genocide or crimes against humanity, although presently it does not appear that the conduct of PMSCs and their employees is under examination by the Prosecutor of the International Criminal Court.

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