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PRIVATE MILITARY AND SECURITY COMPANIES IN NON-INTERNATIONAL
ARMED CONFLICTS: *IUS AD BELLUM* AND *IUS IN BELLO* ISSUES

Luisa Vierucci

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ACADEMY OF EUROPEAN LAW

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Abstract

The paper addresses *ius ad bellum* and *ius in bello* issues arising from the activities of private military and security companies (PMSCs) in non-international armed conflicts (NIAC). This legal analysis, which has so far been neglected by scholars, is crucial given that most conflicts where PMSCs are involved qualify at least in part as internal (e.g. Iraq, Afghanistan, Darfur (Sudan)).

The *ius ad bellum* analysis hinges upon a distinction between the right of the legitimate government - and to some extent of national liberation movements- to make recourse to PMSCs to restore or maintain internal law and order or to repel an aggression, and the prohibition to use PMSC for combat purposes or other action on the part of armed opposition groups or third parties. At the same time, several arguments are presented to the effect that the right of the government to use foreign armed force, including services provided by private actors, is subject to a number of limitations.

As to the *ius in bello* inquiry, where the question of the status of PMSCs, their scope of protection from attack, their treatment in case of deprivation of liberty and the responsibility of an armed opposition group under international humanitarian law are analysed, places special attention to the notion of armed forces applicable, according to international humanitarian law, in a NIAC. This investigation shows that in very few instances can PMSC members fall under the category of a state's armed forces. Indeed the vast majority of PMSC members qualify as civilians. As to the responsibility aspect of PMSC actions, only the question of the international liability of armed opposition groups is examined with special emphasis being placed on the due diligence obligations accruing both to the group and the state.

***Private Military and Security Companies in Non-International Armed Conflicts:
Ius ad Bellum and Ius in Bello Issues***

LUISA VIERUCCI*

1. Introduction

Much writing has been devoted to the legal issues arising under international law with respect to one of the 'prominent feature'¹ of contemporary armed conflicts: outsourcing traditional security and military functions to private companies. Not only scholars but also international and non-governmental organisations, states and the companies themselves have gained such awareness of the legal implications of the activities of these firms that several aspects of applicable law have already been clarified and new rules are being proposed. However the focus of the reflection has been the increased privatisation of state functions in time of international armed conflict.² At best, those studies doing an international humanitarian law (IHL) analysis have dealt with non-international armed conflicts (NIAC) in minimal part.³ The imbalance between the writings devoted to private military and security companies (PMSCs) acting in international conflicts as compared to internal ones may be justified in light of the greater number of international law rules applicable in the first types of conflict. At the same time this discrepancy is unwarranted given that an important number of conflicts where PMSCs have been and are currently active either are completely of a non-international character or at least contain some elements of an internal character. For instance, the current use of PMSCs in Afghanistan and Iraq is well known, as it was the employ of such firms in Sierra Leone and Angola in the 1990s. On the contrary little is known about the involvement of DynCorp and Blackwater in Southern Sudan⁴ as well as the possible major participation of private firms in the conflict in Darfur, Western Sudan, to contribute to stop the civil war.⁵ Likewise the employ of US contractors, probably also in combat operations, against armed opposition groups in the Philippines has attracted small attention among legal scholars.

The present inquiry attempts to fill this gap under a twofold perspective: both *ius ad bellum* and *in bello* issues arising from the activities that PMSCs carry out in internal armed conflicts will be analysed. In the paper the notion of non-international armed conflict propounded by the International

* Researcher, University of Florence [luisa.vierucci@unifi.it].

¹ Report of the Secretary-General on the protection of civilians in armed conflict, S/2007/643, 28 October 2007, p. 3, para 9.

² Eg J.C. Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder', *Stan.J.Int'l L.* (1998) 75-162; P.W. Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law', *Columbia J. Transnat'l L.* (2004) 521-549; N. Boldt, 'Outsourcing War – Private Military Companies and International Humanitarian Law', *GYbIL* (2005), pp. 502-544.

³ L. Doswald-Beck, 'Private military companies under international humanitarian law', in S. Chesterman and C. Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, Oxford University Press, 2007, pp. 115-138; E.-C. Gillard, 'Business goes to war: private military/security companies and international humanitarian law', *IRRC* (2006) 525-572; C. Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies', *EJIL* (2008) 989-1014.

⁴ I. Jones, 'US firm DynCorp to turn south Sudan rebels into soldiers', *Sudan Watch*, 12 August 2006, available at <http://sudanwatch.blogspot.com/2006/08/us-firm-dyncorp-to-turn-south-sudan.html> and 'American Mercenaries in Sudan', *Sudan Vision*, 22 January 2007, available at <http://www.sudanvisiondaily.com/modules.php?name=News&file=print&sid=17790>.

⁵ W. McGurn, 'Mercenaries for Darfur?', *Wall Street Journal*, 29 July 2008, available at http://online.wsj.com/article/SB121728728103991373.html?mod=googlenews_wsj#printMode; and D. Isenberg, 'Dogs of War: Put up or Shut up', in *Middle East Time*, 20 March 2009, available at http://www.metimes.com/Security/2009/03/20/dogs_of_war_put_up_or_shut_up/6fc4/.

Criminal Tribunal for the Former Yugoslavia will be adopted. Accordingly, any such conflict exists whenever there is 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.⁶

As far as *ius ad bellum* is concerned, all the main legal questions will be addressed, ranging from the legitimacy of intervening in favour of the legitimate government to the issues arising in case of intervention in support of an armed opposition group, including national liberation movements. As we shall see, the thorniest question concerns the limits of support provided to the legitimate government given the difficulties materializing in many internal conflicts to identify the legitimate authority. As we shall see, both on account of those hurdles and the prohibition to recruit mercenaries, serious doubts arise as to the lawfulness under international law of recourse to PMSCs for activities in which the use of force is required.

By contrast, the *ius in bello* analysis will be confined to the most unsettled aspects, namely the legal status of PMSCs and their members in NIAC and the international responsibility of such firms in case they qualify as armed groups. Only a brief analysis will be devoted to the scope of protection of PMSC members as well as the treatment they are entitled to when acting in a non-international conflict as the two issues do not raise special problems but stem from the solution given to legal status.

2. Resort to PMSC Services in NIACs: A Legitimate Means to Re-establish Internal Peace or a Breach of International Law?

There are no specific rules in international law regulating resort to PMSCs in time of armed conflict, including conflicts of a non-international character. Hence the issue of the legitimacy of the use of PMSCs services, which may also include direct combat activities, has to be evaluated in light of the principles and rules of international law relating to intervention in a NIAC. Those rules vary according to the type of entity in favour of which intervention takes place, namely: 1. intervention in support of the legitimate government; 2. intervention on the side of the armed opposition group; 3. intervention for a national liberation movement. In the present analysis that division will be followed. Clearly, a distinction will also be made between support consisting in the use of force (i.e. envoy of troops) and any other form of aid and assistance (supply of equipment, technical support, training etc) as the law changes accordingly.

A. Intervention in Support of the Legitimate Government

The principle whereby a state is free to resort to foreign aid and assistance to help restoring internal order or defending the national unity and territorial integrity of the country can be considered as established in international law, as this is an attribute of sovereignty.⁷ Its applicability is

⁶ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (IT-94-1-AR72), Appeals Chamber, 2 October 1995, para. 70.

⁷ Cf Institut de Droit International, Commission on Present Problems of the Use of Force in International Law, Sub-group on Intervention by Invitation, *draft report on Intervention by Invitation* 25 July 2007, p. 229 (hereafter: *IDI Draft Report 2007*). The Institut de Droit International had previously expressed a different position, consisting in the duty of third states to 'refrain from giving assistance to parties to a civil war which is being fought in the territory of another state', without distinguishing between assistance provided to the legitimate government and to other subjects (art. 2(1) of the resolution on The Principle of Non-Intervention in Civil Wars (1975). This view was supported, at least to some extent, also by (a minority of) scholars, cf. authors referred to in I. Brownlie, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963, p. 323. Brownlie himself, though not openly denying the existence of the freedom of the government to get foreign assistance, cautions that 'once intervention has commenced the requesting government ceases to be a completely free agent as its security rests on foreign aid'. Moreover, he stresses that it is undesirable that the legality of military operations should be related to controversial questions of internal law also because 'there is in international law no definition of 'legitimate government'', *ibidem*. We shall deal extensively with these questions in the following paragraph.

uncontroversial when the measures which are the object of the request for intervention fall short of the employ of force,⁸ provided that some conditions be met.⁹ The question arises of the lawfulness to resort to foreign armed force on the part of the government given the prohibition of intervention in internal affairs and the ban on the threat and use of force in international relations. We shall therefore focus on this very modality of intervention.

As is well known two PMSCs, Executive Outcomes and Sandline International, conducted military operations respectively in Angola in 1992-1994 and Sierra Leone in 1995-1998 in support of the government. Their direct participation in the conflict by means of military units providing combat services contributed to a major extent to the victory and restoration of the established government.¹⁰ Although those instances remain isolated, the possibility of PMSCs' involvement in combat operations in internal conflicts cannot be excluded mainly for two reasons. In the first place, in many cases PMSC members deployed in a conflict area are armed in order to carry out their mandate, which does not necessarily include the use of force but may be limited to services such as providing security to certain personalities. However, if they happen to be the object of an attack in connection with the armed conflict and/or use offensive force, they become *de facto* involved in the hostilities. Secondly, some agreements expressly envisage the active participation in hostilities by a company.¹¹

The lawfulness of intervention of foreign entities is subject to the existence of consent as a clause precluding wrongfulness.¹² Therefore it is crucial to analyse what are the conditions of validity of consent.

1. Consent as a Necessary Condition for the Lawfulness of Foreign Armed Intervention

The prohibition to use force does not operate in presence of the government's consent to foreign intervention involving direct participation in hostilities.¹³ In the case at issue, consent takes the form of a request for intervention. In order for consent to be valid, international law requires that certain conditions be fulfilled. First of all consent must be expressed by the competent authority, because it has to be attributed to the state in order to be valid under international law. This is the most delicate condition to be met in a situation of armed conflict where it can be difficult to identify the authority entitled to represent internationally the state. The situation is clear-cut if the rebels have not attained the status of insurgents (either by means of insurgent or belligerent recognition, or else *de facto* through control exercised over a part of the state territory). In this case it is the *de iure* government that is entitled to express consent.

Disputable is the authority entitled to express consent in situations where unrest has attained the threshold whereby rebels are subjects of international law, namely in a civil war. In this hypothesis

⁸ Typically those measures consists in providing training to security and/or military forces; guaranteeing security to specific persons (normally in position of responsibility within the government); or granting financial assistance.

⁹ See *infra*, paras I.2.1 and I.2.3.

¹⁰ S. Cleary, 'Angola – A case study of private military involvement', in J. Cilliers and P. Mason (eds), *Peace, Profit and Power: The Privatisation of Security in War-Torn African Societies*, Pretoria, Institute of Strategic Studies, 1999, p. 164; I. Douglas, 'Fighting for diamonds – Private military companies in Sierra Leone', *ibid.*, p. 195.

¹¹ See the Agreement for the Provision of Military Assistance Between the Independent State of Papua New Guinea and Sandline International, 31 January 1997, according to which Sandline was contracted to 'Conduct offensive operations in Bougainville in conjunction with PNG [Papua New Guinea] defence forces to render the BRA [Bougainville Revolutionary Army] military ineffective and repossess the Panguna mine'.

¹² The discussion on whether the question of intervention by invitation should be dealt with as a matter of primary rules goes beyond the scope of this paper. For interesting remarks on this question see T. Christakis and K. Bannelier, '*Volenti non fit injuria*? Les effets du consentement à l'intervention militaire', *AFDI* (2005) 102-137.

¹³ Art. 20 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001 lists consent among the clauses precluding wrongfulness.

practice is not uniform and the doctrine has expressed divergent opinions. According to one view, effectiveness is the crucial criterion.¹⁴ This means that the *de facto* government is the one competent to express consent on behalf of the state. Another position holds that recognition by third states or international organizations is the key factor, on condition that it endures over a certain period of time.¹⁵ Such recognition entails a presumption of legitimacy in favour of the established government and it persists also if the government is faced with armed opposition in the country so long as such opposition has not acquired stable control over portions of the territory.¹⁶ As we shall see, the United Nations is increasingly proceeding to identifying the legitimate government of a country, hence operating a form of recognition.

In the third place, the view is propounded whereby it is the combination of effectiveness and recognition on the part of third states or international organizations that determines who is the legitimate authority to request foreign armed assistance.¹⁷ According to this view governments such as those put in place by Hamas in the Gaza strip are not legitimate because, even if they satisfy the effectiveness criterion, they have not gained international recognition by a large part of the international community. This seems to be the majority position and the one that best reflects recent practice.

The difficulties inherent in the determination of the authority from which consent can validly emanate during a NIAC make the content of the principle relating to the freedom of the legitimate government to request foreign armed assistance unsettled.¹⁸ It is submitted that the principle is helpful to identify the two poles of a continuum. At one pole lie those situations where the government lacks the requirements (effectiveness and/or recognition) needed to express valid consent. In this case, third parties are under a duty to refrain from intervening militarily until the situation permits identification of the authority which can validly express consent to intervention.¹⁹ At the other extreme are those instances in which the opposition has received armed assistance from abroad. In this case both practice and *opinio iuris* indicate that third parties may supply direct military assistance to the legitimate government.²⁰ Apart from these two extremes, the dividing line between a lawful and an unlawful intervention based on valid consent remains blurred.

The approach followed by PMSCs as to identification of the authority entitled to request foreign military assistance *durante bello interno* helps only partially to shed light on the matter. The agreement signed by Papua New Guinea and Sandline International on 31 January 2007 states that the company operates 'particularly in situations of internal conflict and only for and on behalf of recognized Governments'. During the second civil war in Angola (October 1992-November 1994) Executive Outcomes provided armed assistance to the recognised government of President Dos Santos, when the government's effectiveness was in doubt given that the UNITA insurgents were controlling four fifths of the Angolan territory.²¹ The backing given by PMSCs to the government of

¹⁴ A. Tanca, *Foreign Armed Intervention in Internal Conflict*, Dordrecht, Nijhoff, 1993, pp. 35-36.

¹⁵ Cf. *IDI Draft Report 2007*, pp. 248-249 and authors referred to in footnotes.

¹⁶ If the opposition group has acquired portions of the territory then, depending on the circumstance, the principle of effectiveness calls for recognition of the legitimacy of the power exercised over that territory, L. Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', *BYbIL* (1985) p. 197 and V. Grado, *Guerre civili e terzi stati*, Padova, Cedam, 1998, p. 67.

¹⁷ For a detailed analysis of this position see O. Corten, *Le droit contre la guerre*, Paris, Pedone, 2008, pp. 432-446. This seems also to be the approach favoured in the *IDI Draft Report 2007*, p. 264.

¹⁸ C. Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested', *New York University Journal of International Law and Politics* (2003) p. 791.

¹⁹ Corten expresses the same position, *supra* note 17, p. 446.

²⁰ Brownlie, *supra* note 7, p. 327 and art. 5 of the resolution of the Institut de Droit International on *The Principle of Non-Intervention in Civil Wars* (1975), *supra* note 8.

²¹ Cleary, *supra* note 10, p. 146.

Sierra Leone during the conflict of the mid-90s is more articulated, as power changed several times. Initially, Executive Outcomes and Branch Energy signed an agreement with the government of Strasser²² which included also assistance in defeating the Revolutionary Unitary Front opposition group. Those agreements remained in place also with the election of a new government led by Ahmad Tejan Kabbah. In the second phase, which started with the 25 May 1997 *coup d'état* led by Ernest Koroma that ousted President Kabbah, it was Sandline International that helped restoration of the deposed President, who actually returned to power on 10 March 1998.²³

This practice, which tends to indicate that recognition alone is the redeeming criterion for the validity of consent, is contradicted by evidence that the above companies operated in favour of armed opposition groups that would certainly not qualify as the recognised government of the country at the relevant time.²⁴ It is therefore not easy to defeat the impression that political or other criteria, rather than legal convictions, direct the choices of military firms in this field.

The issue of the identification of the legitimate authority representing a country is increasingly addressed by international organizations and in particular the UN Security Council. The Council identifies the government the international community considers as legitimate mainly due to the expansion of the UN role in the field of peace-building.²⁵ For example, in the case of Ivory Coast the Security Council, acting under Chapter VII of the UN Charter, indicated by name the President who was deemed legitimate to stay in office.²⁶ In addition, with resolution 1546 (2004) the Security Council legitimised the Iraqi *interim* government whose effectiveness was highly debatable.

Notable are those resolutions where the Council draws legal consequences from the identification of the legitimate government. In several occasions the UN body has affirmed the right of states to assist the legitimate government against opposition groups and has decreed an embargo only *vis-à-vis* armed opposition groups.²⁷

Other features of consent as a basis for intervention are the fact that consent should not be nominal (it has to be effective, expressed in clear terms and not vitiated) and be given either before or at the same time of intervention. Such features are usually uncontested in case of intervention on the part of a PMSC as the contract tends to satisfy those requirements.

Other conditions for the validity of consent pertain to the scope of intervention. The action of the invited entity must be limited to the purposes accompanying the invitation and shall respect the conditions posed by the government. Typically, the contract between a state and a PMSC sets the duration both of the intervention and the contract itself. Normally the duration of the contract is expressed in precise temporal terms but subject to the achievement of the purposes set out in the document, which cannot usually be foreseen with accuracy.²⁸ Another condition concerns the *ratione materiae* scope of the intervention. The conduct of activities not foreseen at the moment when consent

²² Douglas, *supra* note 10, p. 179.

²³ *Ibid.*, pp. 190-1.

²⁴ See allegations of PMSCs supporting UNITA between 1992 and 1995, Cleary, *supra* note 10, pp. 149-150 and K. O'Brien, 'Private Military Companies and African Security 1990-98', in Musah Abdel Fatau and J. Kayode Fayemi (eds), *Mercenaries: An African Security Dilemma*, Pluto Press, 2000, pp. 58-59.

²⁵ C. Gray, *International Law and the Use of Force*, Oxford University Press, 2008 (3rd ed), p. 113.

²⁶ Res. 1721 (2006), para. 5.

²⁷ Gray, *supra* note 25, p. 113.

²⁸ See e.g. para. 1.1. of the Sandline-PNG agreement of 31 January 1997.: 'The duration of this contract shall be effective from the date of receipt of the initial payment [...] for a maximum initial period of three calendar months (the initial contract period) or achievement of the primary objective, being the rendering of the BRA [Bougainville Revolutionary Army] militarily ineffective, whichever is the earlier.'

is expressed (which, in the case of a PMSC, is usually a contract), makes the intervention unlawful.²⁹ For instance an inquiry has recently been ordered by the Philippine Senate aimed at verifying whether US troops conduct also open combat operations in the course of what were supposed to be merely joint US-Philippines training exercises to fight rebels and terrorists in the South of the country. Most probably this inquiry will also look at the agreement of 4 March 2008 between the US and DynCorp concerning provision of support services to US troops in Mindanao till 2012³⁰, since the Philippine Constitution prohibits permanent military bases and the conduct of combat operations by foreign troops.³¹

Absent the above conditions, consent cannot be considered as valid and consequently the use of armed force on the part of the foreign entity does not qualify as an intervention by invitation but amounts to a forcible intervention hence unlawful.

In short, valid consent is a *necessary* condition for the legality of intervention by invitation in a NIAC in those situations where it is possible to identify the legitimate authority to express it. Yet even when valid, consent is not a *sufficient* condition for the legality of the intervention, as we shall now turn to see.

2. Legal Bases for Intervention Accompanying Consent

Consent is decreasingly invoked as the only justification for the intervention of a foreign state in support of the legitimate government in its struggle against an armed opposition group. Practice shows that consent, which is usually expressed in a contract, coexists with other legal bases for intervention.³²

Firstly, maintenance of internal law and order usually constitutes the legal ground for intervention where PMSCs are involved.³³ For instance, Papua New Guinea engaged Sandline International 'to support its Armed Forces in the protection of its Sovereign territory and regain control over important national assets.'³⁴

Secondly, open support to the legitimate government during a NIAC is frequently grounded on self-defence. This occurs when there is evidence that the armed group fighting the government is receiving

²⁹ Cf art. 3(e) of UN General Assembly Res. 3314(XXIX).

³⁰ Cf. DynCorp website (<http://www.dyn-intl.com/news2008/news030408.aspx>).

³¹ It seems that the controversy pertains to the fact that the parliament was not informed of the possibility that the US (and a PMSC acting on its behalf) would be carrying out open combat operations on the Philippine soil, rather than lack of government consent to the conduct of such operations, v. 'Oversight body to probe US troops' involvement in combat', *Businessworld*, vol. XXII, no. 49, Thursday, October 2, 2008, available at <http://www.bworldonline.com/BW100208/content.php?id=077>.

³² Practice shows that since the establishment of the United Nations instances of intervention by virtue of a treaty stipulated *ante facto* have virtually disappeared, cf. Grado, *supra* note 16 and Gray, *supra* note 25, p. 214. There is no evidence of agreements concluded between a state and a PMSC before a need for the latter's intervention arises.

³³ According to Corten, *supra* note 17, p. 461 and pp. 480-481, this legal basis shows the third party intention to maintain a neutral attitude towards the conflict. In our opinion it is often difficult to distinguish between an operation aimed at maintaining law and order and direct intervention in the conflict.

³⁴ Sandline – PNG Agreement, preamble. As to assistance short of the use of force, mention can be made of an agreement signed between the Philippines and the United States which is based, *inter alia*, on fighting terrorists, see L. Panti, 'Changes in VFA on Hold, Adan Says', in *Manila Times*, 21 July 2008, available at: http://www.manilatimes.net/national/2008/july/18/yehey/top_stories/20080718top7.html. It should be noticed that the fight against terrorism does not constitute a new ground for intervention. Despite repeated declarations by some states that the 'was on terror' is a basis for a new interventionism, the change only concerns terminology, since fighting terror, at least in the terms that are relevant for this paper, concerns either maintenance of internal law and order. or self-defence (see the *US-Israel Memorandum of Understanding* of 16 January 2009 indicating that 'defense against terrorism' is included in 'self-defence').

external aid. The legality of the intervention in favour of the government in this case is well established.³⁵

Thirdly, especially since the early 1990s, intervention by invitation has more and more often been conducted either directly by the United Nations or under a Security Council authorization.³⁶ Interestingly, such evolution also concerns situations in which consent of the government was present.³⁷ In these cases a UN Security Council resolution adopted by virtue of Chapter VII constitutes the factor legitimising intervention, as we have seen above.

In short, these three elements attest to the increasing awareness of the international community that the conditions for a valid consent to external armed force in a non-international armed conflict are prone to abuse because of the difficulties connected to the determination of the authority competent to express consent. They indicate that the principle whereby the legitimate government is free to invite foreign armed forces to curb internal armed opposition is being the object of increasing restraints.³⁸ The only case where such freedom remains unlimited relates to those situations where the Security Council authorises intervention or opposition groups have received foreign armed assistance. It is submitted that it is also on account of the above evolution that no formal attribution of combat responsibility to PMSCs can be recorded since the 1990s.

B. Limitations to the Freedom of the Legitimate Government to Request Foreign Intervention

There are cases in which international law expressly forbids or limits resort to foreign intervention. We are referring to: 1) the use of force employed in contravention of the right to self-determination of peoples; 2) the prohibition to recruit mercenaries; 3) recourse to assistance measures violating provisions set forth in a Security Council binding resolution or in 4) an agreement concluded between the government and an armed opposition group. Obviously, foreign assistance is unlawful also if it entails the breach of another international obligation incumbent upon the requesting and/or requested state.³⁹

1. Respect for the Principle of Self-determination of Peoples

The freedom of the legitimate government to resort to aid and assistance by foreign states is limited not only by the principles prohibiting the threat and use of force as well as interference in internal affairs but also by the principle of self-determination of peoples. Recourse to force and any other form of foreign aid and assistance aimed at enhancing repression by the government of a people fighting for its self-determination is prohibited.

Preliminarily it must be stressed that this legal constraint is arguably pertinent to our analysis. Its relevance depends on the qualification of the nature of the armed conflict where a national liberation movement is fighting. With the adoption of art. 1(4) of Protocol I of 1977 the traditional view whereby

³⁵ See the detailed analysis by Corten, *supra* note 17, p. 467ff and Brownlie, *supra* note 7, p. 327.

³⁶ Gray, *supra* note 25, p. 70ff. and p. 113ff.

³⁷ Two requests for authorization to intervention forwarded to the Security Council are particularly relevant: the request for a multinational force intervening in Haiti to facilitate the return of the President Bertrand Aristide in 1994 and the request of Italy to conduct a humanitarian operation in Albania in 1997. In those instances the government (or deposed president) had openly expressed consent to intervention, but both that authority and the requesting states had not deemed it sufficient to intervene militarily; extensively on those cases cf Corten, *supra* note 17, p. 439ff.

³⁸ IDI Draft Report of 2007 concludes that 'International law does not prohibit any State to render military assistance to another State, subject, however to the latter's consent (request) and further legal conditions', p. 31.

³⁹ We refer in particular to the conventions limiting the use or transfer of certain weapons and to human rights rule.

such type of conflicts were internal in character has been abandoned in favour of the applicability to those states of the rules of humanitarian law pertaining to international armed conflicts, yet it cannot be affirmed with certainty that art. 1(4) has crystallised into a customary norm.⁴⁰

In any case, recourse to external aid and assistance to suppress a national liberation movement is prohibited regardless of the qualification of the conflict. This means that, for example, resort to the services of PMSCs in the territories occupied by Israel are in violation of the right of the Palestinian people to self-determination, inasmuch as they consist in activities aimed at repressing the national liberation movement, regardless of the qualification of the conflict.⁴¹

It should be noted that, if one accepts the view propounded by some legal scholars whereby the principle of self-determination of peoples is a *jus cogens* rule,⁴² consent cannot be invoked by the government as a circumstance precluding wrongfulness.⁴³

The issue arises of the applicability of this prohibition to PMSCs when the conduct of the company is not attributable to a state. In this regard reference must be made to the various resolutions of the General Assembly that have condemned armed intervention in favour of a government repressing a people fighting for its self-determination not only through the envoy of national units or armed groups but also by way of mercenaries.⁴⁴

2. Prohibition to Recruit Mercenaries

International law does not ban aid or assistance in any form – be it training, equipment or combat operations – by corporate companies *per se*. The only prohibition concerns resort to *individuals* who qualify as a mercenaries.⁴⁵ The question then arises of the possible qualification of PMSCs members as mercenaries.

As it will be shown below, it is difficult to classify PMSC members as mercenaries both under the definition contained in art. 47 of Additional Protocol I of 1977 and the 1977 OUA Convention⁴⁶ or the

⁴⁰ Cf N. Ronzitti, *Le Guerre di Liberazione Nazionale e il Diritto Internazionale*, Pisa, 1974 e A. Cassese, *Self-Determination of Peoples – A Legal Reappraisal*, Cambridge University Press, 1995, pp. 201-204. The ICJ advisory opinion on the *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* of 9 July 2004 seems to be based on the assumption of the customary nature of the rule because it held that the construction of the wall in Palestinian occupied territory infringed upon the right of that people to self-determination and at the same time concluded in favour of the application of the *ius in bello* rules pertaining to international armed conflict.

⁴¹ We shall underline that Israel is not a party to Protocol I. According to the NGO Who Profits, 'Private security firms guard settlements and construction sites in the occupied territories; some are also in charge of the day-to-day operation, security and maintenance of some of the checkpoints', available at http://www.whoprofits.org/Involvements.php?id=grp_inv_population#grp_inv_secu.

⁴² While a few scholars recognise the *jus cogens* nature of the principle of self-determination (see A. Cassese, *International Law*, Oxford, Oxford University Press, 2nd edn, 2005 pp. 65-67), the International Court of Justice has defined self-determination as 'one of the essential principles of contemporary international law' which creates *erga omnes* obligations (*Case Concerning East Timor*, ICJ, *Reports*, 1995, par. 29) but stopped short of defining it as a peremptory rule of international law.

⁴³ In addition, according to art. 41(2) of the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, a serious violation of a *jus cogens* rule entails the obligation, among others, not to render aid or assistance to the responsible state.

⁴⁴ Grado, *supra* note 16, p. 130.

⁴⁵ It is well known that the conditions to be fulfilled in order to be qualified as a mercenary are so stringent that make the category almost exclusively theoretical, see art. 47 Protocol I and the 1989 Convention.

⁴⁶ Convention on the Elimination of Mercenarism in Africa, Organization of African Union, 3 July 1977.

1989 UN Convention.⁴⁷ For our purposes two are the crucial questions: that a mercenary is an individual who is formally enlisted in the armed forces of the state by whom is paid and that he is recruited to fight.⁴⁸

The circumstance that the treaties outlawing mercenarism are either not widely ratified or not ratified by important powers renders the determination of such a category of fighters quite fuzzy. In particular it would be difficult to identify a customary law definition of mercenary. One of the reasons for such a lack of uniform practice and *opinio iuris* lies in the motivations leading a government to recruit mercenaries, namely lack of adequate combat resources or technical skills internally. This is the *raison d'être* also for the use of PMSCs in combat operations.

At a closer examination it seems that the opposition of states to an international rule prohibiting mercenarism is not due to the perception of that phenomenon as legal, but is rather related to the vagueness of the definition of mercenary.⁴⁹ This shows that there is a quest by the international community for a more stringent definition of mercenary, rather than no *opinio iuris* as to the illegality of that practice. As stated by the United Nations special *rapporteur* on the use of mercenaries, the organization 'has repeatedly condemned mercenary activities. There is no legal system that authorizes or tolerates them. Whether or not there is any gap or deficiency in the law, such activities are unlawful at the international level'.⁵⁰ Indeed, recently the Russian delegate to the Security Council has solicited treating the staff of these firms as mercenaries.⁵¹ The statement is important as Russia is not a party to the 1989 Convention against the Recruitment, Use, Financing and Training of Mercenaries.

However notice must be given of the differences between PMSCs and mercenaries. The main one relates to the fact that while mercenaries are almost exclusively used in situations that violate the self-determination of peoples and sovereignty of states,⁵² this is generally not the case with PMSCs intervening in favour of a government. The instances where governments have required withdrawal of PMSCs, the best know of which is the request addressed by the Iraqi government to Blackwater following the death of 17 civilians in Baghdad in September 1997, was not based on a threat to sovereignty as such but misbehaviour. Actually, the fact that Blackwater left Iraq as required is evidence to the maintenance of sovereign powers in the hands of the government. It is also difficult to envisage a PMSC taking control over a country up to the point of endangering its sovereignty.

In connection with the threat to sovereignty another more radical objection is raised and pertains to the lack of freedom of a government to resort to private entities to perform inherently governmental functions such as maintenance of internal security and order.⁵³ This argument seems to confuse cause and effect. It would be incongruous to blame a state for divesting itself from its obligations by attributing elements of governmental authority to a private company, which is supposedly more competent to perform some aspects of that authority, and at the same time hold that the state may be

⁴⁷ International Convention against the Recruitment, Use, Financing and Training of Mercenaries, United Nations, 4 December 1989.

⁴⁸ Fighting constitutes the very purpose of the recruitment of a mercenary. For this reason we believe that the fact that a person may become accidentally involved in fighting does not suffice for this criterion to be met on the basis of the relevant treaty rules. However there is no doubt that incidental fighting sparks the application of IHL rules inasmuch as it qualifies as direct participation in hostilities.

⁴⁹ This position is propounded by the United Kingdom, House of Commons, Committee on Foreign Affairs, *Report of the Sierra Leone Arms Investigation (second report)*, 27 July 1998, par. 93 available in full at <http://www.publications.parliament.uk/pa/cm199899/cmselect/cmffaff/116/11602.htm>.

⁵⁰ Commission on Human Rights, Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN E/CN.4/1998/31, 27 January 1998, para. 50.

⁵¹ Debate in the Security Council on the Report of the Secretary-General on the Protection of Civilians in Armed Conflict, S/PV.5781, 20 November 2007, p. 8.

⁵² Report cit. supra note 51, para. 50.

⁵³ Ibid, para. 38.

held internationally accountable for the conduct of the company. Actually, a state resorts to a PMSC in order to strengthen its authority, thus being able to abide by its international obligations, not to divest itself from it.⁵⁴ Nonetheless, the question bears weight in those instances in which the attribution to the state of acts of PMSCs is not forthcoming.⁵⁵

An analysis of the lawfulness of recourse to the services of PMSCs on the part of the legitimate government cannot eschew a discourse on the *ratio* of the ban on recruiting mercenaries. The rationale lies in the loathing towards employ of force that is driven not by a political objective but exclusive lucrative purposes. This appears to be also the very essence of the activity performed by a PMSC, namely offer of services in exchange for payment. Indeed this aspect seems to be stronger in PMSCs than mercenaries: practice shows that private firms only intervene in countries with rich natural resources, thus warranting the presumption that this circumstance assures provision of payment for the services offered. Indeed, foreign intervention in exchange for commercial concessions (usually oil or mining activities) has attracted the harshest criticism on the part of the international community.⁵⁶

A counter-argument is that also a state's motivations to intervention may be less noble than they appear at first sight. After all national interest of a state may encompass control over the natural resources of the country where the state intervenes. However, the question surrounding mercenaries, namely whether is 'peace in their interest, given that they would find themselves out of business'⁵⁷ fits the PMSC paradigm more than it does states, as the latter usually do not depend for their survival exclusively on the natural resources of another state.

The abhorrence towards mercenarism is also dictated by the necessity to maintain order among the armed forces. This attitude can also be discerned with respect to PMSCs. For instance, one of the reasons for Papua New Guinea not to implement the agreement with Sandline International of 1997, on the basis of which the government would have used the training and combat experience of the company in the attempt to defeat the secessionist Bougainville movement, was the opposition of the army.

Finally, two other factors that differentiate a PMSC member from a mercenary, namely maintaining a reputation as law-abiding organisations and their permanent existence as firms⁵⁸ do not hold at closer scrutiny. Evidence that a government avoids choosing a certain PMSC specifically on account of its not respectable record of observance of the law is extremely scant. It is competence and efficiency the quality that are predominantly searched for by the entities engaging these firms. As to the character of permanency, many PMSC reinvent themselves under new names with a certain degree of frequency.

On account of the similarity between the rationale behind the ban on mercenarism and the principal features of PMSCs, serious doubts arise as to the lawfulness under international law of recourse to PMSCs for activities in which the use of force is required.

⁵⁴ This concept is well expressed in the United Kingdom Green Paper on *Private Military Companies: Options for Regulation*, London: Stationery Office, 2002, para 54. An interesting question concerns the susceptibility of recourse to foreign private armed forces as a means for a state to discharge its positive obligations stemming from human rights treaties. On this point see European Court of Human Rights, *Ilascu and Others v. Moldova and Russia*, judgment of 8 July 2004 (Grand Chamber), para. 340.

⁵⁵ Extensively on the gaps in the law of state responsibility as applicable to PMSCs see Hoppe, *op. cit.* supra note 3.

⁵⁶ A. McIntyre and T. Weiss, 'Weak governments in search of strength – Africa's experience of mercenaries and private military companies', in Chesterman and Lehnardt (eds), *supra* note 3, p. 78.

⁵⁷ A. Vines, 'Mercenaries, Human Rights and Legality', in Abdel-Fatau Musah and J. Kayode Fayemi (eds), *supra* note 25, p. 189.

⁵⁸ UK Green paper, *op. cit.* supra note 55, para. 35.

3. Respect for Security Council Resolutions

Security Council resolutions adopted under Chapter VII of the Charter, which impose the withdrawal of foreigners from a certain country or decree an embargo on arms or other material, restrict the freedom of the government to involve a foreign actor to quell internal armed opposition. The obligation to respect and implement Security Council binding decisions rests primarily upon member states that must ensure their observance also on the part of the legal persons under their jurisdiction. For this reason the United Kingdom felt the urge to institute a parliamentary commission of enquiry when the violation of the arms embargo imposed on Sierra Leone by resolution 1132 (1997) committed by the British company Sandline was voiced.⁵⁹ Well known is also the case of the violation of the arms embargo decreed by the Security Council against Rwanda and Burundi by US private security firms,⁶⁰ as well as the breach of the arms embargo against Somalia by Select Armor.⁶¹

The obligation to respect and implement Security Council binding resolutions may be incumbent directly upon non-state actors. The practice of the Security Council in this sense is not old but consistent.⁶² For example, in resolution 864(1993) the Council warned UNITA, an armed opposition group, that it would decree trade measures against the armed group and restrictions on the travel of personnel unless the group complied with the peace agreement and previous resolutions.⁶³ From this practice it follows that any entity which is the addressee of a binding resolution has the obligation to ensure its respect also on the part of individuals or entities carrying out activities on its behalf. In other words, should an opposition group avail itself of the services of a PMSC and at the same time become the addressee of coercive measures taken by the Security Council, the reach of the resolution extends to the PMSC. In this case infringement of a Council resolution by a PMSC constitutes an unlawful act under international law independently of the existence of a link between the firm and a state.

4. Respect for Special Agreements Concluded between Conflicting Parties

In the agreements concluded between conflicting factions in those conflicts where the involvement for combat purposes of PMSCs was ascertained, namely Angola and Sierra Leone, the parties committed themselves to ensure that all foreign forces be withdrawn from the country. In this case, the continuous permanence of members of PMSCs of foreign nationality would have constituted a breach of the agreement.⁶⁴

The Lomè peace agreement signed on 30 November 1996 between the government of Sierra Leone and the Revolutionary United Front is particularly explicit in this respect and it also stands out as it expressly mentions Executive Outcomes as among the foreign troops that have to be repatriated. According to art. 12 of the peace agreement,

‘The Executive Outcomes shall be withdrawn five weeks after the deployment of the Neutral Monitoring Group (NMG). As from the date of the deployment of the Neutral Monitoring Group, the Executive Outcomes shall be confined to barracks under the supervision of the Joint Monitoring

⁵⁹ See supra note 50.

⁶⁰ O’Brien, supra note 24, p. 56.

⁶¹ C. Lehnardt, ‘Private military companies and state responsibility’, in Chesterman and Lehnardt (eds), supra note 3, p. 139.

⁶² P. Kooijmans, ‘The Security Council and non-state entities as parties to a conflict’, in K. Wellens (ed), *International Law: Theory and Practice – Essays in Honour of Eric Suy*, The Hague: Nijhoff, 1998, pp. 333-346

⁶³ Security Council Resolution 864, 15 September 2003, para 26.

⁶⁴ The question of the legal nature of such agreements, in particular whether they qualify as international treaties goes beyond the scope of this paper. On this issue see R. Goy, ‘Quelques accords récents mettant fin à des guerres civiles’, *AFDI*, 1992, p. 126, Kooijmans, op. cit. supra note 63, p. 388, E. Roucounas, ‘Peace agreements as instruments for the resolution of intrastate conflict’, in UNESCO, *Conflict Resolution: New Approaches and Methods*, Paris, 2000, esp. pp. 116-120 and C. Bell, ‘Peace Agreements: Their Nature and Legal Status’, *AJIL*, 2006, esp. p. 391

Group and the Neutral Monitoring Group. Government shall use all its endeavours, consistent with its treaty obligations, to repatriate other foreign troops no later than three months after the deployment of the Neutral Monitoring Group or six months after the signing of the Peace Agreement, whichever is earlier.’

It is difficult to establish whether this clause is indicative of the illegality of this type of assistance⁶⁵ or only a pre-condition rebels advance to sit at the negotiating table. However, the fact that in the subsequent peace agreement signed in Lomè on 7 July 1999, which terminated the conflict, a similar undertaking was reiterated offers an argument in support of the *ius ad bellum* relevance of this provision.⁶⁶

Interestingly, an analogous engagement was entered into by UNITA in Annex 1/A to the Memorandum of Understanding - Addendum to the Lusaka Protocol for the Cessation of Hostilities and the Resolution of the Outstanding Military Issues under the Lusaka Protocol concluded between the Angolan government and UNITA.⁶⁷

C. *Intervention in Favour of an Armed Opposition Group*

It is a well-settled principle under international law that armed opposition groups cannot receive *any* form of aid or assistance by third states, also short of the envoy of troops. According to the type of support provided, such activity would violate the principle of non intervention or amount to a violation of the prohibition of the threat and use of force.⁶⁸ Hence there can be no doubt that *prima facie* the intervention of Sandline International in favour of the Revolutionary United Front in Sierra Leone, the combat operations conducted by Executive Outcomes in Angola on behalf of the UNITA opposition group, the actions allegedly conducted by DynCorp in favour of rebels in Colombia⁶⁹ and MPRI involvement in arms trafficking from Uganda to the Sudanese People’s Liberation Army⁷⁰ constitute a breach of international law.

The only exception that traditional international law admits to the above rule relates to the existence of recognition of belligerency⁷¹ and, to some extent, recognition of insurgency.⁷² Following recognition of belligerency, third states are bound by neutrality rules. This means that they can offer any type of aid and assistance to the opposition group on condition that they do it impartially, that is, they do not

⁶⁵ According to Douglas, *supra* note 10, p. 187, foreign military intervention on the part of private entities was seen at least as an ‘anomaly’ that created embarrassment for the government.

⁶⁶ Art. XVIII of the agreement of 7 July 1999 is more wide-ranging than art. 12 of the preceding engagement as it refers to the withdrawal of ‘all mercenaries, in any guise’ from Sierra Leone immediately upon the signing of the Agreement. Such a sweeping wording presumably includes also members of PMSCs working for rebel groups.

⁶⁷ According to art. 1.1 of the agreement, ‘The parties recognize the existence of foreign military forces in areas of the national territory under control of the UNITA military forces, namely units consisting of Congolese citizens from the DRC and units composed of citizens of the DRC and of Rwanda of Tutsi-Banyamulenge and Hutu origin, and the need to proceed to their urgent repatriation.’ This wording seems to implicitly exclude the application of this undertaking with respect to PMSCs, as the members of the companies operating in the area were mainly from the West.

⁶⁸ International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, *ICJ Reports 1986*, p. 126 (hereafter *Nicaragua case*)

⁶⁹ P.W. Singer, *Corporate Warriors – The Rise of the Privatized Military Industry*, Itaca, NY: Cornell University Press, 2003, p. 137.

⁷⁰ O’Brien, *supra* note 24, p. 62.

⁷¹ For the view that the recognition of belligerency is increasingly desuete see A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006, p. 271ff.

⁷² According to a customary principle, when an armed opposition group acquires control over a portion of the territory with a certain degree of stability, they reach the status of insurgents, see Oppenheim, *International Law*, Jennings and Watts (eds.), London, 9th ed. 1992, pp. 161-176.

take a discriminatory attitude.⁷³ In case of a recognition of insurgency,⁷⁴ third states must abstain themselves from intervening in favour of either parties as they would otherwise influence the outcome of the conflict. Such recognition only allows third parties to take contacts with the insurgents to safeguard their own interests, for example for the sake of protecting their nationals on the territory under the control of the armed group,

D. Intervention in Favour of a National Liberation Movement

Another limitation posed by international law to the freedom of the legitimate government to resort to external aid and assistance in case of internal conflict consists in the intervention of a third party in favour of a national liberation movement. A customary rule exists whereby a people that is forcefully deprived of its right to self-determination has the right to receive assistance by third states (so called right of resistance). However, despite the contrary view being propounded by a number of non-western states, a general rule of international law allowing the sending of troops to assist a national liberation movement cannot be said to have crystallised.⁷⁵ Hence the legality of such assistance is limited to support short of direct military intervention. This limitation applies also if the third party intervening in favour of a national liberation movement is a PMSC.⁷⁶

3. The Legal Status of PMSCs in Non-international Armed Conflicts and their Scope of Protection

Addressing the question of the legal status of PMSCs in NIAC is troublesome as in this type of conflict the very term 'status' was a source of controversy during the negotiations leading to art. 3 common to the Geneva Conventions of 1949 and additional Protocol II of 1977. It is a fact that even the expression 'party to a conflict' used in common art. 3 in 1949 appeared as subversive in 1977 and was therefore discarded in the final draft. In addition, the will of the contracting parties not to affect the legal status of the powers ratifying the above treaties was expressly voiced in common art. 3 (*in fine*) and was inserted also in Protocol II via the provision specifying that the Protocol did not modify the 'existing conditions of application' (art. 1, par. 1) of art. 3. Although the issue of legal status in a NIAC is not as weighty as in an international conflict, as no prisoner of war status exists, the question of the existence of a link to a party to the conflict is necessary to establish the type of protection and treatment guaranteed by international law.

This having been said, subtracting armed opposition groups to the exclusive application of domestic law follows logically, at least when certain conditions are met, by one of the fundamental tenets of international law, namely the principle of effectiveness. Indeed, although through different legal arguments, legal doctrine unanimously recognises the applicability of common art. 3 and Protocol II to

⁷³ A distinct question is whether intervention by a PMSC as such in favour of an opposition group internationalises the conflict. The answer must be in the negative unless the PMSC acts on behalf of a state.

⁷⁴ The most recent clear-cut occurrence of recognition of insurgency concerns Biafra in 1967. Doubts exist as to the recognition of insurgency to the Southern People's Liberation Army (SPLA) of Southern Sudan. Actually, according to the Implementation of the Cease Fire Agreement on Security Agreement, 31 December 2004, para. 1.8, the SPLA has repeatedly affirmed that would treat government detainees as prisoners of war, but the government has never confirmed that it would afford the same treatment to SPLA captured personnel. A recent example of a recognition of insurgency is the appeal made by the President of Venezuela on 17 January 2008 to the effect that the FARC be recognised as belligerents by the Government of Colombia. Despite the endorsement of the Venezuela Parliament (Janicke, 'Venezuelan Legislature Supports Belligerent Status for Colombian Rebels', 19 January 2008, available at <http://www.venezuelanalysis.com/print/3080>), there was no follow-up to the appeal either by the Colombian authorities or the international community.

⁷⁵ Ronzitti, *supra* note 40, pp. 116-123; Cassese, *supra* note 40, pp. 152-153 and 199-2000 and Gray, *supra* note 25, p. 61.

⁷⁶ On this aspect see the remarks made above, par. I.2.1.

non-state actors,⁷⁷ hence admitting the relevance of the status also for the party confronting the legitimate government.

In order to avoid contentious status issues, it has rightly been proposed that the term ‘fighter’ should be used for any person who takes direct part in hostilities in a NIAC.⁷⁸ Although we find merits in the employ of the broad category of ‘fighter’, as a matter of clarity for the purposes of this paper we stick to the categories that can be factually distinguished in a NIAC, namely: 1) persons belonging to the armed forces of the legitimate government; 2) persons belonging to an armed opposition group (regardless of whom they are opposing to); 3) mercenaries; 4) civilians. We shall see at what conditions may PMSC members fall under each category and whether a PMSC *as such* may be considered as a separate addressee of IHL obligations.

A. *Persons Belonging to the Armed Forces of the Legitimate Government*

IHL uses the expression ‘armed forces’ with respect to both international armed conflicts⁷⁹ (art. 43 of Protocol I) and NIAC⁸⁰ without defining it. The issue of definition has been discussed in legal doctrine where two main lines of interpretation have emerged.⁸¹ According to some, the silence of IHL shall be construed as devolving the question entirely to domestic law. In our opinion this view is propounded also by the circumstance that Additional Protocol I of 1977 establishes an obligation to notify the other parties when a party to a conflict ‘incorporates a paramilitary or armed law enforcement agency into its armed forces’ (art. 43(3)).⁸² Others hold that IHL adopts a *de facto* criterion whereby determination of membership in the armed forces of a state is based on the function a person carries out in an armed conflict context.⁸³ Restricting our analysis to the notion of armed forces that applies to NIAC,⁸⁴ the expression can only be found in art. 1(1) of Additional Protocol II of 1977 concerning the material field of application. The terms are used both with reference to the armed forces of a High Contracting Party in the territory of which the armed conflict takes place and to ‘dissident armed forces’ with which the High Contracting Party is confronted.

According to the *travaux préparatoires* the expression armed forces of a High Contracting Party ‘means *all* the armed forces – including those which under some national systems might not be called

⁷⁷ See S. Sivakumaran, ‘Binding Armed Opposition Groups’, *ICLQ*, 2006, pp. 369-394 and doctrine therein referred to.

⁷⁸ M. Schmitt, C. Garraway and Y. Dinstein, *The Manual on the Law of Non-International Armed Conflict – With Commentary*, International Institute of Humanitarian Law, Sanremo, 2006, para. 1.1.2(a).

⁷⁹ Cf. art. 1 and 3 of Regulations Respecting the Laws and Customs of War on Land, Annex to 1907 Hague Convention IV. Art. 43 of Protocol I of 1977 broadens the scope of the terms ‘armed forces’ so as to include those ‘groups and units which are under a command responsible to [a] Party for the conduct of its subordinates’, beyond ‘all organized armed forces’. Yet it fails to define what are ‘organized armed forces’.

⁸⁰ Cf. art. 1(1) of Protocol II of 1977.

⁸¹ For a summary of the main arguments see International Committee of the Red Cross (ICRC) and TMC Asser Institute, *Third Expert Meeting on the Notion of Direct Participation in Hostilities, Summary Report*, Geneva, 23-25 October 2005, pp. 74-78.

⁸² As explained in Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 2 August 1949*, Geneva: Nijhoff, 1987 (hereafter: *ICRC Commentary on the Additional Protocols*), p. 517, para. 1682-1683, art. 43(3) of Protocol I was added in order to clarify that police forces may become part of the armed forces in wartime according to the internal law of some countries. Had the Convention adopted a *de facto* standard, such clarification would have been redundant.

⁸³ In this sense see also *Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions*, University Centre for International Humanitarian Law, Geneva, 29-30 August 2005, p. 12.

⁸⁴ From the *ICRC Commentary on the Additional Protocols* (with reference to art. 43 of Protocol I, see pp. 509-511, esp. para 1672), it seems to emerge a distinction between the notion of armed forces of a state (i.e. ‘regular armed forces’) and the armed forces of other parties to a conflict (i.e. ‘irregular armed forces’) belonging to a national liberation movement, an organized resistance movement and eventually also to an international organisation.

regular forces’⁸⁵ (emphasis in the original) but does not include ‘other governmental agencies the members of which may be armed’ such as law enforcement bodies and paramilitary agencies. The rationale seems to be that the latter organisations are normally not incorporated by internal law in the state’s army.

The last remark indicates a difference between the notion of armed forces contained in the two additional protocols concerning notification to the counterpart of the incorporation of those units into the armed forces. Such a notification is compulsory only in international conflicts.⁸⁶ Although notification is not constitutive of status, the purpose it pursues, i.e. facilitating distinction between combatants and civilians, would justify application also in NIAC. Thus the question arises of the reasons why this obligation of notification was not included in Protocol II. It is submitted that this absence has two motivations: on the one hand, armed opposition groups are expected to know the internal law of their country;⁸⁷ on the other, the parties to Protocol II were presumably reluctant to commit themselves to the obligation of notification to the opposition group because such a measure could be seen as legitimizing the group.

In brief, the above difference between the two protocols concerning a procedural matter does not warrant the conclusion that the notion of armed forces applicable in a NIAC is substantially different from that adopted in international conflicts.⁸⁸

Despite this, we are left with a dichotomy between regulation by domestic law and reliance on the functional criterion. It is suggested that IHL establishes a different regime according to the type of armed forces we are dealing with. Whereas membership in the regular armed forces of a High Contracting Party is governed by domestic law, membership in irregular forces (such as militias or volunteer groups) can also (and sometimes only) be established according to a functional criterion. Reference to the law of international armed conflicts helps illustrating the matter.

The Third Geneva Convention of 1949 Relative to the Treatment of Prisoners of War clearly distinguishes between ‘members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces’ (art. 4(A)1) from ‘members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict’ (art. 4(A)2) and sets out only for the latter group the obligation to

⁸⁵ This is the intention of the drafters of the Protocol as can be deduced by *Acts of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts*, Geneva (1974-1977), vol. X, p. 94 (CDDH/I/238/Rev.1, p. 2). In relation to this point, the *ICRC Commentary on the Additional Protocols*, p. 1352, para. 4462 adopts a position that is arguably consonant with the *travaux* as it states that ‘[t]he term “armed forces” of the High Contracting Party should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested such as, for example, “regular armed forces”, in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force)’. As affirmed in the text, in our view the *travaux* can be interpreted in a different way, where they specify that ‘according to the views stated by a number of delegations, the expression [armed forces] would not include other governmental agencies the members of which may be armed; examples of such agencies are the police, customs and other similar organizations’.

⁸⁶ Art. 43(3) of Protocol I.

⁸⁷ This means that armed opposition groups are presumed to be aware of the fact that domestic law provides for incorporation of law enforcement bodies into the armed forces in time of armed conflict.

⁸⁸ According to M. Bothe, K.J. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, The Hague: Nijhoff (1982) p. 672, the two Protocols contain the ‘essential ingredients’ of the concept of armed forces when they refer to the armed forces of a High Contracting Parties. By ‘essential ingredients’ they mean the link to one of the parties to the conflict, organisation of the armed force and responsible command. See also the *Third Expert Meeting on the Notion of Direct Participation in Hostilities, Summary Report*, supra note 81, where it is affirmed that it is ‘unlikely’ that the criteria for membership in the armed forces of a High Contracting Party fighting in a NIAC were different from an international conflict, p. 74 and ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities in International Humanitarian Law*, Geneva, 2009, (hereafter: *ICRC Interpretative Guidance on DPH*) pp. 30-31.

respect the four conditions for lawful combatancy.⁸⁹ A terminological distinction is thus made between those members ‘forming part’ of the armed forces’ and those ‘belonging to a Party to the conflict’. The difference is also in substance: the lawful combatancy criteria are implicit for members of regular armed forces while they are constitutive of the status for irregulars.

One may object that the customary rule concerning the notion of lawful combatant does not correspond to that set out in art. 4(A)1 and art. 4(A)2 of the Third Geneva Convention because it has been superseded by the one included in art. 43 of Protocol I.⁹⁰ We are not convinced about the correctness of this remark since most of the states that have not ratified the protocol have done so rightly to avoid equal treatment between regular and irregular armed forces. In other words, there is no coincidence –at least for the states not parties to Protocol I – between members of the armed forces and combatants: while all members of the armed forces are combatants, the contrary is not true.⁹¹

Domestic law definitely governs membership in the armed forces, while membership in irregular groups is regulated by IHL according to a *de facto* criterion based on the function a group carries out and the existence of the link with the government.⁹² This means that under IHL the notion of combatant applicable in an international armed conflict is generally broader than the notion of armed forces adopted under domestic law.

The same is true also for NIAC. For example, in the Sudanese region of Darfur the Janjaweed militias were only exceptionally incorporated into the Sudanese armed forces, though belonging to a Party to the conflict (the Sudanese government).⁹³ With respect to liability to attack and responsibility under international law their treatment is the same as that accruing to members of the armed forces.

This issue is prominent with respect to PCMs because it shows that lack of formal enlistment in the armed forces of a state in a NIAC⁹⁴ does not exclude qualification of private actors acting on behalf of the state as organs of that state under international law.⁹⁵ This is so because IHL merely requires satisfaction of a functional relationship between the non-state entity constituting an irregular armed

⁸⁹ Also a literal reading of art. 1 (*in fine*) of the Regulations Respecting the Laws and Customs of War on Land, Annex to the 1907 Hague Convention IV, whereby ‘In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army”’ induces to conclude that there may be militias or volunteer corps which, though qualifying as lawful combatants and having a link to a party to a conflict, cannot formally be classified as members of the armed forces.

⁹⁰ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Cambridge: Cambridge University Press, 2005, vol. I, p. 16, resolutely affirm that the definition in art. 43 of Protocol I ‘is now generally applied to all forms of armed groups who belong to a party to an armed conflict to determine whether they constitute armed forces. ... All those fulfilling the conditions in Article 43 of Additional Protocol I are armed forces.’ Hence they implicitly conclude in favour of a coincidence between the notions of combatant and member of the armed forces as a matter of customary law (see rules 4 and 5).

⁹¹ For example, members of armed resistance movements in occupied territory qualify as combatants but not as members of the armed forces.

⁹² This distinction has been recently propounded also by *ICRC Interpretative Guidance on DPH*, p. 31.

⁹³ *Report of the International Commission of Inquiry on Darfur to the UN Secretary-General*, 25 January 2005, para. 108.

⁹⁴ This is the exception and has occurred only in Sierra Leone, Zarate, *supra* note 2, p. 124, and was foreseen for the members of Sandline International in Papua New Guinea (according to art. 2.1(h) of the Agreement for the Provision of Military Assistance Between the Independent State of Papua New Guinea and Sandline International, 31 January 1997, all personnel of Sandline International was to be enrolled as ‘Special Constables’.)

⁹⁵ As it is well known the standard for the attribution of the act of a private or an irregular group to a state is not settled, cf. International Court of Justice, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua. v. United States of America)*, Judgment of 27 June 1986 (merits), para. 115; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Tadic*, Case No. IT-94-A, Judgment of 15 July 1999 (Appeals Chamber), para. 145; International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 27 February 2007, para. 413 and International Law Commission, *Report to the General Assembly on the work of its 53rd session (2001)*, UN Doc. A/56/10, Draft Article 8, Commentary, par. 5.

force and the state. In short, only the *combination* of the domestic law approach and the functional criterion allows encompassing the multiform phenomenon of PMSCs acting in NIAC as organs of a state, that is, members of the armed forces.

Finally, should a PMSC member fall under the category of armed forces or qualify as member of an irregular group having a link with the government, he/she does not enjoy immunity from attack.⁹⁶

B. *Persons Belonging to an Armed Opposition Group*

A legal status is accorded by IHL to those armed groups that fulfil certain conditions that are today codified in art. 1 of Additional Protocol I (organization, existence of a responsible command, control exercised over a part of the territory so as to enable the group to conduct sustained and concerted military operations and to implement the Protocol). When these features are present, the group attains the status of insurgents.⁹⁷ Some IHL treaty rule refer to non-state parties but fail to clarify the content of this notion.⁹⁸ In particular art. 3 common to the Geneva Conventions contains a reference to the obligations accruing to 'each Party to the conflict' in the case of non-international armed conflict occurring on the territory of one of the contracting parties,⁹⁹ but does not assist in identifying the precise content of the notion.

As a starting point we can assume that the notion of armed opposition group is narrower than the notion of non-state entity. This position has been adopted by the Institut de Droit International, that has specified that the expression 'non-state entity' 'includes' the entities that fulfil the conditions set forth in common art. 3 and additional Protocol II, hence admitting the existence of entities other than those provided for in IHL treaties.¹⁰⁰ Lack of a normative definition of the expression armed opposition group and the great variety in which such entities manifest themselves raise the question of the features that a group must have in order to be subject to IHL rules.

The avenue consisting in the importance attached to the organisation of the group has been pursued by the International Criminal Tribunal for the Former Yugoslavia (ICTY) which, since its early cases, has held that the organisation of an armed group was a necessary element to determine the existence of an armed conflict as opposed to acts of banditry, internal disorders or terrorist activities.¹⁰¹

In a recent case, *Boskoski and Tarculovski*, after having surveyed the factual elements that the ICTY judges had taken into account in previous cases to assess the level of organization attained by an armed group, the trial chamber has divided those elements into five broad groups, namely: presence of a command structure; capacity of the group to carry out operations in an organised manner; level of

⁹⁶ This principle, which is now crystallised in a customary rule, can be considered applicable to NIAC also by virtue of art. 13(3) of Additional Protocol II. See also the *ICRC Commentary on the Additional Protocols*, with reference to art. 13 of Protocol II, p. 1453, according to which: 'Those who belong to armed forces or armed groups may be attacked at any time'.

⁹⁷ See Cassese, *supra* note 42, pp. 124-131.

⁹⁸ See art. 1 of Hague Regulations of 1907 which refers to militia and volunteer corps; and also art. 8(2)(f) of the Rome Statute of the International Criminal Court.

⁹⁹ For a detailed analysis of this article in light of the *travaux préparatoires*, doctrinal positions and the implications for a definition of the notion of armed opposition group see L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, 2002, pp. 134-136.

¹⁰⁰ Institut de Droit International, *Resolution on the Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities Are Parties*, art. I, para. 2 (the authoritative text is French, where the word 'comprend' ('include' in English) is used. Surprisingly, in the English translation the term 'means' was preferred. One may think of national liberation movements, de facto entities not recognised as having the features to become parties to the Geneva Conventions such as Somaliland, and international organizations, as non-state entities other than armed opposition groups.

¹⁰¹ *Prosecutor v Tadic*, Interlocutory Decision on Jurisdiction, Appeals Chamber, 2 October 1995, para. 70 and the Opinion and Judgment of 7 May 1997 in the same case, para. 562.

logistics; level of discipline and ability to implement the basic provisions of art. 3 common to the Geneva Conventions; representative character of the group and ability to speak with one voice.¹⁰² These indicative factors are relevant to our analysis as they were devised to be used in situations of non-international armed conflicts.¹⁰³ However, despite the flexible approach adopted by the Tribunal, its exclusive reliance on preceding judgements may prove to be a weak point.¹⁰⁴ Actually some internal practice may lend support to the conclusion that a broader notion of armed group is more suitable. For example, the Justice and Peace Law adopted in 2005 by the Colombian parliament, which aims at obtaining demobilization of armed groups committed to the achievement of peace, defines an 'illegal armed group' as 'a guerrilla or self-defence group, or a significant and integral part of them such as *blocks*, fronts, or other modalities of these same organizations'.¹⁰⁵ It is difficult to infer from this definition that every group taken into account by the law actually respects the indicative factors proposed in *Boskoski and Tarculovski*.

Certain opposition groups have their own armed forces.¹⁰⁶ Clearly also those forces fall under the category of 'armed groups' as much as do 'dissident armed forces' as referred to in art. 1(1) of Additional Protocol II,¹⁰⁷ the only difference between the two being that the latter are composed of former members of the state's armed forces, while the former are not.¹⁰⁸

Two hypotheses must be distinguished with respect to the possibility that PMSCs fall into this category: in the first place, PMSC members contribute to the formation of an armed group; in the second place, a PMSC *as such* qualifies as an armed group. Practice shows that there have been examples of the first hypothesis. It is well known that PMSCs operated, also through combat operations, in Sierra Leone on behalf of the Revolutionary United Front and in Angola for UNITA.¹⁰⁹ In those instances there was no doubt about the existence of a *de facto* link between the members of the PMSC and the party opposing the government. Actually a factual link with the group is both necessary and sufficient for an individual to be considered as belonging to the latter.¹¹⁰ No evidence of the second hypothesis has been found, in any case the same organizational criteria that have been above referred to would have to be satisfied by the company to qualify as an armed group by virtue of IHL.¹¹¹

¹⁰² *Prosecutor v Boskoski and Tarkulovski*, trial judgment, 10 July 2008, paras 199-2003.

¹⁰³ In situations of peace, the notion of armed opposition group might be broader so as to encompass any group that poses a threat to the security of the state, such as organized crime associations.

¹⁰⁴ Critical with respect to this element also A. Cullen, M. Divac Öberg, 'Prosecutor v. Ramush Haradinaj et al.: Threshold of Non-international Armed Conflict in International Humanitarian Law', *ASIL Insights*, 23 April 2008, available at: <http://www.asil.org/insights080423.cfm>.

¹⁰⁵ Art. 1, para. 2, Law No. 975, 17 July 2005, Issuing Provisions for the Reincorporation of Members of Illegal Armed Groups Who Effectively Contribute to the Attainment of National Peace, and Other Provisions for Humanitarian Accords Are Issued.

¹⁰⁶ This factual element has been sanctioned in a number of agreements stipulated between a government and an armed opposition group that contain references to the 'armed forces' of the rebels. See e.g. art. 1.11 of the Agreement on Permanent Ceasefire and Security Arrangements – Implementation Modalities during the pre-interim and the interim Periods – Between the Government of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, Naivasha, 31 December 2004, and art. 1 of the Agreement on a Ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam, 22 February 2002.

¹⁰⁷ For the assimilation of the notion of 'dissident armed forces' with 'the essential idea of an "insurrectional movement"' see the Commentary of the International Law Commission to the Draft Articles on State Responsibility, *supra* note 95, p. 115, par. 9.

¹⁰⁸ *ICRC Commentary on the Additional Protocols*, p. 1351, par. 4460.

¹⁰⁹ See *supra* note 24.

¹¹⁰ In this sense see Boldt, *supra* note 2, p. 52.

¹¹¹ In this case those criteria apply *ratione personae* and not *ratione materiae*.

If a PMSC member or the PMSC as such fall into the category of armed groups, they are liable to lawful attack *durante bello interno*. It is however unclear whether they can be attacked at all times or only for the duration of their active participation in hostilities. This ambiguity stems from the unclear status of the members of an armed opposition group as combatants (in an a-technical sense) or civilians under customary law.¹¹² Nor are treaty rules helpful since there is only one article touching upon the issue and it merely stipulates that the protection of the treaty can be enjoyed by civilians ‘unless and for such time as they take a direct part in hostilities’ without further specification.¹¹³

On this point only the *ICRC Commentary on the Additional Protocols* is unequivocal as it clarifies that ‘Those who belong to armed forces or armed groups may be attacked at any time’.¹¹⁴ Some state practice, for instance a series of acts carried out by the US-led operation *Enduring Freedom* in Afghanistan, tend to indicate that members of armed opposition groups are assimilated to members of armed groups rather than civilians taking a direct part in hostilities, as they are made the object of attack also when they do not take a direct part in hostilities. The recent *ICRC Interpretative Guidance on the Notion of Direct Participation in Hostilities under IHL* convincingly argues in favour of the mutual exclusiveness of the notions of organised armed groups and civilians¹¹⁵ on the basis of the ‘wording and logic’ of common art. 3 to the Geneva Conventions and Additional Protocol II, and it concludes that in NIAC ‘organized armed groups constitute the armed forces of a non-State party to the conflict’.¹¹⁶ Interestingly, according to this study, under IHL ‘the decisive criterion for individual membership in an organised armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities’, i.e. if the person assumes ‘continuous combat function’.¹¹⁷ The study explicitly applies this criterion to PMSCs.¹¹⁸

C. Mercenaries

The issue of the qualification of PMSC members as mercenaries has been discussed since the early days of the debate on military companies. We agree with the majority view that only in extremely rare instances may PMSC staff fall under the current definition of mercenary.¹¹⁹ It should also be noted that, as one of the conditions for mercenary status is enlistment in the armed forces of a foreign country, technically mercenaries fall under the category of ‘armed forces’.

The question does not change in relation to NIACs, as the two relevant conventions on mercenaries¹²⁰ are generally considered applicable irrespective of the type of conflict the mercenary fights.¹²¹ We only briefly mention that, should a PMSC member qualify as a mercenary, he/she would be a

¹¹² A.P.V. Rogers, *Law on the Battlefield*, Manchester University Press, 2nd ed., 2004, pp. 32-33, and Henckaerts and Doswald-Beck, vol. I, supra note 90, p. 19. Extensively on this point specifically concerning PMSCs in NIAC see Doswald-Beck, supra note 3, pp. 129-131.

¹¹³ Art. 13(3) of Protocol II.

¹¹⁴ *ICRC Commentary on the Additional Protocols*, p. 1453, para. 4789.

¹¹⁵ *ICRC Interpretative Guidance on DPH*, pp. 27-29.

¹¹⁶ *Ibid.*, p. 36.

¹¹⁷ *Ibid.*, p. 33.

¹¹⁸ *Ibid.*, p. 39.

¹¹⁹ See Zarate, supra note 2, esp. pp. 120-145, Boldt, supra note 2, pp. 532-535, and L. Cameron, ‘Private military companies: their status under international law and its impact on their regulation’, *IRRC* (2006) pp. 580-582.

¹²⁰ OUA Convention for the Elimination of Mercenarism in Africa (1977) and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989).

¹²¹ The only difference is that the OUA Convention defines a mercenary by reference to his/her fighting in ‘armed conflict’ (see art. 1), while the international convention’s definition covers also participation 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 (art. 2(a)).

legitimate objective of attack. It is however unclear whether for protective purposes a mercenary is assimilated to a member of an armed group or to a civilian taking a direct part in hostilities.

In addition, a member of a PMSC who qualifies as a mercenary would be liable to national criminal proceedings for having committed an illicit act,¹²² while the state that has ratified one of the conventions against mercenarism is subject to the obligation to prosecute or extradite.

D. Civilians

The category of civilians is residual with respect to combatants (in a a-technical sense, see *supra* para. II.1), including mercenaries.¹²³ It is unclear whether armed groups are to be assimilated to civilians or to members of the armed forces, but a trend is developing in the sense that they should be equated to members of the armed forces (see *supra* para. II.2).

PMSC members are likely to fall into the category of civilians especially in two cases. In the first place, if they are not formally enlisted as forming the armed forces of the territorial state and have no link to the state. In the second place, if they accompany the armed forces of a state. For example, US legislation gives this formal qualification to contractors for the Ministry of Defence.¹²⁴ Interestingly the status of civilians accompanying the armed forces finds a normative basis in the Third Geneva Convention of 1949 (art. 4(A) 4 and art. 5), hence it applies in international armed conflict, whereas the US legislation does not distinguish on the basis of the nature of the conflict. The inclusion of civilians accompanying the armed forces of an armed group into the category of ‘civilians’ may be problematic as in a NIAC it is doubtful whether armed groups should be equated to the armed forces or to civilians taking active part in hostilities for the purposes of attack. The *ICRC Interpretative Guidance on DPH* assimilates them to civilians when they accompany both the state’s armed forces and armed groups because they do not perform a ‘continuous combat function’.¹²⁵

The determination of the activities that amount to direct participation in hostilities and the duration of such participation is crucial in NIAC, as only in this hypothesis can a civilian become a legitimate object of attack for such time as he/she participates in the hostilities.¹²⁶ Furthermore, should a civilian carry out ‘continuous combat functions’ on behalf of a party to the conflict, he/she would lose the civilian status and become, depending on the circumstances, an organ of the state or a member of an organised armed group.

¹²² Despite the obligation to introduce national legislation criminalising not only the conduct but also recruit of mercenarism, very few states have done so to date.

¹²³ The definition of civilian given in art. 50 of Protocol I, whereby all those who do not qualify as combatants are civilians, was deleted during the simplification process preceding the adoption of Protocol II. Yet the definition is certainly customary, see Henckaerts and Doswald-Beck, *supra* note 90, vol. I, p. 17, where it is affirmed the existence of a customary rule according to which ‘civilians are persons who are not members of the armed forces’. For the reasons explained in par. II.2, we believe that the customary rule defines as civilians all persons who are not ‘combatants’ (instead of ‘members of the armed forces’).

¹²⁴ US Joint Chief of Staff, *Doctrine for Logistic Support of Joint Operations*, Joint Pub. 4-0, Section 12(a).

¹²⁵ *ICRC Interpretative Guidance on DPH*, p. 34.

¹²⁶ See art. 13(3) of Protocol II, according to which ‘Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities’.

Despite the endeavour of the ICRC to clarify the notion,¹²⁷ the concept of direct participation in hostilities remains largely unsettled. Only two elements can be safely discerned: first, the type of activity that is carried out; second, the duration of the activity. As to the first element, the Israeli Supreme Court in the *Targeted Killings* case has listed the activities that certainly amount to direct participation –as opposed to mere contribution to the war effort - though cautioning about the lack of agreement in the international community on any such list.¹²⁸ As to duration, the Court distinguished between ‘occasional’ and ‘permanent’ participation.¹²⁹ Beyond those extremes, the Court admits that no customary rule has crystallized hence each case must be examined individually.

The key point thus becomes what type of activity is carried out by a PMSC. Should the company be formally entrusted with tasks including combat operations, it would be easier to take the membership criterion as determinative of liability to be attacked at any time. On the contrary, if the company is not mandated to carry out combat operations, its members are liable to attack only during the concrete time of commission of the hostile act and in the immediate preparation or termination of it. In other words, apart from the extreme cases in which a PMSC is explicitly hired to fight, a company member who takes a direct part in hostilities can only be targeted for a short time.¹³⁰

In short, the question of direct participation in hostilities for PMSCs is as delicate as for any other subject and should be addressed with extreme caution. Each situation has to be dealt with on a case by case basis. For the purposes of this paper what needs emphasising is that no difference exists between the application of this notion in international and non-international armed conflicts.

¹²⁷ The ICRC *Interpretative Guidance on DPH* establishes a complex system to determine whether an individual participates directly in hostilities by requiring cumulative existence of these three elements: threshold of the harm likely to result from direct participation in hostilities; direct causation between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part; and belligerent nexus (the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another).

¹²⁸ *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, 13 December 2006, para. 34: ‘a person who collects intelligence on the army, whether on issues regarding the hostilities [...], or beyond those issues (see Schmitt, at p. 511); a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may. All those persons are performing the function of combatants. The function determines the directness of the part taken in the hostilities [...]. However, a person who sells food or medicine to an unlawful combatant is not taking a direct part, rather an indirect part in the hostilities. The same is the case regarding a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid. The same is the case regarding a person who distributes propaganda supporting those unlawful combatants.’

¹²⁹ *Ibid.*, para. 39 ‘a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his “home”, and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack “for such time” as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.’

¹³⁰ A general statement, even if contained in a law or contract, that prohibits PMSCs members from taking direct part in hostilities, is not *per se* sufficient to exclude the possibility that those members may take direct part in hostilities as IHL adopts a *de facto* standard as to participation in hostilities. This is clearly stated, for instance, in the US Defence Federal Acquisition Regulation Supplement (DAFRS) as amended in 2006: ‘it is the responsibility of the combatant commander to ensure that the private security contract mission statements do not authorize the performance of any inherently Governmental military functions, such as preemptive attacks, or any other types of attacks. Otherwise, civilians who accompany the U.S. Armed Forces lose their law of war protections from direct attack if and for such time as they take a direct part in hostilities.’, 71 Fed. Reg. 34,826-27 (June 16, 2006).

4. The Treatment of Members of PMSCs whose Liberty has been Restricted

Absent prisoner of war status in NIAC, a member of a PMSC who falls in the power of the adverse party will be subject to the treatment provided for under domestic law. This treatment shall satisfy, at a minimum, the guarantees included in art. 3 common to the Geneva Conventions and, if Protocol II is applicable, also the rules of Part II, III and IV of the protocol. In particular, persons taking direct part in hostilities (including those PMSCs members that so qualify) are liable to prosecution for criminal offences related to the armed conflict in the competent state. The only exceptions relate to the immunity which may be granted to foreigners by virtue of a treaty¹³¹ and the commitment undertaken by the parties to Protocol II to take into consideration the granting of amnesty.¹³²

Needless to say, despite this embryonic umbrella protection afforded by IHL, PMSC members, as any other person who falls into the hands of the opposing group in a NIAC, remain under the protection of applicable international human rights law.

5. Responsibility of the Armed Opposition Group in Favour of whom the PMSC is Providing Services¹³³

A. Armed Opposition Groups as Addressees of IHL Obligations

The principle whereby armed opposition groups in general, not only those qualifying as insurgents, have obligations under IHL is well established. The theoretical bases of such a principle, which is counterintuitive given the fact that such groups are not signatories to any IHL treaty and often repel rules of a customary nature because uninvolved in their formation, are manifold and pertain to the application to armed groups of the law of treaties,¹³⁴ the reach of customary rules,¹³⁵ the binding

¹³¹ The immunity from the jurisdiction of Iraq for PMSC members working on behalf of the US is well known. The Coalition Provisional Authority order n. 17 restricted the functional immunities to the acts performed in the execution of the contract provided the acts were carried out 'pursuant to the terms and conditions of a contract or any sub-contract thereto' (Section 4, para. 3). As consequence of the serious accidents in which PMSCs members were actively involved, a new Status of Forces Agreement was adopted in December 2008 excluding immunity for such personnel employed by the US Department of Defence. Also the 17 September 2003 agreement stipulated between the US and Colombia (available at <http://www.state.gov/documents/organization/96767.pdf>) in order to exempt US troops operating in Colombia from surrender to the International Criminal Court includes immunity for contractors.

¹³² According to art. 6(5) of Additional Protocol II, 'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict'. This broad formula is in principle capable of covering also PMSC staff. However, the rationale for the Protocol II clause, i.e. favouring national reconciliation (*ICRC Commentary on the Additional Protocols*, para. 4618) can hardly fit a situation where amnesty is granted to foreigners, including foreign members of a PMSC. A special amnesty was envisaged for companies by the agreement stipulated between the Interim Government of National Unity of Liberia, the National Patriotic Front of Liberia and the United Liberation Movement of Liberia for Democracy on 25 July 1993 where, after granting amnesty to 'all persons and parties involved in the Liberian civil conflict in the course of actual military engagements' also 'business transactions legally carried out by any of the Parties hereto with private business institutions in accordance with the laws of Liberia' were declared to be covered by the amnesty. The precise scope and rationale of this provision, which was included also in the Lomè peace agreement of 30 November 1996 concerning Sierra Leone, remain unclear, but it was likely to cover also business transactions eventually conducted by the parties with PMSCs. Such a blanket amnesty was discarded in the comprehensive peace agreement for Liberia of 18 August 2003. Since the late '90s a customary rule has developed whereby the formula 'broadest possible amnesty' excludes granting amnesty to any person who has perpetrated an international crime.

¹³³ Clearly the reflections that will be elaborated in this paragraph apply also in case the PMSC as such qualifies as an armed group.

¹³⁴ A. Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts', *ICLQ* (1981) 416-439.

character of international rules via municipal law¹³⁶ and the signing of special agreements with the government or other armed groups aimed at implementing IHL rules in a specific conflict.¹³⁷

Also the principle that armed opposition groups may be held accountable under IHL can be said to be recognized in contemporary international law. Elements of international practice relating in particular to the United Nations is uniform and conspicuous.¹³⁸ At the same time also the special agreements concluded by the group in order to bring into force certain IHL rules as well as a number of national laws lend support to this conclusion.¹³⁹

Yet the precise content of the legal consequences stemming from this principle remains largely to be determined, as we shall now turn to see.¹⁴⁰

B. Consequences Arising from the Violation of an IHL Obligation by an Armed Opposition Group

A preliminary issue concerns the nature of the obligation incumbent upon armed groups and the type of responsibility that ensues from its violation. In case the obligation has a customary character, for example the rules relating to the protection of civilians, its *erga omnes* nature entails that, upon violation, responsibility arises both towards the injured entity and all other members of the international community. If the breach concerns a treaty rule (not of a customary nature), the international responsibility of the armed group arises *erga omnes partes*.¹⁴¹

This conclusion is supported by art. V of the resolution on the Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties, adopted in 1999 by the Institut de Droit International, according to which 'Every State and every non-State entity participating in an armed conflict are legally bound *vis-à-vis* each other as well as all other members of the international community to respect international humanitarian law in all circumstances'.¹⁴²

1. State Responsibility

The state may be held responsible for violations of IHL committed by an armed opposition group in case the group forms a new government or a new state. This principle has been inserted in art. 10 of

(Contd.) _____

¹³⁵ M. Sassoli, 'Transnational Armed Groups and International Humanitarian Law', Harvard University Occasional Papers Series, Winter 2006, p. 14.

¹³⁶ Sivakumaran, *supra* note 77, p. 369-394

¹³⁷ Roucouas, *supra* note 64, pp. 116-121. In addition, armed opposition groups may unilaterally bind themselves to IHL rules through a specific declaration to that effect.

¹³⁸ Zegveld, *supra* note 99, p. 133, ft 1, for reference to the various positions taken by the International Law Commission with respect to the Draft Articles on the Responsibility of States; UN report on Darfur, *supra* note 93, paras 254-256, and 285-288; UN Doc. A/HRC/7/39, Report of the United Nations High Commissioner for Human Rights on the Situation in Colombia, 29 February 2008, paras 44-48. For further practice concerning UN bodies see A. Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups,' *JICJ* (2008) 916-918.

¹³⁹ Examples of relevant special agreements and municipal laws will be given *infra*, para. IV.2.4.

¹⁴⁰ Henckaert and Doswald-Beck, *supra* note 90, vol. I, p. 536.

¹⁴¹ This conclusion can only be reached by admitting that armed opposition groups are addressees of IHL obligations (see para IV.1).

¹⁴² Art. V of the resolution, which is available at: http://www.idi-iil.org/idiE/resolutionsE/1999_ber_03_en.PDF. This point was harshly debated within the Institut because the revised draft resolution found that the obligation to respect IHL pertained to state only and it was due to the international community.

the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts of 2001, despite the scant practice upon which it is grounded.¹⁴³

The state may incur in international responsibility for acts of an armed group, also if it has not taken all the measures that were necessary to guarantee observance of the law, both at a preventive and a repressive level, on the part of the acting group. In this case the breach of an international obligation by the state consists in an omission;¹⁴⁴ in other words, the state violates a due diligence obligation.

The precise content of due diligence obligations stemming from IHL rules is unclear. An example of such an obligation is contained in art. 1 of the four Geneva Conventions whereby the parties undertake 'to respect and ensure respect' for the conventions.¹⁴⁵ This obligation covers also NIAC as it is expressly engaged 'in all circumstances'. However, the 'flexibility',¹⁴⁶ inherent in the due diligence concept allows room for consideration of the *degree* of control exercised over a certain territory. Indeed it would be improper and ineffectual to require the state to adopt preventive measures with respect to acts of armed groups carried out in the part of the territory over which the government does not exercise effective control.¹⁴⁷ Therefore the factual situation reduces the scope of the obligation to respect and ensure respect to those measures that are still in the power of the state to take. This conclusion is warranted also by the fact that, in case of stable control of a territory by an armed opposition group, the latter acquires the status of insurgents, hence enjoy a degree of international personality which certainly entails respect for IHL rules. This *ratio* underlies the conclusion reached in the only judicial pronouncement connected to this issue, the ICJ *Congo v Uganda*, according to which the occupying power bears responsibility for acts of private actors, 'including rebel groups acting on their own account'.¹⁴⁸ Finally, any other conclusion would make art. 10 of the Articles on the Responsibility of States for Internationally Wrongful Acts, which affirms the international responsibility of an insurgent movement that has gained power, meaningless.

On the opposite, when a state is confronted with an opposition group not controlling a portion of the territory with a certain degree of stability, the interplay between IHL and human rights rules militates in favour of the application of the standards that were set out in a clear-cut manner by the European Court of Human Rights in the judgment *Ergi v Turkey*.¹⁴⁹ There the respondent state was found responsible for having taken 'insufficient precautions',¹⁵⁰ to protect the life of the civilian population not only from the fire of the security forces but also from the fire-power of the members of the

¹⁴³ P. Dumberry, 'New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement', *EJIL*, 2006, p. 605.

¹⁴⁴ Cf. art. of the ILC Draft Articles and related commentary.

¹⁴⁵ Further investigation on the material scope of IHL positive obligations would be appropriate but exceeds the objective of this paper.

¹⁴⁶ On the 'flexibility' of the concept of diligence, also with respect to the degree of control exercised by the state over parts of its territory see R. Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of State', *GYbIL*, vol 35, 1992, p. 44.

¹⁴⁷ The European Court of Human Rights, *Ilascu* case, *supra* note 54, para. 347, has affirmed that the positive obligations of a state stemming from the 1950 European Convention on Human Rights and Fundamental Freedoms concerning parts of the territory over which the state exercises no control do not include those activities which would be 'ineffectual'. In the case at issue the contention pertained to judicial investigations that, according to the applicants, Moldovan authorities were bound to conduct in the territory of the internationally not recognised Moldavian Republic of Transdnistria, where Moldova had no control. This is without prejudice to the responsibility accruing to the state under IHL or human rights obligations concerning the territory over which it has control, including territory beyond its borders.

¹⁴⁸ ICJ, *Case concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, 19 December 2005, *ICJ Reports*, 2005, para 179.

¹⁴⁹ ECHR, *Case of Ergi v Turkey*, Judgment, 28 July 1998.

¹⁵⁰ *Ibid.*, para. 81.

opposition group.¹⁵¹ Again, this suggestion is on line with the Articles on the Responsibility of States for Internationally Wrongful Acts, which implicitly establish responsibility of the state also for the atrocities committed by an unsuccessful armed group committed over its territory.

A distinct but connected question concerns the issue whether an armed opposition group can be held accountable for violation of a due diligence obligation stemming from IHL rules. Practice¹⁵² shows that the obligation to protect civilians from hostilities is certainly incumbent also upon those groups.¹⁵³ What practice does not clarify is whether, and eventually to what extent, in case of breach of a positive obligation there is a *concurrent* responsibility between the territorial state and the armed group.

2. International Criminal Responsibility

The individual criminal responsibility of members of an armed group, including those holding a position of command, is so settled in international law that deserves no further examination.

More complex is the question of the international criminal responsibility of the group as such. The concept of joint criminal enterprise elaborated by the ad hoc criminal tribunals, as well as the notion of group responsibility enshrined in art. 25(3)(d) of the statute of the International Criminal Court might be the way to ensure criminal responsibility both of the group as such and of its members.¹⁵⁴ However, recourse to this modality of enforcing the accountability of a group is not seen unanimously as the panacea. Concerns relating to the resurface of collective notions of guilt make this hypothesis less appealing than it might appear at first sight.¹⁵⁵

3. Obligation to Give Full Reparation

A few elements of practice may be taken as an indication that the obligation incumbent upon armed groups to the effect that they make full reparation is increasingly accepted in international law.¹⁵⁶ For example, the General Assembly resolution of 2006 on Basic Principles and Guidelines on the Right to

¹⁵¹ Ibid., para. 80. In the same paragraph it is specified that the Court agrees with the Commission's reasoning whereby 'Even if it might be assumed that the security forces would have responded with due care for the civilian population in returning fire against terrorists caught in the approaches to the village, it could not be assumed that terrorists would have responded with such restraint. There was no information to indicate that any steps or precautions had been taken to protect the villagers from being caught up in the conflict.' Note that the Court was not applying IHL rules but art. 2 of the European Convention on Human Rights and Fundamental Freedoms.

¹⁵² Zegveld, *supra* note 99, pp. 79-84. Cf also Security Council resolutions (e.g. resolution 1674, 28 April 2006, where it is stated that '*parties* to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of affected civilians'); and some agreements between conflicting parties (for instance, art. 2(1) of the Protocol on the Improvement of the Humanitarian Situation in Darfur, 9 November 2004, according to which the Parties commit themselves "to take all steps required to prevent all attacks, threats, intimidation and any other form of violence against civilians by any Party or group, including the Janjaweed and other militias").

¹⁵³ G. Abi-Saab, 'Non-international Armed Conflicts', in UNESCO, *International Dimensions of Humanitarian Law*, 1988, p. 274.

¹⁵⁴ Clapham, *supra* note 138, esp. 919-926.

¹⁵⁵ M. Sassòli and L. Olson, 'The decision of the ICTY Appeals Chamber in the Tadić Case: New Horizons for International Humanitarian and Criminal Law?', *IRRC*, pp. 747-756.

¹⁵⁶ As it has been pointed out by Zegveld, *supra* note 99, pp. 152-155, the applicability to armed groups of the rules of attribution pertaining to states needs clarification. It should be pointed out that recourse to this form of responsibility may be quite fruitful as armed groups, unlike states, do not enjoy immunity from foreign jurisdiction.

Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law implicitly recognises this principle.¹⁵⁷

By contrast, only very few agreements concluded between an armed group and a government contain undertakings by the group with respect to the clauses relating to the procedural and substantial right of a victim to reparation. The Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army of 29 June 2007, as supplemented by the annex of 19 February 2008, is the best example of the wide-ranging engagement that an armed group may take with respect to reparation issues, but its relevance as element of international practice is tainted by the fact that the document was concluded in view to avoid surrender of the leaders of the Lord's Resistance Army to the International Criminal Court, following the issuance of arrest warrants against them.¹⁵⁸ Another example is offered by the Darfur Comprehensive Peace Agreement, which is very articulated in relation to the issue of reparation. The relevant clauses are couched in terms that bind equally the government and the signing armed groups (Sudan People Liberation Movement/Army and the Justice and Equality Movement) and recognise the 'inalienable right' of 'war-affected victims' to reparation.¹⁵⁹ Furthermore, this right is enunciated with respect to a very wide category of damages suffered, including 'physical or mental injury, emotional suffering or human and economic losses', provided that they were suffered in connection with the conflict. The wording of this part of the agreement is so advanced that it arises doubts as to the influence that the Report of the UN Commission of Inquiry on Darfur may have had on it. In that report, which was concluded only a few months before the signing of the agreement, it was affirmed that 'there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses.'¹⁶⁰ This right would be a corollary to the right to an effective remedy in case of serious violations of human rights and would apply also to armed opposition groups.

Beyond this, only in exceptional instances have armed groups provided reparation on a unilateral basis.¹⁶¹

In light of the above practice, the conclusion is warranted that the practice concerning the obligation incumbent upon armed opposition group to grant reparation is at an emerging stage.¹⁶²

5. Conclusions

The paper addresses both *ius ad bellum* and *ius in bello* issues arising from the activities that private military and security companies carry out in non-international armed conflicts.

The *ius ad bellum* analysis hinges upon a distinction between the right of the legitimate government - and to some extent of national liberation movements- to make recourse to PMSCs to restore or maintain internal law and order or to repel an aggression, and the prohibition to use PMSC for combat purposes or other action on the part of armed opposition groups or third parties.

¹⁵⁷ UN GA res 60/147, 21 March 2006. Art. IX (15): 'In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.'

¹⁵⁸ A. Dworkin, 'The Uganda-LRA War Crimes Agreement and the International Criminal Court (Updated)', 25 February 2008, available at <http://www.crimesofwar.org/onnews/news-uganda2.html>.

¹⁵⁹ Articles 199-213 of the Darfur Peace Agreement, Abuja, 5 May 2006.

¹⁶⁰ Report on Darfur, *supra* note 93, para. 597.

¹⁶¹ E.-C. Gillard, 'Reparation for Violations of International Humanitarian Law, *IRRC*, 2003, p. 535 referring to the excuses offered by the Colombian ELN armed group in 2001 for having provoked the death of children and destruction of civilian buildings in the course of an act of war.

¹⁶² Henckaerts and Doswald-Beck, *supra* note 90, vol. I, p. 550.

The difficulties inherent in the determination of the authority from which consent can validly emanate during a NIAC makes the content of the principle relating to the freedom of the legitimate government to request foreign armed assistance more unsettled than it may *prima facie* appear. The principle is helpful to identify the two poles of a continuum, at the one end of which lie those situations where the government lacks the requirements (effectiveness and recognition) necessary to express valid consent, whereas at the other extreme are those instances in which the opposition has received armed assistance from abroad or the UN Security Council has identified the legitimate authority. In the former case, third parties are under a duty to refrain from intervening militarily until the situation permits identification of the authority which can validly express consent to intervention; in the latter situation, on the contrary, third parties may supply direct military assistance to the legitimate government.

Apart from these two extremes, the dividing line between a lawful and an unlawful intervention based on valid consent emanating from the legitimate government remains blurred. Nevertheless, the rationale behind the recruitment of mercenaries, that is shared by recourse to a PMSC in wartime, questions dramatically the lawfulness under international law of recourse to PMSCs for activities in which the use of force is required.

As far as the *ius in bello* inquiry is concerned, the question of the status of a PMSC in NIAC is predominantly addressed as the scope of protection from attack and the treatment in case of deprivation of liberty flow from such a determination. The analysis has focused on the definition of armed forces applicable, according to IHL, in a NIAC. This issue is prominent with respect to PCMs because lack of formal enlistment in the armed forces of a state does not exclude qualification of PMSC personnel as organs of the state under international law, provided they are part of an irregular force which has a functional link with the state party to the conflict. Despite this broad notion of organ (armed forces) of the state, only very rarely do PMSCs fall under this category. At the same time, the unclear content of the notion of armed opposition group shows that in very few instances PMSC members qualify as members of such a group or as an armed opposition group *per se*. Indeed the vast majority of PMSC members qualify as civilians. Whether they are civilians *tout court*, civilians accompanying the armed forces or civilians taking an active part in hostilities is a *de facto* analysis that depends on the actual activity they carry out rather than on the contractual engagement.

As to the responsibility aspect of PMSC actions, only the neglected question of the international liability of armed opposition groups has been examined with special emphasis being placed on the due diligence obligations accruing both to the group and the state.