



EUI Working Papers

AEL 2010/3

ACADEMY OF EUROPEAN LAW

PRIV-WAR project

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The ‘Regulating Privatisation of “War”’: The Role of the EU in Assuring the Compliance with International Humanitarian Law and Human Rights’ (PRIV-WAR) project is funded by the European Community’s 7th Framework Programme under grant agreement no. 217405.

This paper was produced as part of the EUI contribution to Work-Package 2 of the PRIV-WAR Project: *Private Military and Security Companies under International Humanitarian Law*.

www.priv-war.eu

ISSN 1831-4066

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

This paper explores the criminal accountability of Private Security Company (PSC) personnel in war contexts. It focuses on the legal position of PSC personnel, defined on the basis of the relationship linking PSCs to the hiring subject. The topic is analysed from two perspectives. First, the liability of PSC personnel for war crimes is considered. Secondly, attention is paid to the concept of ‘direct participation in hostilities’ as a possible excuse for PSC personnel in case of domestic criminal liability. The paper argues that, under certain circumstances, private security contractors can be *de facto* assimilated to subjects formally classified under IHL. In this light, the ambiguous legal status of private security personnel with respect to war should have a limited impact on criminal liability. In theory, the current national and international regulation affords multiple means to try PSC personnel. In practice, the unwillingness or incapability of States to prosecute proves a major obstacle for the efficiency of the system. By overcoming the frame of State sovereignty, the International Criminal Court (ICC) provides appropriate mechanisms for implementing the existing rules, but its jurisdiction is limited by the founding treaty.

War Contexts: The Criminal Responsibility of Private Security Personnel

OTTAVIO QUIRICO*

1. Introduction

In the framework of both international and non-international armed conflicts, the activity of Private Security Companies (PSCs) raises particular problems, which so far have not been systematically studied in the literature.

PSCs can be briefly defined as corporate entities exchanging security services for financial gains. By having regard to their proximity to combat activity, PSCs' services range from military activities, such as equipment production, weapons transport and units training, to security activities, such as guarding sites or persons. PSCs are likely to work for States, but, sometimes, other subjects active in unstable zones benefit from their services. The phenomenon is often labelled as 'modern mercenarism' and it is tackled in this light within the framework of the United Nations (UN).¹

From the criminal standpoint, various violations have been reported concerning PSC personnel. Such is the case of the alleged perpetration of rapes by DynCorp² contractors in Bosnia,³ the involvement of CACI International⁴ and Titan⁵ members in inhuman treatments inflicted upon Iraqi prisoners,⁶ various acts of violence by security employees against civilians in Iraq,⁷ killings and beatings allegedly perpetrated by security personnel having a stake in diamond-mining in Angola.⁸

PSCs are deemed to act in a legal 'vacuum' or 'grey zone', throwing the need for clarity into relief, specifically in criminal law. According to some authors, State-centred international law would not provide a suitable regulatory framework for PSCs.⁹ The question is subjectively and objectively complex, as I shall explain.

Generally speaking, given the unstable circumstances in which they normally act, private actors are likely to incur criminal responsibility under domestic and international law.¹⁰ Nevertheless, from the

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¹ For a comprehensive and critical view of legal problems related to P(M)SCs see F. Francioni *et al.*, 'Symposium on Private Military Contractors and International Law', 19 *European Journal of International Law* (2008) 961-1074, at 961-964.

² See <http://www.dyn-intl.com>.

³ See P.W. Singer, 'War, Profits and the Vacuum of Law – Privatized Military Firms and International Law', 42 *Columbia Journal of Transnational Law* (2004) 491-549, at 525; A. Barnett and H. Solomon, 'British Firms Accused in UN 'Sex Scandal'', *The Observer*, 29 July 2001, available online at <http://www.guardian.co.uk>.

⁴ See <http://www.caci.com>.

⁵ See <http://www.titan.com>.

⁶ See S. Makki, 'Sociétés militaires privées dans le chaos irakien', *Le Monde Diplomatique*, November 2004, available online at <http://www.monde-diplomatique.fr>.

⁷ See T.C. Miller, 'Private Security Guards in Iraq Operate with Little Supervision', *Los Angeles Times*, 4 December 2005, available online at <http://articles.latimes.com>.

⁸ See J. Pearce, 'Angola's Diamonds Still Deadly', *Mail and Guardian*, 3 April 2005, available online at <http://www.afrika.no>.

⁹ See N. Stinnet, 'Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses', 28 *Boston College International and Comparative Law Review* (2005) 212-223, at 212; Singer, *supra* note 3, at 521.

¹⁰ For a comprehensive analysis of the criminal responsibility of P(M)SCs personnel under international law see C. Lehnardt, 'Individual Liability of Private Military Personnel under International Criminal Law', 19 *EJIL* (2008) 1015-1034, at 1015 ff.

subjective standpoint, the formal status of PSC employees is unclear, in particular under international humanitarian law (IHL). As a result, from the objective standpoint, it is uncertain when criminal rules apply. In fact, the situation of PSCs and their personnel is questionable both as perpetrators and victims of crimes.

This paper seeks to ascertain to what extent PSC personnel can be held criminally liable in the light of IHL, both at the international and domestic levels. The analysis focuses on the legal position of PSC personnel, defined on the basis of the relationship linking PSCs to the hiring subject (hiring subject – PSC). The focus is on the liability of physical persons operating as agents of the companies, addressing substantive and procedural issues *de lege lata*. Incidentally, for reasons of clarity the analysis also touches upon the accountability of non-PSC persons related to PSC personnel. The study is twofold: first, it seeks to clarify the responsibility of PSC personnel for war crimes; secondly, it aims to provide better understanding of the criminal responsibility of PSC personnel under domestic law in the light of the concept of ‘direct participation in hostilities’.

2. The Subjective Structure of PSCs and International Criminal Law

To different extents, various categories of subjects enjoy legal personality under international law: physical persons, private entities, States and international organizations (IOs).

The UN Commission on Human Rights is currently trying to clarify the status of private entities through the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. According to these rules, a private entity qualifies as a ‘business enterprise’ whenever it constitutes a ‘business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, the corporate, partnership or other legal form used to establish the business entity’.¹¹ A ‘transnational corporation’ is ‘an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively’.¹² Finally, transnational not-for-profit private entities qualify as non-governmental organizations.¹³

PSCs, which can be defined as corporate entities providing their clients with security services, whether or not they involve armed activities, certainly qualify as ‘business enterprises’.¹⁴ When their activity has a transnational character, they should furthermore classify as transnational corporations. In particular, they must be considered organizations of individuals enjoying limited international personality. In fact, as for legal competency, they have the faculty to regulate international obligations only from the standpoint of private (international) law, so that their engagement in contracts with

¹¹ See the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12, 30 May 2003, Article 21, at 7.

¹² *Ibid.*, Article 20, at 7. See also the 1977 IDI Oslo Resolution, which defines Multinational Enterprises as: ‘Enterprises which consist of a decision-making centre located in one country and of operating centres, with or without legal personality, situated in one or more other countries’ (IDI, *Oslo Resolution* (1977), available online at <http://www.idi-iil.org>, at 2).

¹³ See Article 1 of the 1986 Strasbourg Convention on the Recognition of Legal Personality.

¹⁴ See C. Ortiz, ‘The Private Military Company: an Entity at the Centre of Overlapping Spheres of Commercial Activity and Responsibility’, in T. Jäger and G. Kümmel (eds.), *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2007) 55-68, at 60.

States and other subjects is fully justified. With regard to legal capacity, PSCs enjoy rights and duties, flowing not only from private agreements, but also from international treaties.¹⁵

De iure, Private Security Companies are usually registered under the label of ‘PSCs’; *de facto*, they provide services that range from security to military activities.¹⁶ The literature usually distinguishes PSCs from Private Military Companies (PMCs).¹⁷ In this regard, the *actus reus* – the conduct – must be distinguished from the actors – the companies and their subjects as (legal) persons. In particular, it can be assumed that the category of PSCs includes that of PMCs.¹⁸ Such a classification is based on the observation that the notion of ‘security’ encompasses the ‘military’ one; in fact, the latter activity takes place within the framework of the former.¹⁹ This is particularly important under IHL, where the term ‘military’ (from the Latin, *miles/militia*) is used in the subjective sense of ‘(person) belonging to the armed forces’,²⁰ in opposition to ‘civilian’ (from the Latin, *civis*).²¹ The word ‘military’ entails specific consequences and does not necessarily apply to PSCs: only private enterprises belonging to ‘militias’ should qualify as ‘PMCs’ (a specific category of PSCs).

PSCs can provide services to all the other subjects of international law, i.e.: (1) States; (2) IOs; (3) non-governmental organizations (NGOs); (4) transnational corporations and other private subjects. Therefore, the following external relationships can be envisaged: State – PSC, IO – PSC, NGO – PSC, private subject – PSC.

Responsibility depends on the subjective status of PSCs and their relationship with other legal entities.²² Thus, externally the liability of States and IOs for the acts of PSCs can be envisaged under the Projects of the ILC on secondary rules, but this does not relieve the companies themselves and their personnel of culpability. When PSCs provide services to private actors, complicity may subsist. Internally, it must be determined how responsibility is divided between PSCs and their personnel. By virtue of an established principle of law applying to both the domestic and international legal orders, the conduct of an individual acting as agent of an organization is imputed to the organization itself. This general rule, certainly effective for States and IOs, should apply also to private contractors. However, the first concern of criminal law is individuals. Such a principle, common to most national jurisdictions, has been accepted in international law since Nuremberg and has recently been fortified by the Statute of the International Criminal Court (ICC).²³ Whether or not penal liability can reach to legal persons is a much-debated question, rejected rather than accepted *de iure condito*.²⁴

¹⁵ See N.D. White and S. MacLeod, ‘EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility’, 19 *EJIL* (2008) 965-988, at 967-970.

¹⁶ See Ortiz, *supra* note 14, at 59.

¹⁷ See, for instance, S. Chesterman and C. Lehnardt (eds.), *From Mercenaries to Market: the Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007).

¹⁸ Accordingly see Ortiz, *supra* note 14, at 55 ff.

¹⁹ In this sense see C. Kinsey, ‘Private Security Companies: Agents of Democracy or Simple Mercenaries?’, in Jäger and Kümmel, *supra* note 14, 87-104, at 87 ff.

²⁰ See the text of the relevant Articles of the GCs *infra* at para. 4.A.

²¹ See *The Oxford English Dictionary*.

²² On this issue see White and MacLeod, *supra* note 15, at 965 ff.; C. Hoppe, ‘Passing the Buck: State Responsibility for Private Military Companies’, 19 *EJIL* (2008) 989-1014.

²³ See S. Manacorda *et al.*, ‘The Principle of Individual Criminal Responsibility: a Conceptual Framework’, 5 *Journal of International Criminal Justice* (2007) 913-1001.

²⁴ On this problem see C. Lehnardt, *supra* note 10, at 1032-1033.

Concerning individual liability, currently in case of systematic crimes against humanity, genocide and war crimes, ICC prosecution is relatively effective at the international level. Customarily, obligatory universal penal jurisdiction (*aut dedere aut iudicare*) exists, as a minimum, for war crimes, torture, piracy, and some forms of terrorism.²⁵ Within the ICC Treaty, the Preamble simply recalls ‘the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’. Thus, it is doubtful whether or not the obligation either to judge or extradite binds all the States (Parties) for crimes against humanity and genocide. Concerning other breaches, not touching upon the international community as a whole, the classic principles of territoriality (*locus commissi delicti*: ‘host state’), active/passive nationality and State interest apply in determining competent domestic jurisdictions. Thus, criminal prosecution for non-systematic violations of human rights committed in non-war contexts relies on domestic legal systems.²⁶

3. Responsibility for War Crimes

A. War Crimes under the Geneva Conventions

Armed conflicts are governed by customary international law, as mainly codified in a consistent set of conventions, dating from 1856.²⁷ The first holistic regulation of IHL dates from the Hague Conventions (HCs) of 1897 and 1908. These Treaties were followed by the four Geneva Conventions of 1949 (GCs I-IV), detailed by the two Additional Protocols of 1977 (APs I-II) and the third Additional Protocol of 2005 (AP III), which are supposed to summarize customary IHL.

The GCs directly bind the Contracting (State) Parties to ensure respect for the drafted rules (common Article 1 GCs I-IV). Nonetheless, it seems that the GCs also set up obligations for non-state subjects, since many norms are formulated impersonally.²⁸ Therefore, at the substantive level, obligations arise for state and non-state subjects, whereas mainly States have the power to enforce them.²⁹ Within this framework, individuals are compelled to abide by duties established by the GCs.

Common Article 3 GCs I-IV establishes the minimum obligations applying to non-international armed conflicts occurring in the territory of a State Party, i.e. humane treatment of subjects not taking an active (direct)³⁰ part in hostilities.

Common Art. 3 provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other

²⁵ See A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), at 265; C. De Than and E. Shorts, *International Criminal Law and Human Rights* (London: Sweet and Maxwell, 2003), at 10.

²⁶ In this sense see T. Weigelt and F. Marker, ‘Who Is Responsible? The Use of PMCs in Armed Conflicts and International Law’, in Jäger and Kümmel, *supra* note 14, 377-394, at 380-381.

²⁷ For an overview of written documents governing the law of war and their text, see the website of the ICRC: <http://www.icrc.org/ihl.nsf/INTRO?OpenView>.

²⁸ Common Article 3, for instance, provides: ‘Persons taking no active part in the hostilities (‘...’) shall in all circumstances be treated humanely (‘...’) the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons ...’. See also Weigelt and Marker, *supra* note 26, at 380.

²⁹ See Weigelt and Marker, *supra* note 26, at 379; De Than and Short, *supra* note 25, at 13.

³⁰ See *infra* para. 4.C.1.

cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. ('...')

Since these obligations apply 'as a minimum' in non-international armed conflicts, they should be effective also in international armed conflicts.³¹

All other rules apply optionally to non-international armed conflicts and necessarily to international armed conflicts involving Parties to the Treaties. GCs I and II aim to shield wounded, sick and shipwrecked combatants, in the field or at sea; GC III provides combatants with the status of prisoners of war (POW); GC IV basically shields civilians from hostilities, especially when they fall in the hands of the enemy.

From the penal standpoint, Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV state:

The High Contracting Parties undertake to enact any legislation necessary to provide *effective penal sanctions* for persons committing, or ordering to be committed, any of the *grave breaches of the present Convention* defined in the following Article.

Each High Contracting Party *shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.* It may also, if it prefers, and in accordance with the provisions of its own legislation, *hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.* ('...')³²

Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV provide:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health. ('...')³³

Article 85 AP I adds a series of grave breaches against the civilian population and ensures that they are submitted to the criminal regime provided for in Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV.

According to Articles 86-87 AP I, criminal responsibility of superiors exists for failure to prevent or repress (grave) breaches of the GCs and AP I.

³¹ See J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), Rule 87, at 306.

³² Emphasis added.

³³ Emphasis added.

Subjectively, from the passive viewpoint, the scope of Articles 50 GC I, 51 GC II, 130 GC III, 147 GC IV and 85 AP I, addressing all types of persons protected by the Conventions, is broader than that of Article 3, concerning solely persons taking no (more) active part in hostilities as possible victims.³⁴ Objectively, it can be reasonably affirmed that conduct set out in Article 3 is encompassed by that provided for in Articles 50 GC I, 51 GC II, 130 GC III, 147 GC IV and 85 AP I. Therefore, Article 3 constitutes the core of the GCs and its violation is necessarily a grave breach that should entail criminal prosecution.³⁵

Articles 49-50 GC I, 50-51 GC II, 129-130 GC III, 146-147 GC IV and 85 AP I establish a list of grave breaches and qualify them as criminal.³⁶ Accordingly, detailed substantial and procedural norms must be created by States domestically following the principle of legality. Thus, individual responsibility ultimately subsists in conformity with national rules. From the procedural viewpoint, the implementation of these provisions takes place thoroughly at the domestic level. The determination of the competent jurisdiction follows the general mechanisms co-ordinating national criminal jurisdictions, based on: (1) the territory where the breaches occur (*locus commissi delicti*); (2) the nationality of the author; (3) the nationality of the victim; and (4) the State interest in proceeding. Articles 88-89 AP I strengthen cooperation and mutual assistance, especially by way of extradition, joint or individual action, collaboration with the UN and respect for the UN Charter. Furthermore, war crimes are subject to the principle of obligatory jurisdiction, which is moreover considered to be customarily universal.³⁷ This means that every State (Party) has the duty either to judge or extradite the author of the violation. In principle, such a regime should apply regardless of the distinction between international and non-international armed conflicts.³⁸ It also allows for supposing that grave breaches of the GCs are violations of *ius cogens*, and thus should be invariably criminalized.³⁹ Instead, below the level of gravity required by the GCs for necessary criminalization, penal prosecution is left to the discretion of domestic jurisdictions.⁴⁰ An International Fact-Finding Commission (Article 89 AP I) is supposed to ensure the well functioning of the secondary rules established for prosecuting criminal and non-criminal breaches. In case of violation of the duty to repress, States are responsible and liable to pay compensation for the infringements perpetrated by subjects belonging to their armed forces (Article 91 AP I).

³⁴ See Henckaerts and Doswald-Beck, *supra* note 31, Rule 87, at 306.

³⁵ In this sense the ICTR recognizes that serious violations of obligations set up by common Article 3 GCs I-IV entail criminal liability (see Judgment, *Rutaganda* (ICTR-96-3), Trial Chamber, 6 December 1999, §§ 91 ff.). Furthermore, Articles 49-50 GC I, 50-51 GC II, 129-130 GC III and 146-147 GC IV do not provide for any reference limiting their effectiveness to international armed conflicts (accordingly see L. Doswald-Beck, 'Private Military Companies under International Humanitarian Law', in Chesterman and Lehnardt, *supra* note 17, 115-138, at 134).

³⁶ Thus, all grave breaches of the GCs and Additional Protocols are war crimes (see Henckaerts and Doswald-Beck, *supra* note 31, Rule 156, at 568 ff.).

³⁷ *Ibid.*, Rules 157-158, at 604-611.

³⁸ Since Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV relate to all rules of the GCs and APs without distinction, it must be thought that obligatory universal jurisdiction exists for grave breaches committed in both non-international and international armed conflicts. This seems logical, given that grave breaches committed in domestic conflicts constitute core war crimes (see Henckaerts and Doswald-Beck, *supra* note 31, Rules 157-158, at 604-605, 607-608). For a contrary viewpoint see Doswald-Beck, *supra* note 35, at 134.

³⁹ See De Than and Shorts, *supra* note 25, at 10.

⁴⁰ See T. Meron, 'International Criminalization of Internal Atrocities', 89 *American Journal of International Law* (1995) 554-577, at 564.

B. International Prosecution of War Crimes: the ICC

At the international level, the rules in question are reinforced by the complementary competence of the ICC. In fact, the ICC Statute, which entered into force in 2001, provides an international procedure for judging grave breaches of the GCs (Article 8 ICC Statute).

Thus, Article 8(2)(a) ICC Statute establishes a list of ‘grave breaches’ committed in both international and non-international armed conflicts. This Article basically recalls crimes embodied in Articles 50 GC I, 51 GC II, 130 GC III, 147 GC IV, and in common Article 3. Article 8(2)(b) ICC Statute provides for criminalization of ‘serious violations’ of the rules governing international armed conflicts. Concerning non-international conflicts, which include protracted armed combats between governmental authorities and organized armed groups or between such groups, Article 8(2)(c) ICC Statute provides for criminalization of ‘serious violations’ of common Article 3 GCs. Furthermore, Article 8(2)(e) ICC Statute penalizes other infringements, partially overlapping with those recognized in international armed conflicts, which must therefore be considered customarily applicable in non-international conflicts.⁴¹

Systematic non-war crimes can be prosecuted as genocide or crimes against humanity under Articles 6 and 7 ICC Statute. Instead, the prosecution of non-war crimes having no systematic character and perpetrated in situations of internal disturbances or tensions relies thoroughly on domestic jurisdictions. This is the case of riots and sporadic acts of violence.

As expressly provided for in Article 25(1) of the Statute, ICC rules only concern individuals, not legal entities. According to the jurisdictional limits established by Article 12, ICC rules apply exclusively to: (1) citizens of State Parties to the Rome Treaty, (2) crimes committed on the territory of a State Party.

C. Criminal Responsibility and Prosecution of PSC Personnel for War Crimes

Under the GCs, liability for war crimes concerns all subjects without distinction in both international and non-international armed conflicts, regardless of their position as civilians or combatants.⁴² This holds true also in the light of the ICC Statute, indiscriminately addressing ‘natural persons’ (Article 25(1)). Thus, for instance, ‘wilful killing’ of persons protected by the GCs – criminalized under Article 8(2)(a)(i) and (c)(i) ICC Statute – can be perpetrated indifferently by both combatants or civilians.⁴³ Such a viewpoint is upheld by the constant and unanimous jurisprudence of the international criminal tribunals since World War II.⁴⁴

⁴¹ The expression ‘serious violations’ (Article 8(2)(b) and (c) ICCSt.) must be considered equivalent of the wording ‘grave breaches’ (Article 8(2)(a) ICCSt. and Articles 50 GC I, 51 GC II, 130 GC III, 147 GC IV). In fact, Article 8(2)(a) ICCSt. mentions ‘grave breaches of the Geneva Conventions’, Articles 8(2)(b) and (c) ICCSt. mention ‘other serious violations of the Geneva Conventions’.

⁴² See *supra*, at para. 3.A, the text of common Article 3 GCs and the text of Articles 49-50 GC I, 50-51 GC II, 129-130 GC III, 146-147 GC IV. See also Henckaerts and Doswald-Beck, *supra* note 31, Rule 156, at 573.

⁴³ See K. Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001), at 133.

⁴⁴ See UN War Crimes Commission, *Notes on the Case Bruno Tesch and Two Others (Zyklon B Case)*, British Military Court, Hamburg, 1-8 March 1946, in *Law Reports of Trials of War Criminals*, Vol. I (London: His Majesty’s Stationery Office, 1947), 93-104, at 103, available online at <http://www.loc.gov>; UN War Crimes Commission, *Notes on the Case Alfons Klein and Six Others (The Hadamar Trial)*, US Military Commission, 8-15 October 1945, *ibid.*, 46-54, at 53-54; UN War Crimes Commission, *Notes on the Case Erich Heyer and Six Others (The Essen Lynching Case)*, British Military Court for the Trial of War Criminals, Essen, 18-19 and 21-22 December 1945, *ibid.*, 88-92.

In a restrictive sense, for imputing war crimes a link must be established between the agent and the war. In other words, for an illicit act to qualify as a war crime it is not sufficient that the conduct takes place in time of war, but it must be connected to the conflict. A functional relationship is considered to exist when subjects, including private actors, undertake war tasks. Normatively, according to the GCs grave illegal acts qualify as war crimes by reason of the victims or the goods injured by the violation. In fact, under Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV war crimes are directed ‘against persons or properties protected by the Conventions’. From this perspective, war crimes should constitute a form of ‘direct participation in hostilities’.⁴⁵ From the subjective standpoint, it is assumed that a link exists between the criminal conduct and war whenever a subject is connected, at least *de facto*, with a Party to the conflict.⁴⁶ As a result, PSC employees must comply with IHL whenever a *de facto* link can be established with a Party to the conflict, irrespective of their position as combatants or civilians.⁴⁷

The trial of PSC employees acting in the context of international or non-international armed conflicts involving State Parties to the GCs should be ultimately ensured by the mechanism of counter-measures. In fact, State Parties are obliged to criminalize and prosecute grave breaches of the Conventions. PSC personnel can be tried by criminal courts, whereas they should be subject to military courts only when they enjoy the ‘military’ status.⁴⁸ From a broader perspective, by considering that the GCs have customary universal effectiveness, the responsibility of PSC employees is engaged for grave breaches in the context of all international and non-international armed conflicts. In theory, the application of obligatory universal jurisdiction should ensure that PSC personnel are punished.

In practice, trying PSC employees for war crimes proves very difficult for several reasons. First and foremost, the States’ unwillingness to prosecute tends to grant PSC personnel immunity from jurisdiction.⁴⁹ Secondly, the host State is often unable to prosecute in war times.⁵⁰ Thirdly, not all States have adopted the domestic legislation necessary to allow for prosecution on the basis of universal jurisdiction, and those which have so done still require a link with the State, such as residence.⁵¹ Finally, collecting evidence abroad, especially witness statements, is quite complicated and expensive, because it requires the cooperation of other States in the absence of a supranational power. In fact, few processes have taken place on the basis of obligatory universal jurisdiction and, so far, the mechanism has not proved efficient.⁵² Also when proceedings do effectively take place, it is not easy for victims to obtain compensation from individuals, in the absence of alternative schemes provided by States.

⁴⁵ On this issue see *infra* para. 4.C.1.

⁴⁶ In the case law see Judgment, *Kayshema and Ruzindana* (ICTR-95-1), Trial Chamber, 21 May 1999, §§ 174 ff.; Judgment, *Akayesu* (ICTR-96-4), Trial Chamber, 2 September 1998, §§ 633-634, 640. For a juristic viewpoint see G. Werle, *Principles of International Criminal Law* (The Hague: TMC Asser Press, 2005), at 295-296; B.M. Yarnold, ‘The Doctrinal Basis for the International Criminalization Process’, in M.-C. Bassiouni, *International Criminal Law*, Vol. 1 (2nd edn., New York: Transnational Publishers, 1999) 127-152, at 148.

⁴⁷ See Weigelt and Marker, *supra* note 26, at 380; Doswald-Beck, *supra* note 35, at 134.

⁴⁸ See *infra* para. 4.B.

⁴⁹ See Doswald-Beck, *supra* note 35, at 135.

⁵⁰ See Singer, *supra* note 3, at 537-538.

⁵¹ For an overview of State legislation and case law concerning the exercise of jurisdiction over war crimes see Henckaerts and Doswald-Beck, *supra* note 31, at 3894-3931. See also the ICRC Web site: <http://www.icrc.org/ihl-nat>.

⁵² See Doswald-Beck, *supra* note 35, at 134-135.

As for the jurisdiction of the ICC, it applies only when either PSC personnel are citizens of a State Party to the Rome Treaty or they commit a crime on the territory of a State Party (Article 12 ICC Statute). In this case, by setting up the duty for the Parties to exercise their criminal jurisdiction over the authors of the crimes, the Preamble of the Statute strengthens the obligation of the States either to judge or extradite PSC personnel (*aut dedere aut iudicare*). Within the jurisdictional limits set up by Article 12, furthermore, Article 17 of the Statute adds the complementary jurisdiction of the ICC, ultimately ensuring international prosecution of PSC employees. This should permit more impartial and efficient handling of the problems relating to the co-ordination of domestic jurisdictions. Technically speaking, the ICC has more means to overcome State sovereignty and investigate crimes, regardless of the fact that they are perpetrated in war times. More importantly, the lack of State's will to prosecute PSC employees is one of the reasons for triggering the jurisdiction of the Court under Article 17 of its Statute. Finally, a special role is assigned to victims in proceedings before the ICC and effective compensation is guaranteed through particular procedures, especially via the Trust Fund established under Article 79 ICC Statute.

D. Superior–Subordinate Relationship: Command Responsibility for War Crimes within the Framework of PSCs

International criminal law recognizes the responsibility of commanders, both for positive (direct or by participation) and negative conduct. In case of liability for negative behaviour, superiors are held responsible for failure to exercise due control over international crimes committed by subordinates. This principle, firstly acknowledged in the *Yamashita* case,⁵³ has been embodied in Articles 7(3) ICTY Statute and 6(3) ICTR Statute, and it is finally clearly stated in Article 28 ICC Statute.⁵⁴ It applies to all international crimes, and thus also to war crimes. Article 28, recalling a controversial case-law,⁵⁵ distinguishes between the negative responsibility of military and non-military commanders. Liability of military commanders is based on negligence, according to the 'should have known' standard. Instead, the accountability of non-military commanders is ascertained on the basis of intention,⁵⁶ following the criteria 'knowing' or 'consciously disregarding' of clear information. It is, nevertheless, admitted that international courts could overcome this difference by applying the principle of 'constructive knowledge', thus considering negligence as the minimum criterion for the liability of non-military superiors.⁵⁷ In any case, a *de facto* relationship objectively suffices for exercising effective authority.⁵⁸

⁵³ See Judgment, *In re Yamashita* (327 US 1), US Supreme Court, 4 February 1946, 13 *International Law Reports* (1946), at 273-274.

⁵⁴ For a juristic viewpoint and a summary of the case-law on this point see Werle, *supra* note 46, at 129.

⁵⁵ See *Kayshema and Ruzindana*, *supra* note 46, §§ 227-228; Judgment, *Delalić* (IT-96-21), Trial Chamber, 16 November 1998, §§ 355 ff.; *Akayesu*, *supra* note 46, § 491.

⁵⁶ The word 'intention' is used in the sense of the French '*dol*', in order to express a mental state involving 'intent and knowledge' (see A. Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in A. Cassese, P. Gaeta and J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: a Commentary*, Vol. 1 (Oxford: Oxford University Press, 2002) 889-948, at 906-907).

⁵⁷ See K. Keith, 'The *mens rea* of Superior Responsibility as Developed by the ICTY Jurisprudence', 14 *Leiden Journal of International Law* (2002) 617-634, at 631-632.

⁵⁸ See Judgment, *Blškić* (IT-95-14), Appeals Chamber, 29 July 2004, § 67; *Delalić*, *supra* note 55, § 378. For a juristic standpoint see R. Arnold, 'Responsibility of Commanders and Other Superiors – Article 28', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (München, Oxford, Baden-Baden: C.H. Beck, Hart, Nomos, 2008) 795-843, at 825-826, §§ 88-89.

No question subsists when commanders participate as co-perpetrators in the positive conduct of PSC personnel, since the legal qualification as a commander is not a pre-requisite for the existence of responsibility. Instead, the issue arises as to whether or not liability of commanders for omissions exists with regard to the criminal conduct of PSC employees, given the peculiar position of PSCs in relation to States and due to the problematic qualification of their personnel under IHL.

Concerning PSCs acting for States or IOs, it is important to determine whether or not State officials, be they military or civilians, can be considered liable for international crimes committed by subordinate PSC employees (IO/State's superior – PSC's subordinate). According to the above-mentioned case-law, liability is detected on the basis of *de facto* control, *inter alia* by taking into account the hiring contract. Consequently, regardless of whether or not PSCs are incorporated in the State machinery, State commanders should be held liable according to their position as military or civilians. In any case, the qualification of PSC employees as combatants rather than non-combatants⁵⁹ does not affect that of State superiors as military or non-military personnel, since the latter distinction relies totally upon domestic law. Furthermore, in case of international crimes committed by taking direct part in hostilities, the position of PSC personnel as combatants or non-combatants is of no influence for judging PSC superiors' responsibility for omissions. In fact, international crimes can be committed by any physical person without distinction. Since international crimes are banned for subjects having the right to take a direct part in hostilities, *a fortiori* they are forbidden for individuals not enjoying such a claim.

In the case of PSC employees acting for non-state subjects (NGO/private entity's superior – PSC's subordinate), the liability of superiors for negative behaviour must also be retained whenever they exercise *de facto* control over PSC personnel. In fact, Article 28 ICC Statute acknowledges the responsibility of: (a) 'persons effectively acting as military commanders', or (b) non-military superiors, without mentioning their affiliation to States.⁶⁰

On the same basis, the responsibility of superiors belonging to PSCs must be admitted in case of failure to exercise control over international crimes perpetrated by subordinates (PSC's superior – subordinate). In fact, international law does not limit command responsibility to State actors. Under Article 28(a) ICC Statute, it seems possible that PSC employees are 'persons effectively acting as military commanders' by qualifying both as combatants or non-combatants.⁶¹ This holds true, furthermore, regardless of the classification of subordinates as combatants rather than civilians.⁶² Moreover, PSC personnel can be held responsible as non-military superiors under Article 28(b) ICC Statute, but in this case liability is based on intention rather than negligence. Therefore, the question arises as to what extent PSCs can be considered organized enough in order to apply command responsibility. Generally speaking, it seems that superior-subordinate relationships are *de facto* unavoidable for the effective functioning of PSCs.⁶³

⁵⁹ See *infra* para. 4.B.

⁶⁰ See also Article 7(3) ICTY Statute and Article 6(3) ICTR Statute.

⁶¹ See *infra* para 4.B.

⁶² See Doswald-Beck, *supra* note 35, at 135.

⁶³ See M.N. Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees', 5 *Chicago Journal of International Law* (2005), 511-546, at 529-530.

E. Subordinate Responsibility for War Crimes within the Framework of PSCs

International law excludes the responsibility of subordinates for war crimes whenever they act according to the orders of a superior which is not manifestly unlawful. Nevertheless, the same principle does not apply to other international crimes, since the unlawfulness of genocide and crimes against humanity is always presupposed. This means that, in case of war crimes, negligence exceptionally acts as a general criterion for imputation with regard to the knowledge of the lawfulness of the conduct, whereas unavoidable mistakes are grounds for excluding responsibility. Therefore, superior orders are currently recognized as a justification under Article 33 ICC Statute, whilst in the past they were acknowledged as a crucial factor only in order to reduce sanctions.⁶⁴

Concerning PSC employees, the question arises as to whether unavoidable mistakes as to the legality of superior orders constitute an excuse for subordinates committing war crimes. This issue is also problematic in the light of the organization of PSCs, from the internal viewpoint as well as with regard to the external relation with States, IOs and non-state subjects. In this respect, by virtue of Article 33(1)(a) ICC Statute, the existence of an obligation to abide by superior orders is crucial. Such a condition, which is not explicit in Article 7(4) ICTY Statute and Article 6(3) ICTR Statute, is logical. This means that the binding effect of commands is the indispensable criterion in order to consider them a possible justification. As in the case of command responsibility, it is coherent to ascertain such effectiveness *de facto*, since the doctrine of superior orders represents nothing else but the other side of the coin with respect to the liability of commanders.⁶⁵

Therefore, the non-manifest unlawfulness of orders should be invoked by PSC personnel whenever they obey commands given by superiors belonging to States and IOs (IO/State's superior – PSC's subordinate), regardless of the position of the latter as military personnel or civilians, as expressly provided for in Article 33(1) ICC Statute. Nevertheless, in case of orders concerning activities directly relating to hostilities the distinction between combatants and non-combatants must be taken into account. In fact, superior orders should excuse only PSC subordinates qualifying as combatants. By contrast, commands given to non-combatants, whose direct participation in hostilities is illegal under the GCs,⁶⁶ should not be considered binding on the basis of the principle *ex iniuria ius non oritur*. Consequently, in the latter case PSC employees should be held responsible not only domestically for acts directly connected with hostilities, but also internationally for war crimes.

Such a regulation should apply also in case of orders given by superiors belonging to private subjects to which PSCs provide their services (NGO/private entity's superior – PSC's subordinate). In fact, Article 33 of the ICC Statute takes into account the 'orders of a Government or of a superior', without distinguishing, in the latter case, between public and private structures.⁶⁷

The same discipline should apply to subordinates acting in conformity with orders given by superiors belonging to PSCs (PSC's superior – subordinate), in so far as an internal superior-subordinate relationship can be recognized, at least *de facto*, on the basis of the inner structure of private firms.

⁶⁴ See Article 8 Charter of the Nuremberg Tribunals, Article 6 Charter of the Tokyo Tribunal, Article 7(4) ICTYSt. and Article 6(4) ICTRSt. On the evolution of the doctrine of superior orders see A. Zimmermann, 'Superior Orders', in Cassese, Gaeta and Jones, *supra* note 56, 957-974, at 967; P. Gaeta, 'The Defence of Superior Orders: the Statute of the International Criminal Court versus Customary International Law', 10 *EJIL* (1999) 172-191, at 188-189; M.C. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (New York: Transnational Publisher, 1996), at 384 ff.

⁶⁵ Accordingly see Doswald-Beck, *supra* note 35, at 136.

⁶⁶ See *infra* para. 4.A.

⁶⁷ See also Article 7(4) ICTYSt. and Article 6(3) ICTRSt.

4. Domestic Criminal Responsibility of PSC Personnel in Case of Direct Participation in Hostilities?

It is debatable whether PSC employees must not directly engage in hostilities.

Such a question has no influence on their accountability for war crimes. In fact, acknowledging that war crimes are a form of 'direct participation in hostilities' does not affect international criminal liability: all subjects, including PSC personnel, can be held responsible.⁶⁸

Instead, the issue is important in order to ascertain criminal liability at the domestic level. In fact, in the case of a negative answer, certain acts (e.g., killing), normally criminalized under domestic law (murder), would be excused. Otherwise, in case of a positive answer, PSC personnel could be held criminally liable under domestic law.

Ultimately, the solution of the problem relies on the qualification of PSC personnel according to IHL, because only specific categories of subjects can take 'direct part in hostilities'.

A. Legal Positions under IHL

The wording adopted by the GCs in defining subjective positions is very specific. The Conventions do not distinguish between military personnel and civilians, combatants and non-combatants, but set up different categories. Thus, under IHL a basic differentiation must be drawn between *combatants*, i.e., subjects authorized to take a direct part in hostilities, and *civilians*, i.e., persons not authorized to take direct part in hostilities.⁶⁹

Article 48 AP I to the GCs states that:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times *distinguish between the civilian population and combatants* and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

*Members of armed forces and recognized militias (military in the sense of Latin 'miles') other than medical personnel and chaplains are combatants.*⁷⁰

In fact, the text of Article 43 (Armed Forces) AP I to the GCs explicitly provides for that:

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

2. *Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.*⁷¹

⁶⁸ See *supra* paras 3.A and 3.B.

⁶⁹ See Y. Sandoz, C. Swinarski and B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), at 597 ff.

⁷⁰ See Henckaerts and Doswald-Beck, *supra* note 31, Rule 3, at 11 and 13; Sandoz, Swinarski and Zimmermann, *supra* note 69, at 506 ff.

⁷¹ 'Direct' participation in hostilities envisaged in Article 43(2) AP I should be equated to 'active' participation provided for in common Article 3 GCs.

3. Whenever a Party to a conflict incorporates a *paramilitary or armed law enforcement agency* into its armed forces it shall so notify the other Parties to the conflict.⁷²

Furthermore, common Articles 13 GCs I-II and 4(A) GC III affirm that protection is afforded to the following categories of subjects:

- (1) *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.*
- (2) *Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:*
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) *Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.*
- (4) *Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.*
- (5) *Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.*
- (6) *Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.*⁷³

In particular, the status of POW affords a set of fundamental rights during the period of captivity to subjects who have fallen into the hands of the enemy. Concerning combatants, it also presupposes that they cannot be prosecuted for lawful activities associated with the armed conflict, as, for instance, carrying firearms, killing, inflicting grievous bodily harm.⁷⁴

Civilians are defined in Article 50 AP I to the GCs as follows:

1. *A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.*
2. *The civilian population comprises all persons who are civilians.*

⁷² Emphasis added. In paragraph 3, ‘paramilitary’ and ‘armed law enforcement agency’ should be considered equivalent of ‘member of militias’ recognized in Articles 13 GCs I-II and 4 GC III. Article 43 AP I to the GCs specifies the content of Article 3 Annex to the HCs II of 1899 and IV of 1907, concerning the ‘Regulations of Laws and Customs of War on Land’, providing that: ‘The *armed forces of the belligerent parties may consist of combatants and non-combatants*. In case of capture by the enemy both have a right to be treated as prisoners of war’.

⁷³ Emphasis added.

⁷⁴ This can be inferred from Article 45(2) AP I, which states that: ‘If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated (emphasis added)’. Accordingly, see Henckaerts and Doswald-Beck, *supra* note 31, Chapter 33 – Introduction, at 384; Sandoz, Swinarski and Zimmermann, *supra* note 69, at 554-557.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.⁷⁵

Thus, since (a) Article 48 AP I contrasts *civilians* with *combatants*, whereas (b) Article 50 AP I defines *civilians* by contrast with *military personnel* and *inhabitants of non-occupied territories spontaneously taking up arms to resist an invasion*,⁷⁶ it necessarily follows that: (c) *military personnel* and *resistant inhabitants* are *combatants*.⁷⁷ This also entails that: (d) *civilians taking a direct part in hostilities not to resist an invasion* are *non-combatants*.

In the light of Articles 48 and 50 AP I, moreover, Articles 13 GCs I-II and 4 GC III identify not only military personnel, but also civilians enjoying protection under GCs I-III, the latter group including contractors supplying armed forces.⁷⁸

Finally, under Articles 13 GCs I-II and 4 GC III, civilians directly taking part in hostilities other than those resisting invading forces do not benefit from the protection granted by the three Conventions, whereas under Article 51(3) AP I they also lose the protection afforded by GC IV.⁷⁹

Under Article 47 AP I, *mercenaries*, who are neither members of the armed forces nor citizens of State Parties to the conflict and are motivated to fight by financial gains, explicitly qualify as *non-combatants*, so they do not enjoy the protection afforded by the GCs.⁸⁰

In fact:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
 - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) does, in fact, take a direct part in the hostilities;
 - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
 - (e) is not a member of the armed forces of a Party to the conflict; and
 - (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.⁸¹

⁷⁵ Emphasis added. See also Sandoz, Swinarski and Zimmermann, *supra* note 69, at 609-612.

⁷⁶ See Henckaerts, Doswald-Beck, *supra* note 31, Rule 3, at 11-13, Rule 5, at 18-19.

⁷⁷ Inhabitants resisting an invasion cannot be defined as 'combatant civilians', because under the GCs the word 'civilian' is opposed to 'combatant', and not to 'military'.

⁷⁸ It is admitted that PSC personnel fall in this category of subjects, at least since they provide effective services to the armed forces ('accompany the armed forces') (see Doswald-Beck, *supra* note 35, at 123-124).

⁷⁹ See Henckaerts, Doswald-Beck, *supra* note 31, Rule 6, at 20; Sandoz, Swinarski and Zimmermann, *supra* note 69, at 618-619.

⁸⁰ *Ibid.*, at 571-581.

⁸¹ Emphasis added. Given the definition of 'combatants' as subjects who 'have the right to participate directly in hostilities', provided for in Article 43 AP I, the reference embodied in Article 47(1) AP I to the 'right to be a combatant', is inconsistent, because the whole paragraph means that: 'A mercenary shall not have the right to have the right to participate directly in hostilities'. The rule could simpler provide for that: 'A mercenary shall not be a combatant'.

Overall, a pattern defining the basic subjective positions under IHL from the active viewpoint can be described as following:

- *Combatants* are subjects enjoying the right to take direct part in hostilities, they benefit of the protection of GCs I-II-III-IV;
- *Military personnel other than medical personnel and chaplains* and *inhabitants* of a non-occupied territory opposing an invasion are *combatants*, they enjoy the protection of GCs I-II-III-IV;
- *Civilians* are *non-combatants*, and thus subjects non-authorized to take direct part in hostilities, benefiting of the protection of GC IV; by taking direct part in hostilities, they lose the protection of GC IV (by virtue of Article 51(3) AP I and, *a fortiori*, Article 5 GC IV) and they are not shielded by GCs I-II-III;
- *Mercenaries*, neither members of the armed forces nor citizens of State Parties to the conflict, motivated to fight by financial gain, are non-combatants and do not benefit of the protection afforded by GCs I-II-III-IV;
- *Military medical personnel and chaplains (non-combatant military personnel)*⁸² enjoy the protection of GCs I-II-III-IV.⁸³

This model certainly applies to international armed conflicts, whereas it is doubtful whether it covers a case of non-international armed conflict, since common Article 3 generally protects ‘persons taking no active part in the hostilities’. Given that the Articles defining subjective qualifications in the GCs and Additional Protocols do not envisage any limitation as to their validity with regard to common Article 3, it could be thought that they apply to both international and non-international armed conflicts. This argument seems even more persuasive by considering that common Article 3 embodies the GCs’ core obligations. Nevertheless, scholars tend to exclude the effectiveness of subjective distinctions envisaged by the GCs and the APs in case of non-international armed conflicts.⁸⁴ This assumption relies on the observation that the only distinction set up by common Article 3, regulating non-international armed conflicts, concerns persons taking and not taking an active part in hostilities. Although literally Article 3 does not exclude the applicability of other rules embodied in the GCs and APs to non-international armed conflicts, further differentiations would not be relevant in non-international armed conflicts, especially the distinction between combatants and non-combatants.

⁸² Paradoxically, this expression is equivalent to ‘civilian military personnel’.

⁸³ A distinction based on the oppositions combatant/non-combatant and military/civilian could provide for that: – *Lawful combatants* are subjects authorized to take a direct part in hostilities, and thus are afforded the protection of GCs I-II-III-IV; – *Unlawful combatants* are subjects not authorized to take a direct part in hostilities, and thus are not afforded the protection of GCs I-II-III-IV; – *Non-combatants* are subjects that do not take a direct part in hostilities; – *Military personnel* are subjects belonging to the army of a State; – *Civilians* are subjects that do not belong to the army of a State; – *Military personnel* engaging in hostilities are *lawful combatants*, and thus benefit of the protection of GCs I-II-III-IV; – *Civilians resisting invaders* are *lawful combatants*, and thus benefit of the protection of GCs I-II-III-IV; – *Other civilians* taking direct part in hostilities are *unlawful combatants*, and thus do not benefit of the protection of GCs I-II-III-IV; – *Mercenaries*, neither members of the armed forces nor citizens of State Parties to the conflict, motivated to fight by financial gain, are *unlawful combatants*, and thus do not benefit of the protection of GCs I-II-III-IV; – *Non-combatant military personnel* benefit of the protection of GCs I-II-III-IV; – *Non-combatant civilians* benefit of the protection of GCs I-II-III-IV. On the problems of labelling under the GCs see R. Baxter, ‘So Called “Unprivileged Belligerency”’: Spies, Guerrillas and Saboteurs’, 28 *British Yearbook of International Law* (1951) 323-345.

⁸⁴ See C. Schaller, ‘Private Military and Security Companies under the International Law of Armed Conflicts’, in Jäger and Kümmel, *supra* note 14, 345-360, at 357; Henckaerts and Doswald-Beck, *supra* note 31, Rule 157, Rule 3, at 11, Rule 106, at 384.

B. Qualification of PSC Personnel under IHL

In order to determine whether the engagement of PSC employees in hostilities constitutes a crime under domestic law, it must be ascertained whether they qualify as *combatants* or *non-combatants*. In fact, by conferring the right directly to participate in hostilities, the status of *combatant* constitutes a ground for excluding (criminal) responsibility in case of acts connected with the afore-mentioned engagement. Otherwise, the same acts would qualify as illegal under domestic law. For instance, the act of killing a combatant can be *justified* when committed by another *combatant*, but the same conduct is a *crime (murder)* under domestic law if perpetrated by a *non-combatant* subject.

It cannot be excluded that PSC personnel qualify as ‘civilians opposing an invasion’, if they are recruited by resistant civilians (Resistant civilians – PSC personnel) in order to fight an occupying power. Under such circumstances, they would be ‘combatants’ and enjoy the right to take a direct part in hostilities. Nevertheless, in most cases PSCs are hired by State departments (State – PSC personnel). Therefore, for the purpose of attributing to PSC personnel the right to take a direct part in hostilities, the main issue consists in establishing whether or not they can be regarded as *military personnel* (persons belonging to armed forces).⁸⁵ Otherwise, by qualifying them simply as *civilians* or *mercenaries*, PSC personnel would have no right to take a direct part in hostilities, thus possibly incurring criminal responsibility under domestic law.

1. Military Personnel (Combatants): Private Military Companies (PMCs)?

With regard to the position of PSC employees as military personnel, it must be considered that members of the ‘armed forces of a Party’ are subjects formally enlisted,⁸⁶ groups or units (also paramilitary and law enforcement agencies (Article 43(3) AP I to the GCs)),⁸⁷ subordinated to a responsible command and respecting an internal disciplinary system, including IHL (Article 43(1) AP I to the GCs).⁸⁸

Given this definition, with regard to States (‘Parties’ to the GCs), it is possible that employees of PSCs are recruited according to enrolment procedures provided for armed forces, but this is not necessarily the case. In fact, engaging PSC personnel by means of contract provides a flexible and efficient tool that allows keeping low financial and political costs, since it avoids formal enlistment.⁸⁹ In case of formal enrolment, however, PSC personnel would certainly belong to the armed forces, and thus qualify as ‘military’. By contrast, the enterprise would remain an autonomous entity, so that the expression ‘PMC’ could apply only *lato sensu*.

It is also debatable whether PSCs constitute administrative units of the State. Some scholars argue that, though this is possible depending on domestic law, it is not necessarily the case in most circumstances.⁹⁰ Should this be the case, anyway, Security Companies (SCs) could be correctly named ‘Military Companies (MCs)’, and their personnel would certainly qualify as ‘military’. Instead, by

⁸⁵ See Hoppe, *supra* note 22, at 1005 ff.

⁸⁶ This is the meaning normally attributed to the expression ‘the armed forces of a Party to a conflict consist of all organized armed forces’ (Article 43(1) AP I to the GCs). See Weigelt and Marker, *supra* note 26, at 382.

⁸⁷ See *supra* para. 4.A.

⁸⁸ See Henckaerts and Doswald-Beck, *supra* note 31, Rule 4, at 14 ff.

⁸⁹ See N. Boldt, ‘Outsourcing War – Private Military Companies and International Humanitarian Law’, 47 *German Yearbook of International Law* (2004), 502-544, at 515.

⁹⁰ See Doswald-Beck, *supra* note 35, at 115 ff.

becoming administrative units of the State, SC/MCs should qualify as ‘public’ rather than ‘private’ subjects.

Furthermore, it is legitimate to wonder whether PSCs can be conceived of as units abiding by a discipline respectful of IHL and submitted to a command accountable to a State (State – PSC). From this viewpoint, since a *de facto* link is unanimously accepted as a connection sufficient to make militias responsible to States,⁹¹ a private contract could *a fortiori* be regarded as a suitable instrument in order to establish a *de jure* relationship of responsibility. Therefore, at least when they wear uniforms or carry arms openly, employees of PSCs acting on behalf of a State and directly engaging in hostilities could be considered ‘military personnel’, or more precisely ‘paramilitary personnel’ under Article 43(3) AP I to the GCs. As for the label of the companies, PSCs can be considered ‘PMCs’ only by thinking, *lato sensu*, that the relationship of responsibility with the State is adequate to embed them in the armed forces.

Generally speaking, these considerations should be valid also for PSCs contracted by IOs (IO – PSC), given that these bodies are associations of States.

Instead, when PSCs are hired by private subjects (NGO/private entity – PSC), their employees should be necessarily regarded as civilians, not having the right to take a direct part in hostilities.⁹²

2. Mercenaries or Civilians (Non-Combatants)

If PSC employees taking a direct part in hostilities are not considered military personnel, it must be ascertained whether they can be regarded as ‘mercenaries’. Specifically, in the light of the GCs, the definition of the former category is very narrow and a lot of conditions must be simultaneously fulfilled in order to match such a qualification. Among all requisites, those under Article 47(2)(a)(b)(d) AP I are the most problematic ones.

Concerning Article 47(2)(a) AP I, it cannot be said with absolute certainty that PSC personnel are necessarily ‘recruited to fight’, though they may end up doing so. It is reasonable to assume that private contractors are ‘hired to fight’ whenever they are supposed to use armed force beyond the limits of self-defence.⁹³ However, attention should be paid to the activity undertaken *de facto*. Thus, for instance, MPRI, a US military company originally engaged for training purposes in civil–military relations,⁹⁴ ended up planning and commanding military operations for Croatia during the war with Serbia.⁹⁵

As for Article 47(2)(b) AP I, the possibility exists that PSC personnel are promised excessive material compensation, though this is not necessarily the case. Certainly, the hiring contract is crucial for this purpose, unless further remuneration is *de facto* remitted outside the formal agreement.

Finally, concerning Article 47(2)(d) AP I, the citizenship of PSC personnel can be determined either on a strictly individual basis or by relying on the State where corporations have their seat.⁹⁶ Either

⁹¹ See Weigelt and Marker, *supra* note 26, at 382; Doswald-Beck, *supra* note 35, at 121.

⁹² See Doswald-Beck, *supra* note 35, at 119.

⁹³ *Ibid.*, at 122.

⁹⁴ See <http://www.mpri.com>.

⁹⁵ See the University Centre for IHL, *Report on Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions*, 29-30 August 2005, Section A.3 (a) (iii), available online at <http://www.adh-geneve.ch>, at 26.

⁹⁶ See Doswald-Beck, *supra* note 35, at 123.

way, it might be the case that PSC employees are non-nationals of a Party or non-residents of a territory controlled by a Party to the conflict, though this is not necessarily the case.

When PSC employees taking direct part in hostilities do not fulfil the conditions to be regarded either as military personnel or mercenaries, they qualify as civilians. By classifying them both as mercenaries or civilians, PSC personnel are non-combatants, therefore their participation in hostilities is illegal under IHL; accordingly, the recruiting companies could hardly qualify as ‘military’.

C. Direct Participation of PSC Personnel in Hostilities and Criminal Responsibility under Domestic Law: the Combatant Status as an Excuse

In the light of Article 43 AP I to the GCs, Article 13 GCs I-II and Article 4 GC III, the lawfulness of the participation of PSC employees in hostilities is strictly linked to their status as ‘combatants’. Such a qualification depends on the external relationship existing between the firm and the subject for which it works: participation can be lawful solely when PSC employees act on behalf of States, IOs and civilians opposing an invasion.

This distinction does not reflect the classification established under Article 1 of the 1899 and 1907 HCs’ Regulations, which expressly qualified as lawful belligerents also militias and corps not belonging to the armies of a State Party. Therefore, a contextual interpretation of the Hague and Geneva Conventions would allow for concluding that PSC employees can be regarded as lawful belligerents even if they do not act on behalf of a State. Nevertheless, by virtue of the *lex posterior* principle, the external relationship existing with private or state subjects must be taken into account, according to the GCs.

When PSC employees qualify as civilians or mercenaries, their direct participation in hostilities can trigger criminal liability. In fact, though direct participation is not in itself a crime under IHL, by losing the excuse associated with the status of combatant, PSC personnel are no longer justified for acts perpetrated while directly engaging in hostilities. Criminal conduct punishable under domestic law could consist, for instance, in carrying firearms, inflicting bodily harm and killing. Procedurally, prosecution can be undertaken according to the ordinary international criteria for determining jurisdiction (*locus commissi delicti*, nationality, interest in proceedings).⁹⁷

Finally, if they qualify as mercenaries, PSC personnel are furthermore subject to trial for the crime of mercenarism, specifically under the Organization of African Unity (OAU) Convention on the Elimination of Mercenarism of 1972 and the UN Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989. Under these circumstances, prosecution can be universally undertaken, in particular according to Article 9(2) of the 1989 Convention.

1. The Spectrum of Conduct Included in ‘Direct Participation in Hostilities’

In order to establish to what extent PSC personnel can take a direct part in hostilities, it must be ascertained what types of conduct the expression ‘direct participation in hostilities’ includes. As a starting point, it can be said that ‘direct participation’ refers to the immediate use of the armed force

⁹⁷ Under these circumstances, the problem arises of ascertaining the link of causality when non-combatant contractors assist combatants in hostilities. In fact, the conduct of the contractor should normally qualify as ‘collaboration’ in the crime; nevertheless, the primary actor is excused because of his status of ‘combatant’. Let us think, for instance, of the hypothetical case of a private contractor who provides with ammunitions a combatant who subsequently shoots an enemy. The conduct of the combatant is decisive for establishing the causal link between the behaviour of the private contractor and the fatality. Therefore, is it possible to consider the private contractor autonomously liable for the crime of murder under domestic law?

against the enemy beyond self-defence.⁹⁸ Nevertheless, this definition is problematic. The question is a temporal one: what conduct embedded in the process leading to the immediate use of violence against the adversary constitute 'direct participation in hostilities'? This is especially important in order to ascertain to what extent the status of combatant shields PSC personnel from domestic criminal jurisdiction

According to the commentary of the ICRC to Article 51(3) AP I, the required causative link exists in case of acts that are 'likely to cause actual harm to the personnel and equipment of the enemy armed forces', including, at least, '*preparation and return from combat*'.⁹⁹ Instead, activities below this threshold would not constitute part of the direct participation in hostilities, but only participation in the war effort.¹⁰⁰ In this light, for instance, loading bombs on an aircraft or providing co-ordinates for attacks would suffice to establish criminal responsibility.

Though this explanation is clear enough from the theoretical standpoint, it remains rather problematic in practice. In fact, since there is no list of 'directly hostile' conduct, the threshold for determining 'direct participation in hostilities' must be established on a case-by-case basis, with little legal certainty.

The position of States is not at all uniform, so that by 'directly hostile activities' some domestic legislation and military manuals refer only to acts of 'immediate' violence, whereas others extend the notion to conduct consisting in providing logistic support, guard services and intelligence on behalf of military forces.¹⁰¹ Thus, for instance, is it possible to regard as 'directly hostile' the activity simply consisting in guarding a storehouse for air-to-ground bombs? What about the activities consisting in transporting weapons, rescue operations, providing planning and intelligence services? From the criminal standpoint, such a question is indeed highly problematic with respect to the principle of legality.

2. International and Non-International Armed Conflicts

The criminal regime defined certainly applies to international armed conflicts. Though it is effective in theory, it proves practically inefficient. Basically, the hiring State tends to grant 'immunity' to PSC employees for reasons of convenience, since exploiting private contractors for military purposes is a useful business. This result is often achieved via the adoption of *ad hoc* international instruments or domestic legislation. Third States are unlikely to prosecute PSC employees on the basis of active nationality for diplomatic reasons. Instead, the criteria of territoriality and passive nationality could provide a serious incentive for prosecution, but their applicability is affected during armed conflicts. In the Iraqi case, for instance, the regime of Saddam Hussein proved incapable of prosecuting foreign PSC employees. The subsequently installed Coalition Provisional Authority (CPA) decreed that local criminal law was inapplicable to PSCs' personnel (Order No. 17). Finally, the Iraqi administration confirmed this order (Order No. 100). However, it is unlikely that the Iraqi administration will

⁹⁸ In this vein, the Commentary to Article C of the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises envisages that business security arrangements are used only for preventive or defensive purposes, not for carrying on activities reserved to State military services. Therefore, security personnel should resort to force only when strictly necessary in a way proportionate to threats (see the *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2, 26 August 2003, at 6 (b), available online at <http://www.un.org>).

⁹⁹ See Sandoz, Swinarski and Zimmermann, *supra* note 69, at 619, § 1944, at 618, § 1943 (emphasis added).

¹⁰⁰ *Ibid.*, at 619, § 1945.

¹⁰¹ See Henckaerts and Doswald-Beck, *supra* note 31, Rule 6, at 22-23. See also the reports of the ICRC and Asser Institute seeking to clarify the concept of 'direct participation in hostilities', available online at <http://www.icrc.org>.

prosecute PSC personnel. In fact, Iraq maintains a tight political relationship with the hiring States and contractors who are still active in Iraq in a time of internal disorder.

The applicability of the same criminal regime to non-international armed conflicts relies on both subjective and objective criteria. First, it depends on whether or not it is thought that the subjective distinctions established by the GCs and APs are effective with respect to common Article 3. As we have seen, scholarly opinions tend to exclude such applicability.¹⁰² Therefore, in the framework of non-international armed conflicts the qualification of PSC personnel as combatants or non-combatants should be irrelevant.¹⁰³ Secondly, it is important to ascertain whether rules linked to subjective status valid in international armed conflicts apply also to non-international armed conflicts. In fact, it is considered that rules of conduct valid in international armed conflicts do not necessarily apply to non-international armed conflicts, regardless of subjective qualifications.¹⁰⁴ Therefore, the conduct of PSC personnel not contracted by the State (Non-State entity – PSC) is likely to be prosecuted under domestic criminal law, whether it is related or not to direct participation in hostilities. By contrast, the conduct of PSC personnel acting for the State (State – PSC) is likely to be excused as a contribution to the maintenance of public order and internal security.¹⁰⁵

5. Conclusion

PSCs can be briefly defined as private organizations of physical persons exchanging security services for financial gains. Externally, the following legal relationships can be envisaged: State – PSC, IO – PSC, NGO – PSC, private subject – PSC.

The activity of PSC personnel connected with armed conflicts raises the question of criminal responsibility under IHL. Specifically, two issues are relevant: (1) accountability for war crimes; (2) liability under domestic law in case of direct participation in hostilities.

On the one hand, with regard to responsibility for war crimes, PSC employees must be considered liable regardless of their qualification as civilians or combatants, when a *de facto* link exists with a Party to the conflict (Party to the conflict – PSC). In fact, the GCs and the Statute of the ICC provide for the accountability of ‘natural persons’. Within this frame, the specific discipline of command and subordinate responsibility applies in so far as a *de facto* superior–subordinate relationship can be envisaged, both internally (PSC’s superior – subordinate) and externally to PSCs (IO/State/private entity’s superior – PSC’s subordinate).

On the other hand, direct participation in international armed conflicts is not a crime in itself under international law. Nevertheless, by involving conduct such as carrying firearms and killing, it becomes criminally relevant under national law. Therefore, domestic criminalization of PSC personnel depends on their qualification under IHL. By enjoying the status of *combatants*, they are excused for directly participating in hostilities under Article 43 AP I to the GCs. Such is the case only when PSC employees classify as ‘civilians opposing an invasion’ or ‘military’. This status could ultimately be ascertained *de facto*, on the basis of the external relationship existing between PSCs and the hiring subjects (State/resistant civilians – PSC). By contrast, according to the prevalent scholarly

¹⁰² See *supra* para. 4.A.

¹⁰³ See Schaller, *supra* note 84, at 357; M. Voyame, ‘The Notion of ‘Direct Participation in Hostilities’ and Its Implications on the Use of Private Contractors under International Humanitarian Law’, in Jäger and Kümmel, *supra* note 14, 361-376, at 364.

¹⁰⁴ See Henckaerts and Doswald-Beck, *supra* note 31, Rule 3, at 11, Rule 4, at 14.

¹⁰⁵ See Schaller, *supra* note 84, at 357.

interpretation of common Article 3 GCs, such a discipline does not apply to non-international armed conflicts.

Overall, the ambiguous status of private contractors under IHL could often be overcome by assimilating *de facto* their position to that of formally classified parties. In this light, the uncertainty of the official qualification should have a limited impact on criminal liability. The propriety of the current national and international regulation applying to the criminal responsibility of PSC personnel can be questioned, from the viewpoint of both equity and completeness. In theory, it affords multiple means for trying PSC personnel responsible for war crimes or direct participation in hostilities. In practice, the unwillingness or incapacity of States to prosecute proves a major obstacle for the efficiency of the system. By overcoming the frame of State sovereignty, the ICC provides appropriate mechanisms for implementing the existing rules, but its jurisdiction is limited by the founding Treaty.

