International Law and the Use and Conduct of Private Military and Security Companies in Armed Conflicts

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**Introduction**

A growing number of states (and sometimes international organizations, NGOs or businesses) use private military and security companies (PMSCs) in armed conflicts for a large variety of tasks, which were traditionally fulfilled by soldiers, in the field of logistics, security, intelligence gathering, and protection of persons, objects and transports. A definition of PMSCs may be found in the Montreux Document, which, though not binding, constitutes the only inter-state instrument guiding states in their use and tolerance:

“’PMSCs’ are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel (Montreux Document 2008, Preface, point 9(a)).’

The privatisation of activities formerly exclusively performed by states is a general tendency in recent years. It even concerns the use of force, within and between states, a domain previously considered as a core attribute of the Westphalian state. Historically, this constitutes a simple return to previous realities. However, modern codified international humanitarian law (IHL) was born during the phase of nearly complete state monopoly.

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1 This article is largely based upon - and reproduces in part the foreword and the conclusion I wrote of - a book written by Lindsey Cameron and Vincent Chetail (Cameron and Chetail, 2013), which presents the results of a research project funded by the Swiss Science Foundation on the subject. This research project was supervised by the author. The aforementioned book also provides for references for statements and opinions contained in this article.
This development fits into – and is perhaps situated at the cutting edge of - a larger challenge for international law in the contemporary world: the growing importance of non-state actors in international relations and the difficulty of dealing with them under the traditional categories of international law, to attribute them to a state and to determine which state has what obligations in their respect.

Multinational enterprises, armed groups, terrorists, and non-governmental organizations are becoming increasingly important, while public international law is still mainly addressed to states and developed by states, and its implementation mechanisms are best geared towards states. Even when it comes to the use of force within a state against armed groups and between states, a domain previously considered as core attributes of the Westphalian state, private actors, that is, PMSCs, play an increasing role. In some recent conflicts, some belligerent states have employed more PMSC contractors than members of their regular armed forces (Schwartz and Joyprada 2011, Summary). PMSCs are perceived as committing violations of IHL or even as not being bound by the rules of IHL adopted by states to govern the conduct of their armed forces which ensure that they respect civilians and other war victims.

The international law applicable to PMSCs is therefore not only a practical humanitarian challenge, but also an ideal testing ground for conceptual de lege lata questions and de lege ferenda dilemmas. Here, as elsewhere, the question arises whether international law should combat (or already outlaws) the phenomenon, or cover and regulate it. Here, as elsewhere, the possibilities are either to address those actors directly by international law or to deal with those categories via well-established subjects of international law such as states and international organizations, and to a certain extent (in particular for international criminal law) individuals.

The issue is conceptually particularly challenging for the law prohibiting the use of force in international relations because that law is traditionally exclusively addressed to states. In practice, the issue also raises difficult problems for IHL. Certainly, since 1949, this branch has been, at least in part, equally addressed to armed groups involved in armed conflicts against governmental forces and between one another. With the – at least theoretically – breathtaking development of international criminal law and international criminal justice in recent years, the individual has also become the addressee of some rules of IHL. Private companies hired by parties to armed conflicts or others to conduct armed
conflicts, however, are not yet explicit addressees of IHL. As for International Human Rights Law, PMSCs raise the traditional debate about when and to what extent non-state actors are bound by human rights, combined with the controversy about the relationship between IHL and Human Rights, which may not necessarily be the same for a non-state actor as for a state.

The historical, international relations, political science, psychological or public finance aspects of PMSCs, who uses them, for what purposes, in which situations, how they behave: all these questions have been analyzed by others (See, for example, Avant (2005); Kinsey (2010); Ortiz (2010); Dunigan (2011); Mandel (2002); Carmola (2010); Leander (2006); Alexandra, Baker and Caparini (2008); Jäger and Kümmel (2007)). I do not deal with how international law should be developed to cover PMSCs more appropriately. For me PMSCs are, as war is for IHL, a reality. I try to apply international law as it stands to this reality.

**International law applicable to armed conflicts which is relevant to PMSCs**

Armed conflicts are regulated by two distinct and completely separate branches of international law: the *ius ad bellum* prohibiting and exceptionally authorising the use of force, and the *ius in bello*, regulating, mainly for humanitarian purposes, that use of force independently of whether it is lawful or unlawful under *ius ad bellum* and regardless of the causes espoused by or attributed to the parties to the conflict. No matter the legitimacy of the use of force in the first place, the laws on how force may be used apply equally to all parties to a conflict.

The *ius ad bellum* defines when it is lawful to use force in international relations, i.e., to resort to armed conflict. At least since the prohibition of the use of force was enshrined in Article 2 (4) of the UN Charter, it could be more appropriately referred to as *ius contra bellum*. Indeed, the use of force between states is prohibited. There are exceptions, in particular individual and collective self-defence, enforcement measures decided or approved by the UN Security Council, probably national liberation wars and arguably other cases. However, those exceptions in which a *ius ad bellum* (i.e., a right to wage war) exists may only justify the use of force by one party. The enemy has necessarily violated the *ius contra bellum*. States are never equal before the *ius ad bellum* and if the *ius contra bellum* were respected, international armed conflicts would not exist. In this article, I will use a broad concept of *ius ad bellum*, one which in-
cludes not only the rules of the UN Charter on the use of force, but also all rules of international and domestic law which directly or indirectly justify the use of force. In non-international armed conflicts, no international *ius ad bellum* exists concerning non-international armed conflicts, since such conflicts are neither justified nor prohibited by international law. Nevertheless, *ius ad bellum* for non-international armed conflicts does exist in national legislation. As the monopoly on the use of force for state organs is inherent in the very concept of the Westphalian state, the national legislation of all states prohibits anyone under their jurisdiction to wage an armed conflict against governmental forces or, except state organs acting in said capacity, anyone else.

The *ius in bello* defines what is legal in an armed conflict. IHL is its most important branch. It limits the use of violence in armed conflicts by protecting those who do not or no longer directly participate in hostilities and limiting the violence to the amount necessary to achieve the aim of the conflict, which under *ius in bello* can only be to weaken the military potential of the enemy. Currently, IHL is largely codified in treaties, in particular the four 1949 Geneva Conventions and the two 1977 Additional Protocols. Those instruments apply to armed conflicts. They make a strict distinction between international and non-international armed conflicts, the latter being governed by less detailed and less protective rules. As for customary international law, a recent comprehensive study undertaken under the auspices of the International Committee of the Red Cross (ICRC) has found a large body of customary rules, the majority of which apply to both international and non-international armed conflicts (see Henckaerts and Doswald-Beck 2005). Both treaty and customary IHL regulate the conduct of states and armed groups involved in armed conflicts. In addition, at least its numerous criminalized rules equally govern all conduct in an armed conflict linked to the conflict, even if it is not attributable to a party to a conflict. As will be discussed later, conduct of PMSCs is therefore governed by IHL.

International Human Rights Law (IHRL) does not stop applying in armed conflict, except for derogations admissible from some rights in situations of emergency. In the few cases in which IHL and IHRL contradict each other on a certain issues, the applicable law has to be determined by the *lex specialis* principle. Traditionally, IHRL is however only addressed to states, not to private actors, although states have a due diligence obligation to protect the human rights of persons under their jurisdiction against interferences by private actors such as PMSCs.
Recent specific instruments regulating PMSCs

The international legal obligations of contracting states, territorial states, home states, of all other states in relation to PMSCs and their personnel have been restated (together with recommendations of ‘good practices’) in the Montreux Document, accepted by most of the particularly interested states (see Montreux Document 2008). It does not constitute a binding treaty. It essentially encapsulates the varying obligations on different states depending on their relationship with PMSCs. Contracting states have the highest level of due diligence obligations with regard to PMSCs. They must ‘ensure that PMSCs that they contract and their personnel are aware of their obligations and trained accordingly’. These duties are subject to the limitation of what is ‘within their power’ to do. In comparison, territorial and home states of PMSCs are under an obligation to ‘disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel’. The good practices set out in the Montreux Document reflect some of the most effective ways for states to satisfy their due diligence obligations.

As far as the obligations of PMSCs themselves are concerned, the only instrument specifically enumerating them is an International Code of Conduct for Private Security Providers, resulting from an initiative led by the Switzerland and the PMSC industry (see The International Code of Conduct 2010). This Code is presently signed by 511 companies concerned, including nearly all major PMSCs. It aims at establishing direct obligations incumbent on private security companies. This initiative is not the fruit of interstate negotiations (although Switzerland and the UK were co-sponsors of it), but rather of PMSCs, acting in collaboration with the Swiss Federal Department of Foreign Affairs, an NGO (the Geneva Centre for the Democratic Control of Armed Forces) and an academic institution (the Geneva Academy of International Humanitarian Law and Human Rights). The implementation of the pledges in the Code of Conduct is to be overseen by a ‘steering committee’ that bears the responsibility of developing ‘the initial arrangements for the independent governance and oversight mechanism, including by-laws or a charter which will outline mandate and governing policies for the mechanism’. Recently, a Charter for that mechanism has been adopted (see for general information about the process and a draft charter for the mechanism with comments: International Code of Conduct for Private Security Providers, http://www.icoc-psp.org/). It still meets major criticism both from the PMSC industry and from Human Rights NGOs. The effectiveness of this enforcement
mechanism will be pivotal to the effectiveness of the Code. The major flaw of the sophisticated supervisory system foreseen is that findings of violations of the Code by PMSCs are only possible if the industry representatives in the supervisory body agree.

To go beyond soft law, the UN Working Group on Mercenaries prepared a draft convention regulating PMSCs which it presented to the Human Rights Council in September 2010 (see Draft of a possible Convention 2010). The draft included provisions that would require state parties to ‘develop and adopt national legislation to adequately and effectively regulate the activities of PMSCs.’ A significant part is devoted to outlining detailed requirements of such legislation, including licensing, registration and oversight mechanisms. The draft convention was not adopted by the Council; instead, the Council passed a resolution establishing ‘an open-ended intergovernmental working group’ tasked ‘to consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument’ (UN Doc. A/HRC/RES/15/26, adopted 1 October 2010). While the failure to adopt the draft convention does not necessarily signal a death knell for a UN Convention on PMSCs, the mandate of the ‘open-ended intergovernmental working group’ could hardly be more loosely defined. Moreover, support for the draft convention and even for the establishment of the intergovernmental group lacked the support of western states that rely heavily on PMSCs.

**May States use PMSCs?**

Despite all modern theories and an international reality – of which PMSCs are the acme – which is less and less state-centred, international law is still basically addressed to states, developed by states and its implementation mechanisms are geared towards states. It is therefore appropriate to first enquire whether and to what extent states may outsource the conduct of armed conflicts to private companies. Even searching beyond IHL and including *jus ad bellum*, we find only a few explicit prohibitions on very specific activities. Some treaties and arguably customary international law also prohibit states to use mercenaries, but the definition of mercenaries (in particular the condition that they must not be nationals of a party and be hired to fight) excludes most PMSC staff (International Convention 1989, Art. 3). Some implicit prohibitions of outsourcing are arguable. Good faith prohibits it if the specific intent...
is to avoid obligations – and such intent would be futile in most cases – or to implement unlawful action. A state may not outsource the decision to exercise its right to self-defence, but it may outsource the exercise of that right as long as it keeps sufficient control to ensure respect of the principles of necessity and proportionality. As for the UN and regional organisations, nothing fundamental hinders them from a legal point of view to outsource a lawful use of force, or more realistically, to accept PMSC action as contribution by a state or to constitute a permanent force made up of PMSCs. International human rights law arguably also does not prohibit outsourcing of law enforcement functions other than the administration of criminal justice, including the decision to arrest a person. However, the state must make sure that PMSCs to whom it outsources law enforcement action respect human rights to the same extent as if such action was taken by the state. IHL requires that the responsible officer of a POW camp must belong to the regular armed forces of the detaining power, which excludes PMSCs (Geneva Convention III 1949, Art. 39). Similarly, in an occupied territory, requisitions in kind and services may only be demanded on the authority of the military commander of the occupying power (Hague Regulations 1907, Art. 52).

The most crucial admissibility of outsourcing issue is obviously whether a state may outsource the conduct of hostilities under IHL. There are serious reasons for a negative answer. While IHL arguably does not prohibit a civilian from directly participating in hostilities, if a state wants to respect – in good faith – the principle of distinction, it may not entrust civilians with conduct that constitutes direct participation in hostilities (which again shows the crucial importance of the latter concept for our issue). In addition, a PMSC that is not sufficiently integrated into the state organisation could not know or be aware of elements necessary to evaluate criteria such as the military advantage anticipated from an attack. The latter argument also prevents a state from allowing a non-state actor to take some other decisions (such as whether imperative military necessity or security reasons require certain action).

Are States Responsible for PMSCs they Use?

The Montreux Document recalls the obvious: that contracting states retain their IHL obligations even if they contract out certain activities to PMSCs. This raises, however, the question when is a state responsible for (or in relation to) PMSC conduct. A positive answer not only facilitates enforcement through the well-
developed (but still basically non-hierarchical) mechanisms of implementation of international law, but it also implies that the rules of IHL fully apply (at least to the state in relation) to such conduct.

PMSC staffs are only very rarely state organs under domestic law. They may however occasionally be so completely dependent on a state that their conduct is attributable to that state as a de facto organ (See ICJ, Bosnia and Herzegovina v. Serbia and Montenegro 2007, paras 391-4). In my view, such attribution does not yet imply that the PMSC constitutes an armed force for combatant status purposes under IHL. A state is furthermore responsible for conduct of PMSC staff if it delegates to them not just public functions, but elements of governmental authority (ILC Draft Articles 2001, Art.5). Arguably such attribution does not presuppose a delegation by the domestic law of the state concerned. It covers acts of authority through unilateral decision, such as seizure, arrest, detention, interrogation, maintenance of public order and arguably again direct participation in hostilities. A state is furthermore responsible for PMSC conduct that occurs pursuant to its instructions or that is executed under its direction or control (ILC Draft Articles 2001, Art. 8). If the overall control standard developed by International Criminal Tribunal for the Former Yugoslavia (ICTY) is sufficient, contracting states would very often be responsible for conduct incidental to the execution of the contract by PMSCs (ICTY, Tadic 1999, paras 98-145). However, there are good reasons to consider, along with the International Court of Justice (ICJ), that effective control is necessary for such attribution, which rarely exists and even more rarely can be proven (ICJ, Bosnia and Herzegovina v. Serbia and Montenegro 2007, paras 402-6).

Even when PMSC conduct is not attributable to a state, state organs which are attributable to a state may lack due diligence in relation with PMSC conduct. Such very variable due diligence obligations exist in the law of neutrality (if a PMSC is recruiting on a neutral territory staff for a specific conflict) and in international human rights law. If a PMSC acts in a territory under the jurisdiction of a state or the victim of a violation is subject to a high degree of control by a state, that state has an obligation to protect the victim’s human rights even against interference by private actors, including a PMSC whose conduct is not attributable to that state. In IHL, occupying powers have such due diligence obligations (see, e.g. Hague Regulations 1907, Art. 43), and they also result from the many rules directing states to ‘protect’ war victims (see e.g. Geneva Convention IV 1949, Art. 27). In addition, the obligation to ensure respect for
IHL (see Geneva Conventions III and IV 1949, Art. 1) may imply a general due diligence obligation for all states, but more particularly for states contracting PMSCs, host states of PMSCs, and home states (in which the companies are registered or headquartered).

**Legal means through which PMSCs are bound by IHL**

As the phenomenon of PMSCs goes beyond the traditional axioms of the Westphalian system, it is not sufficient to show that states engaging PMSCs are most often responsible for (or in relation to) IHL violations PMSCs commit. For the effective implementation and enforcement of IHL, to create a sense of ownership among their staff, and last but not least because many PMSCs do not work for states and armed groups, the traditional addressees of IHL, it is equally important to apply IHL directly to PMSCs. This does not only involve the interpretation of the IHL rules of conduct in the light of PMSCs tasks and conduct, but equally the question through which means IHL can become binding on PMSCs, a question which is completely neglected in existing legal writings.

While not in a legal vacuum, PMSCs operate, however, in a very chaotic legal environment, made up of very diverse rules, addressed to various actors, which have not been made for PMSCs (but nevertheless cover them). There are several possible legal justifications for the applicability of IHL, each one situation-dependent and often subject to controversies.

Under explicit rules of IHL, this is the case if the PMSC constitutes an armed group party to a non-international armed conflict (See Geneva Conventions III and IV 1949, Art. 3). It seems obvious that this is also the case whenever the conduct of a PMSC can be attributed to a state, although the legal reasoning leading to such equivalence of attribution and obligation is not obvious. The main argument for this conclusion is an *ad absurdum* argument that otherwise even armed forces of a state would not be bound by IHL. In addition, when IHL obligations are self-executing or when they are implemented through the domestic law of states under the jurisdiction of which a PMSC or its staff acts, both the PMSC and its staff are obviously bound by such domestic laws, including through the doctrine of corporate complicity or arguably whenever the relevant rule corresponds to customary international law. Similarly, under a growing number of domestic legal systems, but not yet under international criminal law, there may exist a corporate criminal responsibility of the PMSC as
a legal person. Whether the PMSC itself is a subject of international law raises the general problem of what is international personality and whether companies possess it. This is very controversial, treated in international law doctrine with many preconceived ideological and philosophical ideas and does not lead to many operational results. Beyond international personality, a PMSC may however become an addressee of IHL rules through self-regulation in codes of conduct and the provisions of its contract. Arguably, the binding character upon individuals may also be implicit in the state obligation to disseminate IHL as widely as possible.

In any case, PMSC staff is bound at least by criminalized rules of IHL. The precise range of persons who are addressees of IHL of non-international armed conflicts has been discussed in the jurisprudence of the two ad hoc International Criminal Tribunals (See in particular ICTR, Akayesu 2001, paras 432-45). Not only members of armed forces or groups, but also others mandated to support the war effort of one party to the conflict are bound by IHL. Individuals who cannot be considered as connected to one party, but nevertheless commit acts of violence contributing to the armed conflict for reasons connected with the conflict, are equally bound by the criminalized rules of IHL. What is unclear is whether the many rules of IHL that are not criminalized also cover all individual acts having a nexus with the conflict. This is often claimed, but no one provides a technical legal justification. Therefore, it is only when PMSC staffs are combatants or law enforcement tasks are delegated to them that IHL or IHRL fully and directly applies to them regardless of the applicable domestic legislation. Otherwise, as civilians, they are subject only to criminalized rules of IHL.

**Status of PMSC staff under IHL**

PMSC staff normally do not fall under the very restrictive definition of mercenaries in IHL (See Protocol I 1977, Art. 47) Most of them are not *de iure* or *de facto* incorporated into the armed forces of a party and are therefore not combatants but civilians. This is controversial in scholarly writings. Theoretically, under the text of IHL treaties, a good argument can be made that they often fulfil the necessary conditions for combatant status (See Protocol I 1977, Art. 43; Geneva Convention III 1949, Art. 4(A)(2); Doswald-Beck 2007, 121). States, PMSCs and NGO critics however do not consider them as combatants. A legal explanation for the absence of combatant status is that PMSC staff
does not belong to the contracting state in a fighting function. If they are not combatants, they have no right to directly participate in hostilities and they lose protection as civilians if and for such time as they do so. This raises the highly controversial issue – which conduct constitutes direct participation in hostilities.

When does PMSC staff directly participate in hostilities?

As civilians, PMSC staff may not directly participate in hostilities. In addition, as mentioned above, one may argue that it is contrary to the philosophy of IHL if states use PMSCs for tasks which constitute direct participation in hostilities. The concept of ‘direct participation in hostilities’ is a cornerstone of IHL on the conduct of hostilities, which gains an increasing practical importance because of the ‘civilianization’ of armed conflicts, by powerful states through private contractors and by weaker states and armed groups by using their own civilian population to overcome the enemy. Both in international and non-international armed conflicts, civilians lose their protection against attacks (and their protection against incidental effects of attacks, afforded to the civilian population as a whole) if and for such time as they take a direct part in hostilities (Protocol I 1977, Art. 51(3); Protocol II 1977, Art. 13(3)). Neither treaties nor customary law define this concept. After a large consultation of experts which showed an absence of agreement on some crucial issues, the ICRC has tried to clarify in an ‘Interpretive Guidance’ several notions: who is covered as a ‘civilian’ by the rule prohibiting attacks except in case of direct participation; what conduct amounts to direct participation; the duration of the loss of protection; the precautions to be taken and the protections afforded in case of doubt; the rules governing attacks against persons who take a direct part in hostilities; and the consequences of regaining protection (see ICRC 2009 Interpretive Guidance). The first issue is probably the most controversial one.

PMSCs and major contracting states often stress that PMSCs have only defensive functions. The execution of such functions may nevertheless constitute a direct participation in hostilities. This is uncontroversial if they defend combatants or military objectives against the adverse party. On the other extreme, it is uncontroversial that the defence of military targets against common criminals or the defence of civilians and civilian objects against unlawful attacks does not constitute a direct participation in hostilities. Mine-clearing falls under this concept only if it is directed against the other party to the conflict, training
only if it is provided in view of a predetermined hostile act. The most crucial, difficult and frequent situation is when PMSC staff guard objects, transport or persons. If those persons and objects are not protected against attacks in IHL (combatants, civilians directly participating in hostilities) guarding or defending them against attacks constitutes direct participation in hostilities and not criminal law defence of others. In my view, this is always the case when the attacker is a person belonging to a party to the conflict, even if he or she does not benefit from or has lost combatant status. In my view the unlawful status of the attacker does not give rise to a right to self-defence. If the person attacked – and under the domestic legislation of some countries even if the object attacked - is civilian, criminal law self-defence may justify a use of force, even against combatants. The analysis is complicated by the absence of an international law standard of self-defence and defence of others and by doubts about whether the criminal law defence of self-defence which avoids conviction may be used ex ante as a legal basis for an entire business activity. It must in addition be stressed that self-defence may be exercised only against attacks, not against arrests or the taking of control over objects. Indeed the criteria determining when a civilian may be arrested or objects may be requisitioned are too complicated in IHL to allow a PMSC staff to determine when they are fulfilled. In my view, self-defence as an exception to the classification of certain conduct as direct participation in hostilities must be construed very narrowly. In addition, PMSC staff providing security for an object will often not be able to know whether that object constitutes a military objective (which excludes self-defence, because the attack would not be unlawful) and whether the attackers do not belong to a party (which would not classify resistance against such attackers as direct participation in hostilities, even when the object attacked is a military objective). At the same time it is difficult for the enemy to distinguish between, on the one hand, combatants, PMSC staff who directly participate in hostilities (whom they may attack and who may attack them), and on the other hand PMSC staff who do not directly participate in hostilities, who may not be attacked and will not attack the enemy. To maintain a clear distinction between civilians and combatants and to avoid that PMSC staff lose their protection as civilians, they should therefore not be put into an ambiguous situation.

When PMSC staff is mandated with law enforcement tasks by a state, the normal IHL and human rights rules are applicable, but such law enforcement constitutes direct participation in hostilities if it is directed against armed groups or their members.
The main problem is enforcement

If implementation is the weakest aspect of international law, and even more so of IHL in current armed conflicts – in which reciprocity is often irrelevant – it is even more difficult to obtain from non-traditional addressees such as PMSCs, to whom the traditional mechanisms are not geared. First, the normal mechanisms of implementation of state responsibility may be used, when PMSC conduct can be attributed to a state, by the state injured by such conduct. States other than the injured state may at least invoke the violation and require cessation and reparation to the victims. States however only rarely use those mechanisms. Human rights protection mechanisms may therefore be more promising, as they may also hold a state responsible when no other state complains. The injured individual may invoke the responsibility of the state on the domestic level through domestic law or to the controversial extent international law gives a right to reparation to the individual. Indeed, while the obligation of a state having violated IHL to make reparation is uncontroversial, the possibility of individuals to implement it, including before courts of third states is more questioned and difficult to implement, *inter alia* because of the immunity of states before courts of third states. In any case, territorial states and home states may and should foresee enforcement mechanisms of their and a PMSC’s obligations in their domestic law, *inter alia* through registration and licensing systems. The PMSC itself may be criminally responsible in states knowing criminal corporate responsibility, a concept which is still developing in international criminal law. Individual PMSC employees are however certainly criminally responsible for war crimes, including as superiors who may even fall under the more strict rules for military commanders. In international criminal law mere knowledge of the probability that a crime will be committed is sufficient for criminal responsibility for aiding and abetting and international criminal tribunals have developed a large concept of joint criminal enterprise. IHL violations by PMSC staff may constitute torts under private law (which is more uncontroversial in civil law systems than in common law systems), but court action by the victims may encounter the obstacle of immunities in the contracting state or the territorial state and jurisdictional obstacles in other states. Criminal jurisdiction over them in third countries is not as clearly regulated as for members of armed forces and often not backed up by an efficient law enforcement system. Finally, self-regulatory mechanisms should include credible enforcement possibilities by an independent body and the possibility for individual victims of violations to trigger them.
Conclusion

In conclusion, PMSCs and their staff do not act, as some have claimed, in a legal black hole (This assertion was made in particular by Singer 2004). A PMSC is subject to IHL because its staff has to respect it, because a state is responsible for its conduct, and, in some cases and according to some theories, the PMSC is even itself an addressee of IHL. IHL provides answers to many crucial legal questions, including some, which the industry and states did not want to clarify in recent soft law instruments and codes of conduct, in particular the relationship between self-defence and direct participation in hostilities. I do not think that PMSCs and their staff are more or less prone to commit violations than state organs or members of non-state armed groups. However, they were until now left – deliberately or not - in many respects in a legal fog. Recent research has brought a lot of clarity into this picture, without claiming that clear solutions exist where states disagree or where sound legal arguments may support different approaches (see in particular Cameron and Chetail (2013). However, despite the fascinating and fundamental nature of many of the legal issues discussed in this contribution, the main problems are that the status, rights and obligations of PMSC staff are not always clear to the PMSC and to the staff itself - and representatives of the industry have no interest in clarifying them because this could seriously limit their ability to provide security in conflict areas. The most important problem, however, remains implementation: even where the rules and their applicability are uncontroversial, PMSC staff are often not adequately trained and supervised and if they commit violations, their prosecution often meets legal or factual obstacles – or simply a lack of political will.

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