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## CURRENT LEGAL DEVELOPMENTS

# Common Article 1: A Minimum Yardstick for Regulating Private Military and Security Companies

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**Abstract**

Tens of thousands of contractors work for private military and security companies (PMSCs) during armed conflict and occupation, often hired by states to perform activities that were once the exclusive domain of the armed forces. Many of the obligations and standards that guide states in regulating their armed forces are lacking in relation to PMSCs, raising concerns that states might simply outsource their military policy to PMSCs without taking adequate measures to promote compliance with international humanitarian law (IHL). This article argues that the universally applicable obligation 'to ensure respect' for IHL in Common Article 1 of the Geneva Conventions can provide a key mechanism for addressing these concerns.

**Key words**

Common Article 1; due diligence; Geneva Conventions; obligation to regulate; private military and security companies

The past two decades have witnessed the rapid growth and consolidation of the global private security industry, with private military and security companies (PMSCs) providing a wide range of services to various clients around the world, including states, international organizations, corporations, and non-governmental organizations. Many PMSCs have contracted directly with states to provide military and security services during armed conflict and occupation, bringing the companies within the realm of international humanitarian law (IHL). In this context, PMSCs have performed activities that involve the threat or use of violence or coercion (such as offensive combat, armed security, detention, and interrogation) as well as non-coercive activities (such as the provision of advice and training to military and security forces).

The private security phenomenon raises the concern that states might simply outsource military and security activities to PMSCs without taking positive steps

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to ensure that the companies comply with IHL. Although there is no evidence that PMSC personnel are more likely to engage in misconduct than national troops, private contractors certainly can and do, like national troops, violate IHL in the course of performing their military and security functions. For example, it is well known that a number of contractors working as interrogators for the US firm CACI, under contract with the United States, were implicated in the prisoner abuse scandal at Abu Ghraib prison in Iraq during 2003 and 2004. It later emerged that up to 35 percent of the CACI interrogators lacked formal military interrogation training, and neither CACI nor the US government had conducted adequate background checks on prospective employees before they were hired.[1] In 2007, employees of the US firm Blackwater were involved in the fatal shooting of 17 civilians while guarding a US diplomatic motorcade, and subsequent investigations revealed a number of other Blackwater shootings which may have involved violations of IHL in Iraq.[2] More recently, it emerged that in 2004 the Central Intelligence Agency hired a number of Blackwater contractors as part of a secret programme to locate and assassinate top operatives of Al Qaeda.[3]

States have clear and well-established obligations to ensure that their national forces comply with IHL and to investigate and punish any violations of IHL that soldiers may commit in the field. But what international standards exist to guide states' actions in relation to the PMSCs they hire during armed conflict and occupation? The substantive provisions of the Geneva Conventions provide a small number of positive obligations that are relevant to the private security industry, but their application is limited to specific circumstances.[4] Human rights law can also impose pertinent obligations on the hiring state, but the utility of this framework in armed conflict is limited by the constraints on its extraterritorial applicability. Neither human rights law nor the substantive provisions of the Geneva Conventions provide a general standard of conduct applicable to all states that hire PMSCs in armed conflict and occupation.

The extensive outsourcing of military and security activities also raises the concern that states might be able to evade international responsibility for violations of IHL committed by PMSCs in armed conflict and occupation.[5] Whereas all

1 See Major General G. Fay, Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (2004) (hereinafter Fay Report), available at http://files.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504-pt.pdf; J. Borger, 'Cooks and Drivers Were Working as Interrogators', *Guardian*, 7 May 2004.

2 See US House of Representatives Committee on Oversight and Governmental Reform, Additional Information about Blackwater USA, 1 October, 2007.

3 See M. Mazzetti, 'CIA Sought Blackwater's Help to Kill Jihadists', *New York Times*, 19 August 2009; J. Warrick, 'CIA Assassination Program Had Been Outsourced to Blackwater, Ex-Officials Say', *Los Angeles Times*, 20 August 2009; E. MacAskill, 'CIA Hired Blackwater for Al-Qaida Assassination Programme, Sources Say', *Guardian* 20 August 2009. Blackwater has since changed its name to Xe Services LLC; see its website http://xecompany.com.

4 See, e.g., Arts. 12 and 39 of the Third Geneva Convention. In relation to occupation, see the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention II of 1899 and Hague Convention IV of 1907, Art. 43.

5 For an analysis of the rules of attribution as applied to PMSCs, see C. Lehnardt, 'Private Military Companies and State Responsibility', in S. Chesterman and C. Lehnardt (eds.), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (2007), 139; M. Spinedi, 'Private contractors: responsabilité

violations of IHL committed by national soldiers are automatically attributable to their state,[6] violations committed by PMSC personnel are only attributable to the hiring state in certain circumstances, most commonly where the contractor in question is exercising government authority[7] or acting under the hiring state's instructions, direction, or control.[8] It will frequently be more difficult to prove the responsibility of the hiring state for violations committed by a PMSC than it would be if a national soldier of that state were to engage in the same conduct, and some PMSC conduct will fall outside the rules of attribution altogether. In the face of this apparent gap in the rules of attribution, the hiring state's positive obligations could play an important role in promoting state accountability for PMSC misconduct in the field.[9] Yet this leads to the same problem: the ostensible lack of any broad positive obligation providing a baseline standard of conduct for the hiring state.

This article argues that a universally applicable standard of conduct *does* exist, in the form of the primary obligation in Common Article 1 'to ensure respect' for IHL. This obligation is binding on states 'in all circumstances', including times of peace as well as of armed conflict. A critical analysis of Common Article 1 in the private security context suggests that it requires the hiring state to take certain active steps to promote PMSC compliance with IHL. Section 1 below develops arguments from first principles and by analogy with other fields of international law in order to delineate the general nature and applicability of the obligation to ensure respect for IHL. Section 2 then identifies the standard of conduct that governs this obligation, and section 3 discusses the general factors that are relevant in assessing whether a state has complied with the requisite standard in a particular case. Finally, section 4 pinpoints the specific measures that the hiring state must take in order to fulfil its obligation in relation to PMSCs in armed conflict and occupation.

Not only could the obligation to ensure respect for IHL help to maximize the responsibility of the hiring state *ex post facto* for any PMSC misconduct committed in the field; it could also play an important prospective role by mandating a general baseline level of positive action for all states that hire PMSCs. In this way the obligation to ensure respect for IHL may be likened to the obligations set out in Common Article 3, which, according to the International Court of Justice (ICJ), 'constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts'.[10] While the obligation in Common Article 1 may overlap with more specific obligations in many cases, its broad scope and

internationale des entreprises ou attribution à l'Etat de la conduite des personnes privées?', (2005) 7 *FORUM du droit international* 273; C. Hoppe, 'State Responsibility for Violations of International Humanitarian Law Committed by Individuals Providing Coercive Services under a Contract with a State', Centre for Studies and Research of the Hague Academy of International Law (forthcoming).

6 In international armed conflicts, see Additional Protocol I, Art. 91. In non-international armed conflicts, see Art. 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, (2001) 2 (2) *Yearbook of the International Law Commission* (hereinafter ILC Articles).

7 Ibid., Art. 5.

8 Ibid., Art. 8.

9 See C. Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies', (2008) 19 (5) EJIL 989.

10 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 392, at para. 218. See also *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, ICTY-94–1-AR72 (2 October 1995), para. 102.

universal application distinguish it from other pertinent rules of international law and certainly justify further analysis.

## 1. The nature and applicability of Common Article 1

Common Article 1 provides that '[t]he High Contracting Parties undertake to respect *and to ensure respect* for this [Convention or Protocol] in all circumstances.'[11] The phrase 'in all circumstances' indicates that the obligation 'to ensure respect' is unconditional and not constrained by the requirement of reciprocity.[12] It applies not only to international conflicts, but also to non-international conflicts insofar as they are covered by Common Article 3 of the Conventions.[13] Thus in the *Nicaragua* case the ICJ described the conflict as non-international, and then went on to find that the United States had violated Common Article 1 by virtue of its 'encouragement' of private actors engaged in the conflict to act in violation of Common Article 3.[14] The Court further noted that the obligation to ensure respect for IHL 'does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression'.[15]

### 1.1. Aspirational statement or legal obligation?

It is clear from the broad scope of Common Article 1 that the obligation to ensure respect for IHL is applicable in all situations of armed conflict and occupation in which PMSCs operate today. The key question is to what extent it imposes concrete obligations distinct from those that appear in the subsequent provisions of the Conventions.

Irrespective of Common Article 1, states must of course ensure that any PMSC personnel who are acting as state agents respect the substantive clauses of the Conventions. This is a corollary of the general rules of state responsibility, according to which a state incurs responsibility for the acts of its armed forces and other persons or groups in fact acting on its instructions or under its direction or control.[16] If Common Article 1 were limited to a duty to ensure respect for IHL by state agents, it would effectively be redundant as a legal obligation. Such an interpretation would be contrary to one of the fundamental principles of treaty interpretation, namely the principle of effectiveness (*effet utile*), which requires that a treaty be interpreted 'in such a way that a reason and a meaning can be attributed to every word in the text',[17] so as to avoid a reading 'that would result in reducing whole clauses or paragraphs to redundancy or inutility'.[18]

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11 Emphasis added.

12 *Prosecutor v. Kupreskić*, ICTY IT-95–16-T, 14 January 2000, at para. 517. See also J. Pictet (ed.), *Commentary, Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958), at 15.

13 See L. Boisson de Chazournes and L. Condorelli, 'Common Article 1 of the Geneva Conventions revisited: Protecting Collective Interests', (2000) 837 *International Review of the Red Cross* 67, at 68.

14 *Nicaragua*, *supra* note 9, at paras. 219–220, 250.

15 Ibid., para. 220.

16 See J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law* (2005), I, Rule 139.

17 *Anglo-Iranian Oil Co. case (UK v. Iran)*, Jurisdiction, [1952] ICJ Rep. 93, at 105.

18 US – Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R, adopted 20 May 1996 (App. Body Rep.), at 23. See also *Corfu Channel (UK v. Albania)*, Merits, [1949] ICJ Rep. 4, at 124; *Territorial Dispute*

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One could perhaps argue that Common Article 1 was intended to be an aspirational statement rather than an independent obligation carrying real legal weight,[19] but the use of the word 'undertake' in Common Article 1 goes against this interpretation. As the ICJ explained in the *Genocide* case in relation to the obligation to prevent and punish genocide in Article 1 of the Genocide Convention,[20] the ordinary meaning of the word 'undertake' is

> to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties . . . It is not merely hortatory or purposive.[21]

The International Committee of the Red Cross (ICRC) has taken the position that the phrase 'and to ensure respect' in Common Article 1 is *not* redundant, but was included in order to 'emphasize and strengthen the responsibility of the Contracting Parties'.[22] According to the ICRC, this phrase imposes a legal obligation not only on the parties to the armed conflict, but also on third states not involved in the conflict. The ICRC's 1960 Commentary to the Geneva Conventions explains the nature of the obligation in the following terms:

> [I]n the event of a Power failing to fulfil its obligations, each of the other Contracting Parties (neutral, allied or enemy) should endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Conventions demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally.[23]

When applied to the modern private security industry, the ICRC's interpretation of Common Article 1 would encompass not only those states that are in fact party to the conflict in question, but *all* states that hire PMSCs to work in zones of armed conflict or occupation.

Professor Kalshoven takes issue with the ICRC's broad interpretation of Common Article 1, arguing in his comprehensive study of the *travaux préparatoires* to the Conventions that the ICRC's approach does not accord with the true intention of the drafters.[24] In particular, Kalshoven notes that the drafters did not intend Common Article 1 to impose an obligation on third states to take action to ensure that states party to the conflict ensure respect for IHL. Instead, according to Kalshoven, the

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*case (Libyan Arab Jamahiriya v. Chad)*, [1994] ICJ Rep. 6, at 24; R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (1992), 1280–1. This principle is one corollary of the general rule of interpretation in Art. 31 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force on 27 Jan 1980), 1155 UNTS 331.

19 See University Centre for International Humanitarian Law, *Expert Meeting on Private Military Contractors* (2005), 43.

20 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 Dec. 1948, entered into force 12 Jan 1951), 78 UNTS 277.

21 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb. 2007 (hereinafter *Genocide* case, not yet reported), at para. 162.

22 Pictet, *supra* note 11, at 16.

23 J. Pictet (ed.), *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* (1960), 18.

24 F. Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit', (1999) 2 *Yearbook of International Humanitarian Law* 3.

provision was intended to oblige states party to the conflict to ensure respect for the Conventions by their own populations as well as by their agents and officials, in particular with a view to extending the binding effect of the Conventions to insurgents in a civil war.

Kalshoven's main point of difference from the ICRC relates to the obligations on third states under Common Article 1. Kalshoven's findings on this point suggest that, if a strict originalist interpretation were applicable today, Common Article 1 would not impose obligations on a state that hired a PMSC to work in a conflict to which the state was not itself a party. Such an interpretation would exclude a third state that hired a PMSC to provide security for state officials working in a foreign conflict zone, for example, as well as a state that hired a PMSC to assist the government in a foreign civil war. Yet even under this narrow originalist interpretation, Common Article 1 would remain relevant to the many cases in which a state party to a conflict hires a PMSC. Prominent examples include companies such as DynCorp, hired by the United States and the United Kingdom in Iraq immediately after the 2003 invasion, the combat companies Executive Outcomes and Sandline, hired by the governments of Sierra Leone and Angola during the civil wars in those countries, and the US firm MPRI, hired by the Croatian government during the conflict in the former Yugoslavia.[25]

In any event, the original intent of the drafters is never conclusive as to the current status of a legal norm, since modern treaty interpretation also relies heavily on the 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[26] Although the drafters apparently envisaged a somewhat restricted interpretation of Common Article 1, in the decades since 1949 this provision has been widely interpreted as imposing an obligation on *all* states – including third states as well as parties to the conflict – to take reasonable steps to ensure that the rules of IHL are respected by all, particularly by the parties to the conflict.[27] This practice not only helps to counter the argument that Common Article 1 does not impose obligations on third states; it also illustrates the general tendency towards a broad and dynamic interpretation of Common Article 1 in a variety of situations of armed conflict and occupation. This in turn enhances the potential importance of this provision in relation to the modern private security industry.

Perhaps the earliest significant illustration of this broad approach emanated from the 1968 Tehran Conference on Human Rights, when delegates passed a resolution affirming that every state has an obligation to use all means at its disposal to promote respect for IHL by all, particularly by other states.[28] A more recent example, this time in a binding context, is UN Security Council Resolution 681 of 1990

25 For a detailed discussion of these operations see P. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (2003); D. Avant, *The Market for Force: The Consequences of Privatizing Security* (2005).

26 Vienna Convention on the Law of Treaties, *supra* note 17, Art. 31(3); see also A. Aust, *Modern Treaty Law and Practice* (2000).

27 For a comprehensive review of the state practice see Henckaerts and Doswald-Beck, *supra* note 15, II, 3289 ff.

28 Resolution XXIII, International Conference on Human Rights, Tehran (12 May 1968), adopted with no opposing votes.

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concerning the Arab territories occupied by Israel, which calls on the contracting parties to the Fourth Geneva Convention 'to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with Article 1 thereof'.[29] The UN General Assembly has adopted several resolutions to the same effect in relation to the Arab–Israeli conflict.[30] Other international organizations have likewise called on their member states to respect and ensure respect for IHL, in particular the Council of Europe, NATO, the Organization of African Unity, and the Organization of American States.[31] More generally, in Resolution 60/47 of 2005 the General Assembly considered the scope of the obligation to ensure respect for IHL and concluded that it entails, *inter alia*, a duty to take positive measures to prevent violations, to investigate violations and punish perpetrators, and to provide victims with access to justice and effective remedies.[32] The resolution emphasizes that these basic principles 'do not entail new international or domestic legal obligations', but simply 'identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations'.[33]

The ICJ discussed the duty to ensure respect for IHL in its Advisory Opinion in the *Wall* case of 2004. Considering Israel's actions in the occupied Palestinian territory under the Fourth Geneva Convention, the Court noted that all states party to the Convention have an obligation 'to ensure compliance by Israel with international humanitarian law as embodied in that Convention'.[34] The Court recalled Common Article 1 and concluded on that basis that every state party, 'whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with'.[35] In his dissenting opinion, Judge Kooijmans disagreed with the majority's conclusion that Common Article 1 imposes obligations on states to take action in relation to other states. While emphasizing that he 'certainly' was 'not in favour of a restricted interpretation of Article 1, such as may have been envisaged in 1949', Judge Kooijmans argued that the drafters only intended Common Article 1 to impose an obligation on each contracting state 'to ensure respect for the Conventions by its people' rather than by other states,[36] and in any case he failed to see what kind of positive action might be expected from third states 'apart from diplomatic démarches'.[37]

The above survey suggests that the restricted interpretation of Common Article 1 envisaged by the drafters has been modified by subsequent practice in the application of the Geneva Conventions. In fact, modern practice evinces a general

29 SC Res. 681, 20 Dec 1990, at para. 5.
30 See, e.g., GA Res. 32/91 A, 13 Dec. 1977; GA Res. 37/123 A, 16 Dec. 1982; GA Res. 38/180 A, 19 Dec. 1983; GA Res. 43/21, 3 Nov. 1988.
31 See Henckaerts and Doswald-Beck, *supra* note 15, I, 510; see also Resolution XXIII, *supra* note 27, which emphasizes that the obligation to ensure respect for the Conventions is incumbent even upon states that are not directly involved in an armed conflict.
32 GA Res. 60/147, 16 December 2005, UN Doc. A/RES/60/147 (adopted without a vote), para. 3.
33 Ibid., preamble, at 3.
34 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep. 136 (hereinafter *Wall* Advisory Opinion), at para. 163.
35 Ibid., at para. 158.
36 Ibid., at para. 50 (Judge Kooijmans, Separate Opinion), citing Kalshoven, *supra* note 23.
37 *Wall* Advisory Opinion, *supra* note 33, at para. 50 (Judge Kooijmans, Separate Opinion).

trend towards a broad and dynamic interpretation of Common Article 1, obliging all states – including third states as well as parties to the conflict – to take reasonable steps to promote compliance with IHL. This broad approach is reflected in Rule 144 of the ICRC's 2005 study on customary international law, which provides that 'States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law'.[38] According to the ICRC, 'State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts'.[39] Considerable doctrinal literature also supports this interpretation.[40]

### 1.2. Common Article 1 and private actors

Crucially for present purposes, the obligation extends to ensuring respect for IHL by private actors such as PMSCs involved in armed conflict or occupation. Fleck explains that the obligation to ensure respect for IHL 'extends to acts of third states, not directly involved in an armed conflict, in their relations to state and non-state parties to the conflict'.[41] Indeed, in the *Nicaragua* case the ICJ found that the United States had violated its obligation to ensure respect for IHL by virtue of its relations to the private Contras engaged in the conflict in Nicaragua.[42]

It is important to note, however, that no court to date has found a state responsible for a mere failure to take positive action to ensure respect for IHL by private actors. In *Nicaragua*, the United States incurred responsibility for a violation of Common Article 1 on the basis of its 'encouragement' of the contras to act in violation of Common Article 3. As there was sufficient evidence to prove that the United States had actively encouraged the prohibited activities of the contras, the Court did not need to consider whether a state's failure to take positive action to prevent, repress, or punish those activities could itself constitute a violation of Common Article 1.[43] Nonetheless, the Court did not exclude the possibility of state responsibility on this

38 Henckaerts and Doswald-Beck, *supra* note 15, I, 509.
39 Ibid.
40 See, e.g., A. Duquesne, 'La responsabilité solidaire des états aux termes de l'article 1 des Conventions de Genève', (1966) 15 *Annales de droit international médical* 83; L. Boisson de Chazournes and L. Condorelli, 'Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire en toutes circonstances', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984); H. P. Gasser, 'Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations', in H. Fox and M. Meyer (eds.), *Effecting Compliance* (1993); U. Palwankar, 'Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law', (1994) 34 (298) *International Review of the Red Cross* 9; F. Azzam, 'The Duty of Third States to Implement and Enforce International Humanitarian Law', (1997) 66 *Nordic Journal of International Law* 55; Boisson de Chazournes and Condorelli, *supra* note 12; B. Kessler, 'Die Durchsetzung der Genfer Abkommen von 1949 in nicht-internationalen bewaffneten Konflikten auf Grundlage ihres gemeinsamen Art. 1', (2001) 132 *Veröffentlichungen des Walther-Schücking-Instituts für Internationales Recht an der Universität Kiel* 26; B. Kessler, 'The Duty to "Ensure Respect" under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-international Armed Conflicts', (2001) 44 *German Yearbook of International Law* 498; D. Fleck, 'International Accountability for Violations of the *Ius in Bello*: The Impact of the ICRC Study on Customary International Humanitarian Law', (2006) 11 *Journal of Conflict & Security Law* 182.
41 Fleck, *supra* note 39, at 181–2; see also Kessler, 'Die Durchsetzung', *supra* note 39, at 195.
42 *Nicaragua*, *supra* note 9,at paras. 220, 255.
43 Ibid., at paras. 220, 255.

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basis, and in principle a state that failed to take such positive action could hardly be fulfilling its obligation under Common Article 1, in the words of the ICJ in the *Wall* case, 'to ensure that the requirements of the [Geneva Conventions] are complied with'.[44]

The obligation in Common Article 1 to take positive action to prevent, repress, and punish private violations of IHL resembles, in a number of ways, the obligation to prevent and punish genocide in Article 1 of the Genocide Convention. The obligation to prevent genocide assumed central importance in the ICJ's assessment of Serbia's responsibility in the *Genocide* case, as the Court was unable to find that Serbia had violated its obligation not to commit genocide.[45] Likewise, in the private security context, the obligation under Common Article 1 could provide an alternative pathway to state responsibility where it is not possible to attribute PMSC violations directly to the hiring state.

Neither Common Article 1 nor Article 1 of the Genocide Convention is territorially limited; the former applies to a state 'in all circumstances', while the latter applies to a state 'wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question'.[46] Common sense suggests, however, that a state must have the capacity to influence a particular PMSC effectively before that state will be obliged to take positive action to ensure that the company respect IHL. The requirement that a state have the 'capacity to influence' a PMSC effectively thus serves as a de facto precondition for the positive obligation in Common Article 1. As Kessler explains, 'States have to exert some kind of influence on the party violating its commitments under the Conventions' before they can be required to take positive action under Article 1.[47] The ICJ implicitly adopted a similar approach in the *Genocide* case in assessing the obligation to prevent and punish genocide. The Court noted that the measures required to discharge the obligation depend largely on the state's 'capacity to influence effectively the action of persons likely to commit, or already committing, genocide'.[48] The corollary of the Court's reasoning is that a state will not incur responsibility for a failure to take preventive action if it in fact lacked the capacity to influence potential perpetrators effectively.

A state's capacity to influence a particular PMSC in armed conflict or occupation could derive either from a special relationship between the state and the company or from the state's exercise of control over the territory in which the company operates. The contractual relationship between the hiring state and the PMSC falls squarely within the former category, since the contract of employment provides the hiring state with an obvious means of influencing company behaviour. The host state of the PMSC (the state in which the company operates) clearly falls within the latter category, as does an occupying power of the host state; yet these two states will

44 *Wall* Advisory Opinion, *supra* note 33, at para. 158.
45 *Genocide* case, *supra* note 20, at paras. 425–450.
46 Ibid., at para. 183.
47 Kessler, 'Duty to "Ensure Respect"', *supra* note 39, at 505; for similar comments see N. Levrat, 'Les conséquences de l'engagement pris par le HPC de "faire respecter" les conventions humanitaires', in F. Kalshoven and Y. Sandoz (eds.), *Implementation of International Humanitarian Law* (1989), 279; Kessler, 'Die Durchsetzung', *supra* note 39, at 118; Gasser, *supra* note 39, at 28.
48 *Genocide* case, *supra* note 20, at para. 430.

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in any event be subject to a number of positive obligations under human rights law and IHL, reducing the role for Common Article 1. The home state of the PMSC (the state in which the company is incorporated) could also have some capacity to influence PMSC behaviour, but in many cases the link between the home state and the company will be too tenuous in itself to found a concrete positive obligation under Common Article 1. For these reasons the present article focuses on the hiring state of a PMSC, arguing that Common Article 1 obliges that state to take positive action to ensure that the PMSC complies with IHL. The next step in this analysis is to consider the standard of conduct that governs this obligation.

## 2. Obligations of conduct and the notion of due diligence

The wording of the duty 'to ensure respect' in Common Article 1 suggests that it imposes an obligation of conduct, rather than an obligation of result. In other words, the hiring state is not under an absolute obligation to guarantee that all PMSCs will comply with IHL in all circumstances; rather, the state must take all reasonable measures within its power to prevent and repress PMSC violations of IHL. This aspect of the duty to ensure respect is reflected in Rule 144 of the ICRC's Study on Customary IHL, cited in section 1 above, which provides that states 'must exert their influence, *to the degree possible*, to stop violations of international humanitarian law'.[49]

In the *Genocide* case, the ICJ explained the difference between obligations of result and obligations of conduct in the following terms:

> [I]t is clear that the obligation [to prevent genocide in Article 1 of the Genocide Convention] is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible.[50]

The ICJ's comments reflect the standard approach to obligations of prevention in international law. According to the International Law Commission, obligations of prevention 'are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur'.[51] Such obligations are often said to require a state to exercise 'due diligence' to prevent the event in question from taking place. If applicable to Common Article 1, the notion of due diligence could provide a useful standard of conduct to govern the actions of states that hire PMSCs in armed conflict or occupation.

49 Henckaerts and Doswald-Beck, *supra* note 15, I, 509 (emphasis added).
50 *Genocide* case, *supra* note 20, at para. 430.
51 ILC Articles, *supra* note 5, Commentary to Art. 14, at para. 14.

### 2.1. The due diligence principle in international law

The general concept of due diligence is well established in international law.[52] In the *Alabama Claims* arbitrations of 1871, for example, the Tribunal applied a standard of due diligence to find Great Britain liable for a failure to prevent individuals from violating British neutrality in the US civil war.[53] The due diligence principle has since been applied in numerous international arbitrations in cases of a failure to prevent private misconduct.[54] More recently, in the *Genocide* case, the ICJ stated that 'the notion of due diligence ... is of critical importance' to the analysis of the obligation to prevent genocide.[55] In the context of international environmental law, an obligation of due diligence is 'the standard basis for the protection of the environment from harm', requiring the state of origin 'to exert its best possible efforts to minimize the risk'.[56]

The language of a particular obligation provides clues as to whether a due diligence standard of conduct applies.[57] Obligations requiring a state to use 'all means at its disposal'[58] or 'to employ all means reasonably available'[59] to prevent a particular activity involve the due diligence principle, as does an obligation to set up safeguards against harm that are 'as satisfactory as possible'.[60] Obligations not to 'allow' or 'tolerate' certain private activities have also been interpreted as entailing a due diligence duty to prevent and punish the private activity in question. Examples include the obligation on neutral states not to allow their territory to be used as a base for hostile operations by belligerents,[61] and the obligation on all states not to tolerate certain violent interventions in other states.[62] Likewise, the ICJ's statement in the *Corfu Channel* case that every state has an obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other states' signified a due

52 See generally E. Borchard, *Diplomatic Protection of Citizens Abroad* (1928), at §87; P. M. Dupuy, 'Due Diligence in the International Law of State Responsibility', in Organisation for Economic Co-operation and Development, *Legal Aspects of Transfrontier Pollution* (1977); R. Pisillo-Mazzeschi, *'Due diligence' e Responsabilita Internazionale Degli Stati* (1989); R. Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States', (1992) 35 *German Yearbook of International Law* 9; J. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', (2004) 36 *New York University Journal of International Law & Politics* 265; R. Barnidge, *Non-state Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (2007).

53 *Alabama Claims (US v. Britain)* (1871), decided pursuant to the Treaty between Great Britain and the United States for the Amicable Settlement of All Causes of Difference between the Two Countries, Washington, DC (8 May 1871), 142 Consolidated Treaty Series 145. See also J. Moore, *History and Digest of the International Arbitrations to which the US Has Been a Party* (1898), ch. 68.

54 See, e.g., *Home Missionary Society Claim (US v. UK)*, (1920) 6 *Reports of International Arbitral Awards* 42; *Youmans case*, (1926) 4 *Reports of International Arbitral Awards* 110; *Massey case*, (1927) 4 *Reports of International Arbitral Awards* 155; *Short v. Islamic Republic of Iran* Iran–USCTR (1987); cases in Moore, *supra* note 52, at 4027–56.

55 *Genocide* case, *supra* note 20, at para. 430.

56 ILC Articles, *supra* note 5, Commentary to Art. 3, at paras. 7–8.

57 For a discussion of the importance of language in identifying due diligence obligations, see Barnidge, *supra* note 51, at 114–115.

58 Convention Concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 October 1907, entered into force 26 January 1910), 205 Consol. TS 395, Arts. 8 and 25.

59 *Genocide* case, *supra* note 20, at para. 430.

60 *Lake Lanoux (Spain v. France)*, (1957) 24 ILR 123.

61 Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 October 1907, entered into force 26 January 1910), 205 Consol. TS 299, Arts. 4, 5, and 6.

62 GA Res. 2625 (XXV) (24 October 1970), UN Doc. A/8028, at para. 2.

diligence assessment based on knowledge.[63] In that case, Albania's knowledge of the mines in its territorial waters gave rise to an obligation to take certain measures to prevent the mines from causing harm to the vessels of other states, namely to notify shipping generally of the existence of the minefield and to warn the approaching British ships of the imminent danger. Albania's failure to take these measures gave rise to its international responsibility for the damage caused to UK vessels by the explosion of the mines.[64]

Particularly pertinent to the private security industry, various human rights conventions require states to 'secure' or 'ensure' human rights within state jurisdiction.[65] These obligations have been widely interpreted as requiring states to exercise due diligence to prevent, investigate, and punish human rights violations by private actors within state territory or under effective state control.[66] In a few instances, human rights bodies have applied this standard to the acts of private security guards. For example, the Human Rights Committee stated in its Concluding Observations on Lesotho that it was

> concerned that no action has so far been taken to prosecute law enforcement officers and members of the *private security agency* responsible for the killings in Butha-buthe in 1995. The Committee recommends to the State party to take the necessary action against those responsible.[67]

Likewise, the Inter-American Commission on Human Rights stated that the killing of street children by private security actors in Guatemala and Brazil required responses of investigation, prosecution, and punishment, and that the absence of such responses amounted to 'a failure by the state to perform its obligation of guaranteeing the rights of all persons'.[68]

The General Assembly has interpreted the obligation in Common Article 1 to ensure respect for IHL in the same way as the obligation in human rights law to ensure or secure human rights within state jurisdiction. Resolution 60/147 of 2005 notes that under both IHL and human rights law the obligation 'to ensure respect' requires states to take positive action to prevent, investigate, and redress violations.[69] Specifically, the resolution states that the obligation to ensure respect in both contexts entails *inter alia* a duty to take positive measures to prevent violations, to investigate, and, where appropriate, to punish perpetrators, and to provide victims with access to justice and effective remedies.[70] The Resolution emphasizes that these basic

63 *Corfu Channel*, *supra* note 17, at 22; see also Barnidge, *supra* note 51, at 114–15; I. Brownlie, *State Responsibility* (1983), 42–4, 181–2.
64 *Corfu Channel*, *supra* note 17, at 20–2.
65 See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms (3 Sept. 1953), 213 UNTS 222, Art. 1; International Covenant on Civil and Political Rights (23 Mar. 1976), 999 UNTS 171, Art. 1(2); American Convention on Human Rights (18 July 1978), 1144 UNTS 123, Art. 1.
66 See, e.g., Human Rights Committee, General Comment 6, UN Doc. A/37/40 (1982); Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para. 10; *Velásquez Rodríguez v. Honduras*, (1988) 4 IACtHR Ser. C, at paras. 48, 172; *Kaya v. Turkey*, ECHR Rep. 2000-III 149, at paras. 101, 108–109.
67 Human Rights Committee, Concluding Observations, Lesotho, UN Doc. CCPR/C/79/Add.106 (1999), at para. 19 (emphasis added).
68 *Alonso Eugénio da Silva v. Brasil*, IACommHR Case 11.598, Rep. No. 9/00 (24 Feb.1999), para. 33.
69 GA Res. 60/147, *supra* note 31, at para. 3.
70 Ibid., at para. 3.

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principles 'do not entail new international or domestic legal obligations', but simply 'identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations'.[71] While not expressly referring to the principle of due diligence, the Resolution clearly endorses a correlation between the applicable standards in the two contexts.[72]

### 2.2. Due diligence in international humanitarian law

Against this background, it seems logical to conclude that the standard of due diligence would also apply to Common Article 1. Obligations of this nature are certainly not foreign to IHL. One example is the obligation in Article 77(2) of Protocol I to 'take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities'. In a similar vein, Article 86(2) provides for penal or disciplinary responsibility of superior officers if they 'did not take all feasible measures within their power to prevent or repress' certain breaches of IHL by their subordinates.

A more explicit reference to the due diligence principle appeared in the 1987 ICRC Commentary to Article 91 of Protocol I. This Article restates the customary rule that '[a] Party to the conflict which violates the provisions of the Conventions of this Protocol shall, if the case demands, be liable to pay compensation'. The ICRC's Commentary notes that Article 91 reflects the general principle of international law that the conduct of any state organ constitutes an act of state, provided that the organ acted in its official capacity. The Commentary then states,

> As regards damages which may be caused by private individuals, i.e., by persons who are not members of the armed forces (nor of any other organ of the State), legal writings and case-law show that the responsibility of the State is involved if it has not taken such preventive or repressive measures as could reasonably be expected to have been taken in the circumstances. In other words, *responsibility is incurred if the Party to the conflict has not acted with due diligence to prevent such acts from taking place, or to ensure their repression once they have taken place.*[73]

The ICRC's Commentary is instructive for present purposes, as it represents an attempt to apply the due diligence principle derived from general 'legal writings

71 Ibid., preamble, at 3.

72 Of course, General Assembly resolutions do not constitute a formal source of law within the categories in Art. 38(1) of the Statute of the ICJ, and the General Assembly does not generally have the legal power to make law or to adopt binding decisions under the UN Charter. Nonetheless, as General Assembly resolutions purporting to declare principles of law constitute official expressions by the states concerned, they may be treated as relevant evidence of the propositions of law that they embody, and a state's vote in favour of a law-declaring resolution may constitute an expression of *opinio juris* regarding the norms articulated therein: see *Nicaragua*, *supra* note 9, at paras. 188, 202; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep. 66, at para. 70; I. Sinclair, 'The Significance of the Friendly Relations Declaration', in V. Lowe and C. Warbrick (eds.), *The UN and the Principles of International Law* (1994); O. Schachter, 'General Course in Public International Law', (1982-V) 178 RCADI 111, at 116–18.

73 Y. Sandoz, C. Swinarski, and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at para. 3660 (emphasis added). In support of this contention, the ICRC cites a 1951 work by Marcel Sibert, which states that the government 'doit exercer *toute la diligence nécessaire*, soit pour empêcher ces faits de se produire, soit pour assurer leur répression s'ils se sont produits'. M. Sibert, *Traité de droit international public* (1951), I, 317 (emphasis in original).

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and case-law' to the specific context of IHL, absent any concrete judicial decisions applying the principle in this way.

More recently, the ICJ applied a principle analogous to due diligence in the *Congo* case of 2005. In considering the obligations of an occupying power, the Court applied Article 43 of the Hague Regulations to find that

> Uganda was the occupying Power in [the occupied area] at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.[74]

Having concluded that Uganda was an occupying power in Ituri at the relevant time, the Court found that

> Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any *lack of vigilance* in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.[75]

The Court thus applied a standard of 'vigilance' to the obligation to 'secure respect' under Article 43 of the Hague Regulations. This concept of vigilance is essentially synonymous with the concept of due diligence used in other areas of international law. It is clear from the Court's judgment that the positive obligation of vigilance flowed directly from Uganda's status as an occupying power in Ituri and the particular requirements of Article 43 of the Hague Regulations, a text which is specific to situations of occupation. By definition, an occupying power exercises a high degree of control over the occupied territory, and one cannot simply apply the same obligation to other territories over which the state does not exercise the same degree of control.

Nonetheless, it is not per se inappropriate to apply the same standard of vigilance, or due diligence, when interpreting other positive obligations that are applicable more generally in armed conflict (such as Common Article 1), since, as discussed below, this standard is inherently adaptable to different situations involving varying degrees of state control. The application of a due diligence standard to Common Article 1 would bring this obligation into line with other similar obligations in various fields of international law, such as the obligation to protect and ensure rights under international human rights law. Of course, if one accepts that Common Article 1 requires a due diligence standard of conduct, this begs the question of precisely what the concept of due diligence entails. It is to this question that the discussion now turns.

74 *Case Concerning Armed Activities in the Territory of the Congo (DRC v. Uganda)*, (2005) ICJ Rep. 168, para. 178.
75 Ibid., at para. 179 (emphasis added).

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## 3. Assessing the requirements of due diligence in a particular case

Sections 1 and 2 of this article have argued that the obligation to ensure respect for IHL requires the hiring state to exercise due diligence and take reasonable measures within its power to prevent and repress violations of IHL by PMSCs. Effective prevention also demands that the hiring state diligently investigate and, where appropriate, punish PMSC violations in order to reinforce the state's preventive measures and deter potential wrongdoers. But what exactly does 'due diligence' entail and how much positive action can reasonably be expected of the hiring state in a particular case?

Clearly the notion of due diligence refers to an international standard of behaviour which is not to be determined solely by a state's own national law or practice. Thus in the *Alabama Claims* arbitrations the Tribunal rejected the United Kingdom's proposed definition of due diligence as 'such care as Governments *ordinarily* employ in their domestic concerns'.[76] Nonetheless, the due diligence principle contains a strong element of subjectivity. As Pisillo-Mazzeschi explains, while the due diligence principle references itself against an objective international standard, it 'undoubtedly' has 'an elastic and relative nature'.[77] In a similar vein, Barnidge describes due diligence as a 'flexible reasonableness standard adaptable to the particular facts and circumstances'.[78]

One relevant consideration in assessing the requirements of due diligence in a particular case is the resources available to the state to perform its positive obligation. The significance of this factor is evident from the ICJ's judgment in the *Genocide* case, which emphasized that the obligation to prevent genocide requires each state to employ all means that are 'reasonably available' and 'within its power', so as to prevent genocide as far as possible.[79] Likewise in the *Hostages* case, in finding that the Iranian authorities were responsible for failing to protect the American diplomats, the Court stated that the authorities 'were fully aware of their obligations . . . *had the means at their disposal* to perform their obligations; [and] completely failed to comply with these obligations'.[80] In international environmental law, it is well accepted that the measures expected of a state with highly evolved systems and structures of governance may differ from those expected of a state that is not so well placed.[81] The same general principle would apply to states that hire PMSCs in armed conflict or occupation, although a lack of resources would not excuse a state from its responsibility to take at least basic measures to promote PMSC compliance with IHL.

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76 *Alabama Claims*, *supra* note 52, at 612 (emphasis added).
77 Pisillo-Mazzeschi, 'Due Diligence Rule', *supra* note 51, at 44.
78 Barnidge, *supra* note 51, at 138.
79 *Genocide* case, *supra* note 20, at para. 430.
80 *US Diplomatic and Consular Staff in Tehran (US v. Iran)*, [1980] ICJ Rep. 3, at para. 68 (emphasis added).
81 See ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities with Commentaries (2001) II (2) *Yearbook of International Law*, Commentary to Art. 3, at paras. 12, 17; Report of the United Nations Conference on Environment and Development, Rio de Janeiro, June 1992, Vol. I: Resolutions adopted by the Conference, Res. 1, Ann. I.

Just as the measures necessary to discharge the due diligence obligation may vary between states, so too may the measures required of a particular state vary with the circumstances. Three factors are particularly pertinent to this assessment: first, the level of influence or control that the hiring state in fact exercises over the PMSC in question; second, the risk that the company's activities will give rise to a violation of IHL; and third, the state's actual or constructive knowledge of that risk.

In relation to the first factor, section 1 of this article noted that a state's obligation to ensure respect for IHL by a particular PMSC only takes effect when the state is in a position to influence that company effectively. The hiring state of a PMSC will always be in a position to influence the company effectively by virtue of the contractual relationship between the two actors, and the state will therefore always be obliged to take certain steps to ensure PMSC compliance with IHL. Yet the question of state influence or control does not cease to be relevant at this point; on the contrary, the degree of control exercised by the hiring state over the PMSC will be crucial in determining the precise measures required of the state. The due diligence standard becomes more demanding as the relationship between the hiring state and the company becomes closer and the potential for state control over company activities increases.

Thus a state that hires a PMSC to work within its own territory or in foreign territory that is under its de jure or de facto control – as was the case, for example, when the United States and the United Kingdom hired PMSCs to work in occupied Iraq following the 2003 invasion – will be obliged to take more extensive measures than a state that hires a PMSC to work in foreign territory that is not under its control. Similarly, due diligence may require additional action of a state that hires a PMSC that is based or incorporated within state territory, since this opens up another potential avenue for state control over the company. This will be particularly pertinent where the company maintains close ties with its home government, as is the case for the US firm Military Professional Resources Inc. (MPRI), for example, whose close ties with the US government and military have led some commentators and foreign governments to view the company as a quasi-official US military body.[82]

The second important variable in assessing the requirements of due diligence is the risk that the PMSC activities will entail a violation of IHL. The hiring state will generally need to take more vigorous preventive measures when there is a greater risk of PMSC violations of IHL, particularly where PMSC personnel are authorized to bear arms or otherwise use coercive means. The risk of PMSC violations will be particularly grave where armed contractors operate in a region of hostile fire. Greater preventive efforts may also be required where PMSCs are working with vulnerable individuals in the context of armed conflict or occupation.[83] This reflects the general position put forward by the United States and accepted by the Tribunal in *Alabama Claims* that the requisite standard of due diligence is that which is proportional to the

82 Singer, *supra* note 24, at 121; Avant, *supra* note 24, at 101–13; K. Silverstein, 'Privatising War', *The Nation*, 28 July–4 August 1997, 4.

83 A. Epiney, *Die voelkerrechtliche Verantwortlichkeit von Staaten für rechtswidriges Verhalten im Zusammenhang mit Aktionen Privater* (1992), 249.

degree of risk in the particular case.[84] Of course, the substantive rules of IHL impose a number of specific obligations on states in certain situations involving a particular risk of violation, such as Articles 12 and 39 of the Third Geneva Convention in relation to prisoners of war and Article 27 of the Fourth Geneva Convention in relation to the protection of civilians. But Common Article 1 can still play an important residual role, filling the gaps between these specific rules and providing a 'minimum yardstick'[85] of mandatory positive action which states must take in all situations of armed conflict and occupation.

The third key consideration is whether the hiring state was aware, or ought to have been aware, of the enhanced risk of violation by the PMSC. Although the law of state responsibility contains no general requirement of fault,[86] obligations of prevention frequently require some degree of knowledge or constructive knowledge on the part of the state in order to establish breach. For example, in assessing responsibility for a failure to protect life, the European Court of Human Rights employs a test of 'foreseeability of the event': the state is responsible if the authorities knew or ought to have known of the risk to life and failed to take measures which, judged reasonably, might have prevented the occurrence of the fatal event.[87] In similar vein, in the *Genocide* case the ICJ held that the obligation to prevent and punish genocide applies wherever a state *is aware*, *or should normally be aware*, of a serious risk that genocide will occur.[88] The Transboundary Harm Articles likewise state that '[t]he degree of harm itself should be foreseeable and the State must know or should have known that the given activity has the risk of significant harm'.[89] A similar approach would presumably apply in the private security context, obliging the hiring state to take more stringent measures to control PMSC conduct only where the state is aware or ought to be aware of a greater risk that a PMSC will violate IHL.

## 4. Measures necessary to ensure that private military and security companies respect international humanitarian law

Generally speaking, the hiring state will need to undertake two distinct forms of action in order to fulfil its positive obligation under Common Article 1. First, the state should take steps to equip itself in advance with the general *means* to prevent, suppress, investigate, and punish the prohibited PMSC activities. This may require the enactment of legislation or regulations and the establishment of effective

84 *Alabama Claims*, *supra* note 52, at 572–3, 613; see also ILC Draft Articles on Transboundary Harm, s*upra* note 80, Commentary to Art. 3, at para. 11; Sibert, s*upra* note 72, at 317.

85 To use the terminology of the ICJ in *Nicaragua*, *supra* note 9 (at para. 218) in relation to the obligations in Common Article 3; see also the *Tadić* jurisdiction appeal, *supra* note 9, at para. 102.

86 See ILC Articles, *supra* note 5, Arts. 2 and 12, Commentary to Art. 2, at paras. 3, 10; Brownlie, *supra* note 62, at 37–48; R. Higgins, *Problems and Process: International Law and How We Use It* (1994), 159–61.

87 *Keenan v. UK*, ECHR 2001-III, para. 89, quoting *Osman v. UK*, ECHR 1998-VIII, at para. 116; see also *Kilic v. Turkey*, ECHR 2000-III, at paras. 65–68.

88 *Genocide* case, *supra* note 20, para. 431. See also the cases in Moore, *supra* note 52, at 4027–56, in which the Tribunal held the state responsible for a failure to prevent certain activities on its territory which the state *ought* to have discovered through diligent investigation.

89 ILC Draft Articles on Transboundary Harm, s*upra* note 80, Commentary to Art. 3, at para. 18.

administrative and judicial apparatus. Second, states should diligently *use* those means to prevent PMSCs from committing prohibited activities and to detect, investigate, and punish any prohibited activities that may be occurring or about to occur.[90] A violation of the obligation to ensure respect may result either from broad inadequacies in the state apparatus or from the failure of state officials to use that apparatus diligently to prevent or punish PMSC misconduct in a particular case. Where a wrongful PMSC activity occurs, the hiring state cannot escape liability simply because it had previously failed to enact laws that would have enabled its administrative and judicial authorities to prevent or suppress that activity.[91]

More specifically, it is possible to identify a number of concrete measures that states should always take in relation to the PMSCs they hire in armed conflict or occupation. The requisite measures certainly go beyond the 'diplomatic démarches' mentioned by Judge Kooijmans in the *Wall* case.[92] In the first place, the hiring state should implement procedures to ensure that PMSC personnel are adequately vetted, in order to exclude individuals who have been convicted of violent crimes from working in the private security arena, where they are likely to face abuse-prone situations. In the prison context, the Standard Minimum Rules for the Treatment of Prisoners emphasize the importance of hiring suitable personnel at the outset, stating that the prison administration 'shall provide for the careful selection of every grade of the personnel, since it is on their integrity, humanity, professional capacity and personal suitability for the work that the proper administration of the institutions depends'.[93] Soft-law instruments of this nature can play a useful role in expounding and refining states' due diligence obligations under binding instruments such as the Geneva Conventions.

The hiring state should also take steps to ensure that PMSC personnel are adequately trained and instructed in IHL. The obligation to ensure respect for IHL is commonly taken to include an obligation to ensure that national troops are trained and instructed in accordance with IHL standards. This would also require that a state ensure the training and instruction of any PMSCs it hires to perform military and security activities in armed conflict or occupation.[94] Various hard- and soft-law instruments emphasize the importance of training personnel who work in

90 See GA Res. 60/147, *supra* note 31, paras. 2–3. In the context of human rights law, states have a specific obligation to enact legislative and other measures to protect human rights, in addition to the obligation to prevent, suppress, and punish particular violations: see, e.g., American Convention, Art. 2; ICCPR, Art. 2. In the context of environmental law, see ILC Draft Articles on Transboundary Harm, s*upra* note 80, Commentary to Art. 3, at para. 10. More generally see Pisillo-Mazzeschi, 'Due Diligence Rule', *supra* note 51, at 26–30; Borchard, *supra* note 51, at §86.

91 In *Alabama Claims*, for example, Britain could not plead the insufficiency of its neutrality legislation to escape liability for failing to prevent the violation by private individuals of British neutrality; see also *Baldwin (US) v. Mexico* (11 April 1838) in Moore, *supra* note 52, at 2623; *Noyes* (1933) 6 *Reports of International Arbitral Awards* 308, at 311; *Kennedy* (1927) 4 *Reports of International Arbitral Awards* 194, at 198; E. Hall, *International Law* (1924), at 641–2.

92 *Wall* Advisory Opinion, *supra* note 33, at para. 50 (Judge Kooijmans, Separate Opinion).

93 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders (Geneva, 1955) and approved by the Economic and Social Council by its Res. 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Art. 46(1).

94 Doswald-Beck argues that an obligation on states to train anyone they hire is inevitably part of the duty to 'ensure respect' in Common Article 1: see Doswald-Beck, 'Private Military Companies under International Humanitarian Law', in Chesterman and Lehnardt, *supra* note 4, at 133.

comparable contexts. For example, Article 10 of the UN Convention Against Torture provides that

> [e]ach State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel . . . *and other persons* who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.[95]

The Standard Minimum Rules for the Treatment of Prisoners, mentioned above, provide that '[b]efore entering on duty, the personnel shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests.'[96] Similarly, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials call for 'continuous and thorough professional training'.[97]

The obligation to ensure appropriate training and instruction in IHL could also be relevant where a state hires a PMSC to train or advise a foreign force. Clearly a state that hires a PMSC to train or advise its own armed forces will be obliged to ensure that the PMSC training or advice complies with IHL. There is no logical reason why this would not also apply where a state hires a PMSC to train or advise foreign forces. In *Nicaragua* the ICJ found that the United States had supplied the Nicaraguan rebels with a training manual which *inter alia* discussed the possible necessity of shooting civilians who were leaving a town and advised the 'neutralization' of local judges and other officials.[98] This contributed to the Court's finding that the United States had breached Common Article 1 by encouraging the Contras to violate IHL.[99] Assuming that Common Article 1 not only prohibits states from 'encouraging' violations but also requires states to take positive steps towards prevention, it is possible to extend the *Nicaragua* scenario one step further. Let us say, for example, that the US government today hired a PMSC to train a foreign force such as the Iraqi army, and yet the United States failed to provide any guidelines as to how this training should be conducted. If the company trained the foreign force using a manual similar to that used in Nicaragua, it does not seem too remote to suggest that the United States might bear some responsibility if the foreign soldiers then violated IHL in accordance with their training. In such a case the United States would not be incurring responsibility directly for the violation of IHL committed by the foreign soldiers, but for its own failure to fulfil its obligation under Common Article 1 to ensure that the PMSC training or advice complied with IHL.

Another requirement of Common Article 1 is the inclusion of clear and appropriate rules of IHL in the contract of employment. Indeed, this represents the most direct way of imposing conditions on PMSC employees. Such contractual clauses should be accompanied by adequate procedures for supervising contractors in the field. An examination of PMSC practice, however, suggests that such supervision is

95 UN Convention against Torture, 10 December 1984, 1465 UNTS 85 (emphasis added).
96 Standard Minimum Rules, *supra* note 92, Art. 47(2).
97 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, at para. 18.
98 *Nicaragua*, *supra* note 9, at para. 122.
99 Ibid., at para. 255.

often lacking. For example, in the period following the 2003 invasion of Iraq, the US lacked standardized rules governing the employment of PMSCs and there was little in the way of on-site administration and monitoring of contracts.[100] A 2004 US government report on the Abu Ghraib scandal noted that 'there was no credible exercise of appropriate oversight of contract performance at Abu Ghraib', and in some cases contractors may have even 'supervised' public personnel rather than the other way round.[101] According to the report, a small number of contracting officers were responsible for administering and monitoring numerous PMSC contracts involving 100 or more PMSC employees, sometimes in several locations; these officers 'do well to keep up with the paper work, and simply have no time to actively monitor contractor performance'.[102] The United States has since attempted to improve these practices and has published a range of policy documents governing private security in Iraq,[103] but serious concerns remain about the lack of adequate state supervision of PMSCs in the field.[104]

Finally, due diligence requires the hiring state not only to prevent violations of IHL, but also to investigate and punish such instances when they occur. Diligent investigation and punishment of alleged violations could play a key role in reinforcing the hiring state's preventive measures and deterring potential future wrongdoers. The contract of hire should itself contain clear procedures for reporting any violations that take place, together with provisions for contractual termination in cases of violation. The hiring state should diligently investigate any alleged IHL violations and, if warranted, terminate the PMSC contract or dismiss the employee in question. In addition, if the violation constitutes a criminal offence over which the hiring state has jurisdiction, the state should take steps to arrest and prosecute or extradite the perpetrator.

If the hiring state fails to take the basic steps outlined above and a PMSC employee acts in a way that violates IHL, the state will be responsible internationally for its failure. Of course, the mere occurrence of a PMSC violation does not itself establish that the hiring state has violated its preventive obligation; the claimant must also prove that the state failed to exercise due diligence to ensure that the company respect IHL. It is not necessary, however, to prove that an exercise of due diligence by the state would in fact have prevented the IHL violation in question. Not only would this be difficult to prove, but it is also irrelevant to the breach of the state's obligation under Common Article 1. In order to establish a violation of the obligation to ensure respect for IHL, it will suffice to prove that the hiring state failed to take those measures within its power that *might* have been expected to prevent the violation in

100 See D. Isenberg, 'Challenges of Security Privatisation in Iraq', in A. Bryden and M. Caparini (eds.), *Private Actors and Security Governance* (2007).
101 See Fay Report, *supra* note 1, at 52.
102 Ibid., at 50–2.
103 See, e.g., US Department of Defense Instruction 3020.41 (3 October 2005); US Department of Defense Directive 2311.01 E (9 May 2006).
104 Isenberg, *supra* note 99. These problems came to light dramatically in the aftermath of the Blackwater shooting in Baghdad in September 2007, in which 17 civilians were killed. See US Congress Committee Report, *supra* note 2.

the circumstances.[105] Where this can be established, the extent of the hiring state's responsibility will depend on an evaluation of, on the one hand, the preventive steps in fact taken by the state and, on the other hand, the state's capacity to influence the PMSC, the degree of risk associated with the PMSC activity, and the hiring state's actual or constructive knowledge of that risk, and the means available to the state in the circumstances.

## 5. Conclusion

The duty to ensure respect for IHL in Common Article 1 imposes an obligation on the hiring state of a PMSC to act diligently and take those measures that are reasonably within its power to prevent, repress, and punish violations of IHL by PMSC personnel. This is an obligation of conduct that should be interpreted in accordance with a due diligence standard. Although the precise requirements of Common Article 1 have hitherto gone untested in any court, it is possible to identify a number of concrete measures which the hiring state will need to take in order to discharge its positive obligation. At a minimum, the hiring state should take diligent steps to ensure that all PMSC personnel are vetted and trained, that clear and appropriate terms are included in the contract of hire, that adequate procedures are in place to monitor PMSC activities in the field, and that any alleged violations are investigated and, where warranted, punished. In addition, a state that hires a PMSC to advise or train foreign forces should ensure that the company provides advice or training that complies with IHL.

The hiring state's positive obligation under Common Article 1 could play a key role in establishing state responsibility for PMSC violations of IHL in cases where the wrongdoing PMSC employee is not acting as an agent or official of the hiring state – that is, where the contractor is neither part of the state's armed forces, nor exercising governmental authority, nor acting under the hiring state's instructions, direction, or control. It follows that the relative importance of Common Article 1 in enhancing state responsibility will depend on the scope given to the rules of attribution. The stricter the interpretation of those rules, the more difficult it will be to attribute PMSC misconduct directly to the hiring state and the greater the role for the positive obligation to ensure respect for IHL.

Ultimately, greater discussion of Common Article 1 could also have a prospective impact on state conduct. By calling attention to the hiring state's positive obligation to ensure respect for IHL and expounding the substantive content of that obligation in the private-security context, this analysis can encourage and assist states to develop their internal laws and policies in order to improve overall compliance with IHL.

105 This reflects the test utilized by the ICJ in the *Genocide* case, *supra* note 20 (at para. 430), as well as by the European Court of Human Rights in assessing the obligation to protect life in *Keenan v. UK*, *supra* note 86 (at para. 89), and *Osman v. UK*, *supra* note 86 (at para. 116).