

REPORTS AND DOCUMENTS

Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict

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Abstract

The Montreux Document on Private Military and Security Companies (Montreux Document) was adopted in 2008 by seventeen States to reaffirm and, as far as was necessary, clarify the existing obligations of States and other actors under international law, in particular under international humanitarian law (IHL) and international human rights law (IHRL). It also aimed at identifying good practices and regulatory options to assist States in promoting respect for IHL and IHRL by private military and security companies (PMSCs). Today, fifty-one States and three

* This article was written in a personal capacity and does not necessarily reflect the views of the International Committee of the Red Cross (ICRC).

international organizations have endorsed the Montreux Document. It contains twenty-seven “Statements” – sections recalling the main international legal obligations of States in regard to the operations of PMSCs during armed conflicts. Each statement is the reaffirmation of a general rule of IHL, IHRL or State responsibility formulated in a way that clarifies its applicability to PMSC operations. This article aims to detail the basis of each legal obligation mentioned in the first part of the Montreux Document (Part I). The article follows the structure of Part I, in order to better facilitate its comprehension. The second part of the Montreux Document, relating to good practices, is not covered in this article.

Keywords: Montreux Document, international legal obligations, IHL, IHRL, private military and security companies, private contractors, armed conflict, State responsibility



In 2006, the government of Switzerland and the International Committee of the Red Cross (ICRC) launched an initiative to promote respect for international humanitarian law (IHL) and international human rights law (IHRL) with regard to private military and security companies (PMSCs) operating in situations of armed conflict. Two years later, after several meetings with States and representatives from civil society, academic institutions and industry, seventeen States signed the Montreux Document on Private Military and Security Companies (Montreux Document).¹

The Montreux Document should not be construed as endorsing the use of PMSCs in any particular circumstance or as taking a stance on the broader question of legitimacy and advisability of using PMSCs in armed conflict. Although this question is an important one, there was at the time of the launch of the initiative an urgent need to counter the misconception that PMSCs were operating within a legal vacuum. Therefore, the initiative focused on restating and clarifying the existing legal obligations relating to the activities of PMSCs during armed conflict and on setting out good practices in this regard. Indeed, the increased presence of PMSCs in armed conflict raised important humanitarian and legal concerns such as the status of PMSC personnel under IHL; States’ obligations to take appropriate measures to prevent, investigate and provide effective remedies for

1 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Montreux, 17 September 2008 (Montreux Document), available in Arabic, Chinese, English, Finnish, French, Spanish and Russian at: www.eda.admin.ch/psc (all internet references were accessed in May 2014). The Montreux Document brochure is available in English, French, Spanish and Russian at: www.icrc.org/eng/resources/documents/publication/p0996.htm. On the process that led to the adoption of the Montreux Document, see James Cockayne, “Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document”, *Journal of Conflict and Security Law*, Vol. 13, No. 3, 2008; Louis Balmond, “Observations sur le Document de Montreux relatif aux obligations juridiques internationales pertinentes et aux bonnes pratiques pour les États concernant les activités des sociétés militaires privées”, *Revue Générale de Droit International Public*, Vol. 113, No. 1, 2009.

misconduct of PMSCs and their personnel; and individual accountability of PMSC personnel.

The Montreux Document therefore pursues two main objectives: (1) to reaffirm and, as far as is necessary, clarify the existing obligations of States, PMSCs and their personnel under international law, in particular under IHL and IHRL; and (2) to identify good practices and regulatory options to assist States in promoting respect for IHL and IHRL by PMSCs. As of January 2015, the Montreux Document had been signed by fifty-one States and three international organizations.²

The Montreux Document shall not be interpreted as limiting or prejudging in any manner existing rules of international law or the development of new ones. It is a restatement that certain well-established rules of international law apply to States and PMSCs.

The Montreux Document also does not concern or affect in any manner the rules relating to the *jus ad bellum*,³ in particular those contained in the Charter of the United Nations. It does not address the question of mercenaries either, but States' obligations in this regard remain relevant and applicable. In particular, the African Union Convention for the Elimination of Mercenarism in Africa and the United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries can be recalled.⁴ Although in most situations directors and employees of PMSCs will not qualify as mercenaries under international law,⁵ this possibility cannot be excluded and international agreements prohibiting mercenaries should be kept in mind.

The Montreux Document contains twenty-seven statements recalling the main international legal obligations of States in regard to operations of PMSCs in armed conflicts (hereinafter "statements"). Each statement is the reaffirmation of a general rule of IHL, IHRL or State responsibility formulated in a way that clarifies its applicability to PMSCs' operations. These statements do not create legal obligations, but recall existing ones and link them with the activities of PMSCs in conflict zones. They highlight the responsibilities of three types of States: Contracting, Territorial and Home States. In addition, these statements recall that PMSCs and their personnel are bound by IHL and must respect its provisions at all times during armed conflicts, regardless of their status.

2 Swiss Federal Department of Foreign Affairs, *Participating States of the Montreux Document*, 11 November 2014, available at: www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html.

3 The *jus ad bellum* relates to the legality of the use of force by States under international law and the *jus in bello* to the humanitarian rules that must be respected in warfare. On this issue, see Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, Vol. 1, 3rd ed., ICRC, Geneva, 2011, p. 114.

4 Organization of African Unity (OAU) Convention for the Elimination of Mercenaries in Africa, 1972, OAU Doc. CM/433/Rev.L (entered into force 1977), Annex 1; International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001) (UN Mercenary Convention).

5 For legal definitions of mercenary under international law, see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Art. 47; OAU Convention for the Elimination of Mercenaries in Africa, above note 4, Art. 1; UN Mercenary Convention, above note 4, Art. 1.

While the statements set out existing obligations under IHL and IHRL, they do not seek to define – for every case – which rules are applicable in a given context. IHL, for instance, only applies in situations of armed conflict, either international or non-international. As far as the activities of PMSCs in such contexts are concerned, IHL is applicable to their conduct if their activities have a link to the armed conflict.

IHRL applies in times of peace and does not cease to apply in armed conflict⁶ – although in times of armed conflict or other public emergency, States may decide to derogate from certain human rights. Nevertheless, rights such as the right to life and the prohibition of torture, inhuman or degrading treatment are non-derogable and thus continue to fully apply.⁷ Both bodies of law provide protection to victims of armed conflict within their respective spheres of application.⁸ Therefore, although the Montreux Document focuses on situations of armed conflict, statements and good practices related to IHRL obligations remain relevant. Furthermore, although not specifically mentioned in the document, it goes without saying that the rules set forth in the Montreux Document are relevant to situations involving PMSCs on the high seas.⁹

6 See for instance, International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, para. 106:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 25; and ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports 2005*, para. 216.

7 See, e.g., International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art. 4:

1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2) No derogation from articles 6 [right to life], 7 [prohibition of torture and of cruel, inhuman or degrading treatments], 8 [paragraphs I and 2] [prohibition of slavery], 11 [prohibition of imprisonment for failure to fulfil a contractual obligation], 15 [non retroactivity of criminal law], 16 [right to legal personality] and 18 [right to freedom of thought, conscience and religion] may be made under this provision.

8 30th International Conference of the Red Cross and Red Crescent Movement, *Reaffirmation and Implementation of International Humanitarian Law: Preserving Human Life and Dignity in Armed Conflict*, 30 November 2007, Resolution No. 3, available at: www.icrc.org/eng/resources/documents/resolution/30-international-conference-resolution-3-2007.htm.

9 Indeed, the high seas are not a zone in which States are exempted from international legal obligations. See San Remo Manual on International Law Applicable to Armed Conflict at Sea, 12 June 1994, Art. 10(b). For IHRL, see, for instance, European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment (Grand Chamber), 23 February 2012, paras 79 ff.

This article aims to explain in detail the basis of each legal obligation mentioned in the first part of the Montreux Document, following the structure of the document in order to facilitate its comprehension and implementation. The second part of the Montreux Document, relating to good practices, will not be addressed in this article.

Definitions

It is important to understand the terms used in the Montreux document and their specific definition within the document. Several terms will be explained in this section.

For the purposes of the Montreux document:

- **“PMSCs”** are private businesses 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.

The Montreux Document does not attempt to classify companies. Rather, it seeks to promote respect for IHL and IHRL by any business providing military or security services in armed conflict situations. PMSCs often provide both military and security services, and even other services. It is immaterial whether a PMSC considers itself to be a “military” or “security” company – what matters is the nature of the activities it carries out in a given situation. Furthermore, the Montreux Document is not restricted to military or security services involving the use of arms; it is also relevant for services such as the training of armed forces, intelligence and the interrogation of prisoners.

- **“Personnel of a PMSC”** are persons employed by a PMSC, through direct hire or under a contract with a PMSC, including its employees and managers.

The rules contained in the Montreux Document are applicable to every individual employed by a PMSC and operating in a situation of armed conflict. This includes all employees, regardless of their function within a company, as well as all managers and directors. Personnel employed by business entities which are themselves subcontracted by a PMSC are also covered by this definition.

- **“Contracting States”** are States that directly contract for the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC.
- **“Territorial States”** are States on whose territory PMSCs operate.
- **“Home States”** are States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the “Home State”.

The Montreux Document is conceived around three main relations that States may have with PMSCs: contractual, territorial or by means of incorporation.

The Contracting State, due to the specific links that the contract creates between itself and the PMSC, should take particular care to ensure that the decision to contract a PMSC does not impede respect for IHL and IHRL in any manner. The notion of “contract” should be interpreted in a broad sense, so as to also include very basic contracts. Furthermore, when the contracted PMSC subcontracts to another PMSC, the Contracting State should exercise due diligence to ensure that the subcontracted PMSC will also respect IHL and IHRL.

As for the Territorial State, it has, of course and as with all other States, an obligation to respect and ensure respect of IHL. When a State authorizes PMSCs to operate on its territory and/or to collaborate with or support its own military or police forces, it shall make certain that adequate national mechanisms are in place to ensure respect for IHL on its territory and to allow proper measures, including investigation and prosecution, to be carried out in case of violations. This territory also includes territorial seas and air above its lands and seas. Ships under the flag of a State will also be considered as part of the territory of that State. States are also generally considered responsible for respect and implementation of IHRL obligations “within their jurisdiction”.¹⁰

The Home State is the State in whose jurisdiction the PMSC is incorporated, registered or has its principal place of management. Through its domestic legislation and policy, the Home State can contribute to ensuring that PMSC activities do not result in violations of IHL or IHRL. A State can do that through a variety of measures, such as imposing specific training requirements or activities restrictions for this industry through a licensing and reporting system.

Even if their relationship with PMSCs may be more tenuous, all other States also have some obligations in this regard and should implement the Montreux Document and the good practices it sets out. For instance, all States have an obligation to ensure that they have legislation allowing them to investigate and prosecute war crimes committed by their nationals working for foreign PMSCs abroad.

Furthermore, the IHL and IHRL obligations of Contracting, Territorial and Home States are not implemented in watertight compartments, and various States may have obligations toward one particular PMSC and members of its personnel. Therefore, with the aim of ensuring respect for IHL and IHRL and access to remedy for victims, States should cooperate in elaborating and implementing their regulations so as to avoid jurisdictional gaps.

10 See ICJ, *Legal Consequences of the Construction of a Wall*, above note 6, para. 109. Some States, in particular the United States and Israel, reject the extraterritorial application of certain human rights treaties, especially the ICCPR, via a narrow interpretation of “jurisdiction” as concurrent with “territory”. However, according to the UN Human Rights Committee, this treaty “also applies to those within the power or effective control of the forces of a State Party acting outside its territory”. Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004, para 10.

A. Contracting States

1. Contracting States retain their obligations under international law, even if they contract PMSCs to perform certain activities. If they are occupying powers, they have an obligation to take all measures in their power to restore, and ensure, as far as possible, public order and safety, i.e. exercise vigilance in preventing violations of international humanitarian law and human rights law.

This statement recalls that contracting companies to perform certain activities does not relieve States from their international law obligations. Although international law does not prevent States from contracting out various activities,¹¹ failure of a State to meet its international obligations cannot be excused by the outsourcing of a particular task. Therefore, Contracting States shall ensure that the respect and implementation of their obligations under international law, and in particular under IHL and IHRL, is not impeded by their decision to contract out PMSCs.

For instance, in an international armed conflict, the Detaining Power is responsible for the treatment given to prisoners of war (PoWs).¹² Therefore, even if the capture, transfer or detention of PoWs is carried out by a PMSC contracted by the State, the Contracting State, which will be the Detaining Power in this case, remains responsible for the respect of applicable IHL rules. This overall responsibility of the Detaining Power is also applicable if it contracts out activities related to the running of a detention facility to a private company, such as interrogation of detainees or internees, care or facility administration. If private company personnel do not treat detainees according to the standards of IHL, for instance by mistreating them or by not ensuring adequate health care or nutrition, the State will be responsible if the action or omission in question can be attributed to the State (in this regard, see Commentary to Statement 7) or, depending on the circumstances, for its own failure to ensure that the conditions of detention and standards of treatment specified in the relevant conventions are met (see Commentary to Statement 3).

Furthermore, States contracting out the operation of checkpoints to PMSCs retain their obligation to ensure freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions and to allow and facilitate

11 However, it is interesting to point out that international law prohibits the use of privateers. See Declaration Respecting Maritime Law, Paris, 16 April 1856 (entered into force 16 April 1856), Art. 1: "Privateering is, and remains, abolished." This prohibition is reflected in the Hague Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, 18 October 1907 (entered into force 26 January 1910), Art. 1: "A merchant ship converted into a war-ship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies."

12 Geneva Convention (III) relative to the Treatment of Prisoners of War (GC III), 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 12. The responsibility is the same in respect to any protected persons in the hand of a party to the conflict, such as civilian internees during international armed conflicts. See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (GC IV), 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 29. However, activities listed in Statement 2 below cannot be contracted to non-State agents.

rapid and unimpeded passage of humanitarian relief, which is impartial and conducted without any adverse distinction, for civilians in need.¹³

In a situation of occupation, IHL imposes on the Occupying Power a number of obligations towards the population of the occupied territory.¹⁴ The Occupying Power remains responsible for taking all feasible measures to fulfil these obligations, even if it contracts a private company to do so. A more specific obligation can be found in Article 43 of the Hague Regulations, which requires the Occupying Power to “take all measures in his power to restore, and ensure, as far as possible, public order and safety”. According to the International Court of Justice (ICJ):

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.¹⁵

The Occupying Power has an obligation to exercise “vigilance” in order to prevent violations of IHL and IHRL, including by non-State actors.¹⁶ Thus, in an occupied territory, the Occupying Power has to take positive steps to prevent all third parties, including PMSCs, from committing acts that endanger public order and safety.

Another example can be found in respect to training and teaching. The fact that military training and teaching are being performed by PMSCs does not discharge the State or the military commanders of their obligation to prevent and suppress violations of IHL.¹⁷

States also remain bound by their obligations under IHRL (as they continue to apply in times of armed conflict). Indeed, under IHRL, States not only have an obligation to refrain from violating human rights, but also have a positive obligation to ensure that the human rights of persons under their jurisdiction are

13 See GC IV, Art. 23; AP I, Arts 70(2), 71(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (AP II), Art. 18(2); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 55 and 56.

14 For instance, the Occupying Power has the obligation to ensure the general welfare of the occupied population. Hague Convention (IV) respecting the Laws and Customs of War on Land, and its Annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (entered into force 26 January 1910), Art. 43; the obligation to facilitate, in cooperation with national and local authorities, the proper working of all institutions devoted to the care and education of children (GC IV, Art. 50); the duty to ensure, to the fullest extent of the means available to it, food and medical supplies the population (GC IV, Art. 55), as well as clothing, bedding, means of shelter, and other supplies essential to the survival of the civilian population (AP I, Art. 69); and, in cooperation with national and local authorities, to ensure the maintenance of health and medical establishments and services (GC IV, Art. 56). It also has the obligation to ensure that, when the needs of the civilian population are not met, relief actions are undertaken and relevant IHL dispositions implemented without delay (see also GC IV, Arts 59–62, 108–111; and AP I, Arts 69 and 71).

15 ICJ, *Democratic Republic of the Congo v. Uganda*, above note 6, para. 178.

16 See *ibid.*, para. 179.

17 AP I, Arts 86 and 87.

respected even by private actors, including PMSC personnel.¹⁸ Therefore, States must adopt legislative and other measures in order to protect and to implement their obligations under IHRL. These human rights obligations might be limited when States contract PMSCs to conduct activities abroad (see Commentary to Statement 4).

2. Contracting States have an obligation not to contract PMSCs to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner-of-war camps or places of internment of civilians in accordance with the Geneva Conventions.

Under IHL there are a number of responsibilities of the parties to the conflict that cannot be contracted out at all, as they must be performed by the State party itself, and in some instances even by a specific person. Examples can be found in the following provisions:

- Article 51 of the Hague Regulations Respecting the Laws and Customs of War on Land, annexed to the 1907 Hague Convention (IV), requires a written order of the commander-in-chief for any contribution collected in occupied territory;
- Article 52 of the Hague Regulations Respecting the Laws and Customs of War on Land, annexed to the 1907 Hague Convention (IV), requires the commander in the occupied locality to give authorization for requisitions or demanded services;
- Article 1 of the Hague Convention (VII) relating to the Conversion of Merchant Ships into War-Ships indicates that a merchant ship converted into a warship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control and responsibility of the power whose flag it flies;
- Article 39 of GC III states that PoW camps have to be under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power;
- Article 120(2) of GC III states that death certificates or lists of deaths of prisoners of war have to be certified by a responsible officer;
- Article 99 of GC IV states that internment facilities have to be under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power; and
- Article 121 of GC III and Article 131 of GC IV state that in case of death of a prisoner of war or a civilian internee caused or suspected to have been caused

18 See, e.g., General Comment No. 31, above note 10, para. 8:

the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

by another person, the Detaining Power must carry out an immediate official enquiry.

3. Contracting States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs they contract, in particular to:

- a) **ensure that PMSCs that they contract and their personnel are aware of their obligations and trained accordingly;**
- b) **not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;**
- c) **take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means, such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.**

The obligation to respect IHL means an obligation for the State to refrain from committing violations through its own authorities and armed forces, while the obligation to ensure respect for IHL entails a duty to take measures to prevent and repress violations of humanitarian law. It is a commitment to promote compliance with IHL,¹⁹ a commitment to act “with due diligence to prevent [violations of IHL] from taking place, or to ensure their repression once they have taken place”.²⁰

The obligation to ensure respect for IHL is enshrined in Article 1 common to the four Geneva Conventions and Article 1 of Additional Protocol I (AP I), which stipulate that “[t]he High Contracting Parties undertake to respect and to ensure respect for [the present Convention/this Protocol] in all circumstances”. This obligation “does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression”.²¹ It is also a rule of customary law specifically in regard to persons or groups of persons acting in fact on the instructions of, or under the direction or control of, the State²² (in this respect, see Commentary to Statement 7). The obligation of States not to encourage violations of IHL by parties to an armed conflict and to exert their influence, to the degree possible, to stop violations of IHL is also a rule of customary law.²³ “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

19 See Intervention by Mr Pilloud from the International Committee of the Red Cross in Diplomatic Conference of Geneva of 1949, Final Record, Vol. 3, 9th Meeting, 25 May 1949, p. 39; ICRC, Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, 2nd ed., Geneva, April 1958, p. 129; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, Commentary on Art. 1, p. 18; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, Art. 91, p. 1057.

20 *Ibid.*, Art. 91, p. 1058.

21 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *ICJ Reports 1986*, para. 220.

22 See ICRC Customary Law Study, above note 13, Rule 139.

23 See *ibid.*, Rule 144.

occurring, but without warranting that the event will not occur.”²⁴ As the wording of common Article 1 indicates, this has to be the case in all circumstances, including in respect to the activities of PMSCs.

Contracting States are in a particularly favourable position to ensure respect for IHL. Indeed, PMSCs provide services on the basis of contracts with clients, including Contracting States. Contracting States thus have the means to effectively control how PMSCs operate. In this respect, the good practices contained in Part II of the Montreux Document offer guidance on measures that can be taken to ensure that PMSC personnel comply with IHL. For instance, this could be done by first determining which services may be outsourced, by establishing procedures and criteria for the selection and contracting of PMSCs, by monitoring compliance of PMSCs and their personnel with IHL and IHRL, and by ensuring accountability in case of violations, for instance through criminal procedure or non-criminal accountability mechanisms.²⁵

In addition to the obligation to give appropriate instructions to its armed forces and ensure that they are properly carried out,²⁶ The Contracting State must also disseminate the texts of the Geneva Conventions to its armed forces and to the civilian population as widely as possible.²⁷ The State also has an obligation to disseminate IHL among “the entire population” – especially personnel of PMSCs.²⁸ Furthermore, considering the nature of the services offered by PMSCs and the fact that they may operate in conflict zones, States may decide to develop dissemination programmes specifically designed for the industry.

The Contracting State has to give itself the legal and material means to ensure that its obligations will be respected and to take measures to prevent violations of IHL by PMSC personnel. For instance, the Commentary to Article 27 of GC IV providing for the treatment of protected persons²⁹ states:

The Convention does not confine itself to stipulating that such acts are not to be committed. It goes further; it requires States to take all the precautions and measures in their power to prevent such acts and to assist the victims in case of need.³⁰

24 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission*, Vol. 2, No. 2, 2001 (ASR Draft Articles), Commentary to Art. 14, para. 14.

25 See Montreux Document, above note 1, Part 2, Good Practices 1–23.

26 J. Pictet, above note 19, Commentary on Art. 1, p. 16.

27 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (GC I), 75 UNTS 31 (entered into force 21 October 1950), Art. 47; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949 (GC II), 75 UNTS 85 (entered into force 21 October 1950), Art. 48; GC III, Art. 127; GC IV, Art. 144; AP I, Art. 83; AP II, Art. 19.

28 See GC I, Art. 144; ICRC Customary Law Study, above note 13, Rule 143.

29 Which established, *inter alia*, that “[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.”

30 J. Pictet, above note 19, Commentary on Art. 27, p. 204.

Therefore, measures taken by States to prevent violations of IHL by PMSCs and their personnel and accountability mechanisms established to deal with violations must have practical and concrete preventive effects. They must also provide assistance and remedies to victims.

IHL gives rather clear indications that military authorities must be fully acquainted with the texts of the Geneva Conventions³¹ and that they must have adequate instructions, orders and supervision.³² This obligation is relevant for activities of personnel of a PMSC that is integrated into the armed forces or whose conduct is attributable to the State (see below Commentary to Statement 8). As stated before (see Commentary to Statement 1), the State is not discharged from its obligations under IHL by its decision to have recourse to PMSCs to provide military-related activities.

Which measures a State has to take in order to discharge its obligation to ensure respect will depend on various parameters such as the capacity of that State to effectively influence the PMSCs and/or members of their personnel likely to commit violations, the geographical distance of the State from the events, and the strength of its links – contractual, legal, political, economical, etc. – with PMSCs.³³ The risk of IHL violations should also be a factor in assessing the due diligence obligation of a State. For instance, if the PMSC personnel operate in an armed conflict situation or are authorized to carry arms, or if the contract involves direct participation in hostilities, the State should be particularly vigilant and should implement preventive measures appropriate to the situation.³⁴

Mainly, States should provide instructions to the relevant authorities, for instance their own authorities in charge of liaising with PMSCs. If States contract PMSCs, the obligation to ensure respect for IHL can be understood as entailing an obligation of the contracting authorities to ensure that the company and its employees are aware of their obligations and commit themselves to respecting them.³⁵ When the contracted PMSC subcontracts other PMSCs, the Contracting State should also exercise due diligence to ensure that IHL is respected by those subcontracted PMSCs. How the authorities ensure this is within the margin of discretion of the State, as long as it takes all appropriate measures. As a minimum, States have an obligation not to encourage or assist in any violations of IHL committed by personnel of PMSCs that they contract.³⁶

31 GC III, Art. 39; GC IV, Arts 99, 144(2); AP I, Arts 82, 83(2), 87.

32 AP I, Art. 80(2).

33 See, by analogy, ICJ, *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, ICJ Reports 2007, para. 430.

34 In particular, Contracting States should take into account the potential involvement of private contractors in direct participation in hostilities when determining which services may or may not be contracted out to PMSCs. see Montreux Document, above note 1, Part 2, Good Practice 1.

35 See e.g., *ibid.*, Part 2, Good Practices 10, 11, 12, 14 and 15.

36 ICRC Customary Law Study, above note 13, Rule 144. See also ICJ, *Nicaragua v. United States of America*, above note 21, para. 220, finding that the United States was “under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions”.

Finally, the Statement mentions the obligation to suppress violations of IHL. In addition to the suppression of grave breaches, the relevant articles of the Geneva Conventions require the “suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article”.³⁷ Measures taken in this respect may include, in addition to criminal law, military regulations, administrative orders and other regulatory measures as well as sanctions by appropriate means, which can be administrative, disciplinary or judicial.

4. Contracting States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.

The obligation to implement IHRL is a complex one which can vary according to different treaties to which a State has subscribed.³⁸ The obligations described in the following commentary are relevant not only for Contracting States, but also for Territorial and Home States. However, due to their close link with PMSCs, Contracting States should be especially vigilant in ensuring that they have adopted adequate legislative or administrative measures to give effect to their IHRL obligations in respect to activities of PMSCs that they contract.

a) Obligation to implement human rights: Human rights can be threatened not only by the conduct of States, but also by that of private actors. Some human rights treaties specifically require States to protect individuals from private actors’ abuses.³⁹ Human rights bodies and courts have also generally interpreted the obligation to implement human rights as including an obligation for States to protect people against the conduct of third parties that infringes upon their

37 GC I, 49(3); GC II, 50(3); GC III, 129(3); GC IV, 146(3).

38 See, e.g., ICCPR, Art. 2(1); African Charter on Human and Peoples’ Rights (ACHPR), 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) (entered into force 21 October 1986), Art. 1; American Convention on Human Rights (ACHR), 22 November 1969, OAS Treaty Series No. 36, 1144 UNTS 123 (entered into force 18 July 1978), Art. 1; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended, Art. 1. On this issue, see also Monica Hakimi, “State Bystander Responsibility”, *European Journal of International Law*, Vol. 21, No. 2, 2010, pp. 344–345.

39 See, e.g., Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 18 December 1979, UN Doc. A/34/180 (entered into force 3 September 1981), Art. 2(e); International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 7 March 1966, 66 UNTS 195 (entered into force 4 January 1969), Arts 2(d), 5(b); Convention on the Rights of the Child (CRC), 20 November 1989, UN Doc. A/44/49 (entered into force 2 September 1990), Art. 19(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, UN Doc. A/45/49 (entered into force 1 July 2003), Art. 16(2); Convention on the Rights of Persons with Disabilities, 13 December 2006, 46 ILM (2007) 443 (entered into force 3 May 2008), Arts 4(e), 16.

human rights.⁴⁰ At a minimum States have an obligation to exercise due diligence to prevent, investigate, hold perpetrators accountable for, and provide remedies against the harm caused by the conduct of private persons or entities which can affect human rights.⁴¹ In regard to the obligation of prevention, the obligation to implement human rights includes, for instance, a duty to provide adequate training and clear guidance on IHRL to PMSC employees.⁴²

Certain rights are, of course, more amenable than others to application between private persons or entities. The right to life – which some treaties explicitly oblige States to protect by law⁴³ – is of particular importance and has been recognized as requiring protection by States against the conduct of third parties.⁴⁴

Similarly, the right to physical integrity, including the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, has been recognized in international jurisprudence as requiring protection by the State.⁴⁵ For instance, if a PMSC employee commits any form of assault on a person, this affects that person's right to physical and mental integrity. The State, even if it is not necessarily responsible for that private act, has an

40 See, for instance, General Comment No. 31, above note 10, para. 8:

However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

See also ECtHR, *X and Y v. the Netherlands*, Series A, No. 91, Judgment, 26 March 1985, para. 27; Inter-American Court of Human Rights (IACtHR), *Velázquez Rodríguez v. Honduras*, Series C, No. 4, Judgment, 29 July 1988, para. 74.

41 See, e.g., *ibid.*, para.172.

42 See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (CAT), Art. 10: "Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials 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" (emphasis added). See also Human Rights Committee, "Consideration of Report Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United States of America", UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 14.

43 ICCPR, Art. 6(1); ECHR, Art. 2(1); ACHR, Art. 4(1).

44 See Human Rights Committee, General Comment No. 6 on the Right to Life (Article 6), 30 April 1982, UN Doc. HRI/GEN/1/Rev.7, para. 3; General Comment No. 31, above note 10, para. 8; See also ECtHR, *Osman v. the United Kingdom*, Judgment, *Reports of Judgments and Decisions 1998-VIII*, No. 95, 28 October 1998, para. 115 ff.

45 See, e.g., General Comment No. 31, above note 10, para. 8; Committee against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2/CRP.1/Rev.4, 24 January 2008, para. 18; ECtHR, *A. v. the United Kingdom*, Judgment, *Reports of Judgments and Decisions 1998-VI*, No. 90, 23 September 1998, paras 20–24.

obligation – if the assault is of a criminal nature – to investigate, prosecute and punish the perpetrator.⁴⁶

b) Legislative and other measures: States must adopt all necessary legislative or other measures to implement their human rights obligations. This includes measures to prevent any violation by the State or abuse by PMSCs and their personnel, to punish violations and to provide remedies to victims. This is explicitly stated in some human rights conventions, such as in Article 2(2) of the International Covenant on Civil and Political Rights, which states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.⁴⁷

A similar formulation is found in Article 2 of the American Convention on Human Rights. While the European Convention on Human Rights does not contain an express obligation to adopt legislative measures, the European Court of Human Rights has recognized this obligation in its constant jurisprudence.⁴⁸ Furthermore, as mentioned above, some treaty provisions on the right to life explicitly recognize

46 See IACtHR, *Velásquez-Rodríguez v. Honduras*, above note 40, para. 176:

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

The Human Rights Committee, in its Concluding Observations on the Report submitted by Lesotho under Art. 40 of the ICCPR, 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." UN Doc. CCPR/C/79/Add.106, 8 April 1999, para. 19. Although pertaining to inter-State arbitration, in the case of *Laura M. B. Janes and al. (USA) v. United Mexican States*, General Claims Commission, 16 November 1925, *Reports of International Arbitral Awards*, Vol. IV, p. 87, the indication of the Commission on the notion of due diligence may be of interest:

Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender.

47 ICCPR, Art. 2(2).

48 See ECtHR, *X and Y v. The Netherlands*, above note 40, para 40; ECtHR, *Kudla v. Poland*, Judgment, 26 October 2000, paras 158–160. On the obligation to implement human rights obligations through national legislation, see for instance IACtHR, *The Last Temptation of Christ v. Chile*, Series C, No. 73, Judgment, 5 February 2001, para. 88; IACtHR, *Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago*, Series C, No. 94, Judgment, 21 June 2002, para. 212; IACtHR, *Trujillo Oroza v. Bolivia (Reparations)*, Series C, No. 92, Judgment, 27 February 2002, para. 122; Human Rights Committee, *Suárez de Guerrero v. Colombia*, UN Doc. CCPR/C/15/D/45/1979, Views, 30 March 1982, para. 15; African Commission on Human and People's Rights (ACoMHPR), *Avocats sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication No. 231/99, 2000; ACoMHPR, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication No. 211/98, 2001.

the duty to protect this right “by law”, including against criminal conduct by private parties.⁴⁹ In regard to PMSCs, the Inter-American Commission in its 1996 Annual Report recommended to Guatemala that it should dedicate additional attention “to the proliferation of arms and private security forces or groups, to assure that adequate legislative, administrative and judicial measures are in place to control the number and use of firearms, and to monitor and control the actions of private security agents”.⁵⁰

c) Remedies: Under human rights law, everyone who has an arguable claim that his or her rights have been violated has a right to an effective remedy as determined by competent authorities.⁵¹ Commonly, this means a judicial remedy in accordance with national law, but it can also be an administrative remedy as long as it is effective.⁵² Thus the individual has the right to bring a claim against the State authorities not only on the grounds that the State is responsible for a violation committed by its own authorities but also against a failure of the State to protect the individual against the conduct of a PMSC or its personnel. In this sense, the European Court of Human Rights has held that in order to seek protection as well as to ask the authorities to investigate alleged negligence on the part of governmental authorities, individuals have a right to a remedy if they have an arguable claim that the authorities did not fulfil their duty of due diligence to

49 ICCPR, Art. 6(1); ECHR, Art. 2(1); ACHR, Art. 4(1). See also Human Rights Committee, General Comment No. 6, above note 44.

50 Inter-American Commission on Human Rights (IAComHR), *Annual Report on Human Rights 1996*, Chapter V, OEA/Ser.L/V/II.95, Doc. 7 rev., 14 March 1997, para. 71. In its recommendations to member States, the Commission adds:

The Commission is particularly concerned with the proliferation of private sector security personnel, who may be directed by employers to use measures of force, and who may be utilized without sufficient public sector monitoring or regulation. The Commission consequently recommends that member states review the norms applicable to the provision of private sector security services, and the systems to monitor such activity to ascertain where there may be *lacunae* in coverage and fill them, and take steps to ensure that the provision of such services, to the extent they may be permitted by law, neither conflicts with public sector duties nor infringes upon individual liberties.

Ibid., Chapter VII, Recommendation 2.

51 ICCPR, Art. 2(3); ECHR, Art. 13; ACHR, 25; CERD, Art. 6; CAT, Art. 13; CRC, Art. 39; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN GA Res. A/RES/60/147, 16 December 2005 (Basic Principles on Reparation); see also AComHPR, Principles on Remedy and Fair Trial in Africa of the Commission on Human and People’s Rights, DOC/OS(XXX)247, 2003. The Human Rights Committee in its General Comment No. 29 on derogations during a state of emergency specified that even during a state of emergency, “the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective”. See General Comment No. 29 on Derogations during a State of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14.

52 Human Rights Committee, General Comment No. 31, above note 10, para. 15. See also Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”, UN Doc. A/HRC/17/31, 21 March 2011 (UN Guiding Principles), Principle 25, which states: “As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”

prevent the abuse or investigate it.⁵³ In other words, a victim of unlawful behaviour by a PMSC or its personnel can bring a claim against the State for its failure to take appropriate measures to protect the victim against such unlawful behaviour.

Measures allowing victims to obtain remedies directly from the perpetrator may also be established. Some domestic legislation provides for victims' civil claims to be filed directly against non-State perpetrators, including business entities, for certain human rights and IHL violations; for instance, the US Alien Tort Claims Act (ATCA)⁵⁴ gives subject-matter jurisdiction to US federal courts over claims of non-nationals for a tort resulting from violations of international law.⁵⁵ Violations of international law that have been recognized as actionable under this statute include genocide,⁵⁶ crimes against humanity,⁵⁷ war crimes,⁵⁸ torture,⁵⁹ extrajudicial killings,⁶⁰ prolonged arbitrary detention⁶¹ and forced labour.⁶² Claims have been filed against PMSCs and members of their personnel based on this statute.⁶³ However, in 2013, the Supreme Court of the United States held that the presumption against extraterritorial application of federal statutes applies to the ATCA. Its scope of application has thus been significantly narrowed: "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial

- 53 See ECtHR, *Osman v. the United Kingdom*, above note 44, para. 147. In the ECHR, this claim can arise out of the right to a fair hearing enshrined in Art. 6 or the right to remedy in Art. 13.
- 54 For an exhaustive overview of international law norms accepted by the jurisprudence, see Michael Koebele, *Corporate Responsibility under the Alien Tort Statute: Enforcement of International Law through US Torts Law*, Leiden, Martinus Nijhoff, 2009; Neils Beisinghoff, *Corporations and Human Rights: An Analysis of ATCA Litigation against Corporations*, Peter Lang, Frankfurt, 2008. See also Cedric Ryngaert, "Litigating Abuses Committed by Private Military Companies", *European Journal of International Law*, Vol. 19, No. 5, 2008, p. 1036.
- 55 The ATCA was adopted in 1789 and reads as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". 28 USC § 1350. According to the jurisprudence, the "law of nations" to which the ATCA is referring must be interpreted as it has evolved and exists today and not as it was at the time of its enactment. See, for instance, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2nd Cir. 1980), p. 881.
- 56 See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1996); *Presbyterian Church of Sudan v. Talisman*, 582 F.3d 244 (2nd Cir. 2009).
- 57 See, for instance, *ibid.*; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2nd Cir. 2000); *Presbyterian Church of Sudan v. Talisman*, above note 56; *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002); *Bowoto v. Chevron Corporation*, LEXIS 59374 (not reported in F. Supp.) (N.D. Cal. 2007).
- 58 See, for instance, *Kadic v. Karadzic*, above note 56; *Estate of Valmore Lacarno Rodriguez v. Drummond Co. Inc.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); *Presbyterian Church of Sudan v. Talisman*, above note 56.
- 59 See, for instance, *Filártiga v. Peña-Irala*, above note 55; *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, above note 57.
- 60 See, for instance, *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004).
- 61 See *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987). On short-term illegal detention not having been considered as reaching the necessary threshold, see *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), at 2765–2768.
- 62 See, for instance, *Doe I v. Unocal Corp.*, above note 59.
- 63 See *Ilham Nassir Ibrahim v. Titan et al.*, 391 F. Supp. 2d 10 (D.D.C. 2005). See also *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, (D.D.C. 2006); *In re: Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569 (E.D. Va. 2009); *Al Quraishi v. Nakhla et al.*, 728 F. Supp. 2d 702 (D. Md. 2010). Although liability of individuals, including personnel of PMSCs, is well established under this statute, it should be noted that US federal courts are divided on the question of whether a corporation can be held liable under the ATCA. See *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268 (2nd Cir. 2011); *John Doe VIII et al. v. Exxon Mobil Corp. et al.*, 654 F.3d 11 (D.C. Cir. 2011), vacated on other grounds.

application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”⁶⁴ Nevertheless, it remains possible to bring claims for violations of IHL or IHRL involving business entities under this statute.⁶⁵ In other jurisdictions, war crimes may be indictable offences under civil law.⁶⁶

Additional guidance on measures that States can adopt in order to protect victims of abuses by private companies and to provide them with remedies can be found in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁶⁷ According to these basic principles, States have an obligation under international law to adopt appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice and remedies, including reparation.⁶⁸ Victims should be informed of their rights for seeking redress.⁶⁹ States should also support victims of the worst abuses with compensation if compensation is not available from the offender⁷⁰ and ensure that victims receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based or indigenous means.⁷¹

States can also encourage and support corporate-based grievance mechanisms as a complementary means for victims to access remedies.⁷² For instance, the International Code of Conduct for Private Security Service Providers (ICoC), adopted in November 2010, provides for the establishment of grievance procedures to address claims alleging failure by the a signatory company to respect the principles contained in the ICoC, brought by personnel of the company or by third parties.⁷³ The Charter for the Oversight Mechanism of the

64 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111 (2nd Cir. 2010), p. 1669 (reference omitted), affirmed 133 S. Ct. 1659 (2013).

65 On the possibility of bringing claims for IHRL or IHL violations against business entities in various countries, see Beth Stephens, “Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations”, *Yale Journal of International Law*, Vol. 27, No. 1, 2002, pp. 1–57, especially pp. 17–34; L. F. H. Enneking, “Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases”, *George Washington International Law Review*, Vol. 40, No. 4, 2009, pp. 903–938.

66 This is the case, for instance, in the Canadian province of Quebec, which applies civil law in the matter. See Superior Court of Quebec, *Bil’in (Village Council) et al. v. Green Park International Inc. et al.*, No. 500-17-044030-081, 18 September 2009, at 37.

67 Basic Principles on Reparation, above note 51.

68 *Ibid.*, at I.(2)(b) and (c). See also Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, UNGA Res. A/RES/40/34, 29 November 1985.

69 Basic Principles on Reparation, above note 51, Annex, Principle 12(a).

70 *Ibid.*, Principles 15, 16. See also Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, above note 68, Principle 12.

71 Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, above note 68, Principle 14.

72 See the UN Guiding Principles, above note 52, and their Addendum, “Piloting Principles for Effective Company/Stakeholder Grievance Mechanisms: A Report of Lessons Learned”.

73 See International Code of Conduct for Private Security Service Providers (ICoC), 9 November 2010, Arts 66, 67, 68, available at: www.icoc-psp.org.

ICoC, adopted in February 2013,⁷⁴ establishes the foundations for the creation of the ICoC Association (ICoCA). The ICoCA was officially launched in September 2013 and involves PMSCs, governments and civil society organizations. As of January 2014, more than 700 companies had signed the ICoC and committed to respect IHL and IHRL standards.

d) Limits of extraterritorial application: Human rights treaties usually restrict the obligation of States to secure rights and freedoms that they provide for to “their territory or subject to their jurisdiction”.⁷⁵ “Subject to their jurisdiction” must be understood as anyone within the power or effective control of the authorities.⁷⁶ Although obligations of States that contract PMSCs to carry out activities abroad or Home States of PMSCs operating in another territory may be limited, those States may have some obligations in this respect and may bear responsibility for violations of human rights committed by PMSCs abroad.⁷⁷ For instance, if a State contracts a PMSC to carry out operations abroad, this State will have obligations with regard to violations of human rights committed by the PMSC or its personnel if their acts can be attributed to the State by virtue of the law of State responsibility (see below Commentary to Statement 8) or can be considered as having occurred within the jurisdiction of the State. Again, if the Contracting State has effective control over the territory abroad, such as in a situation of occupation, or if the State has power over the victim, such as in a situation of detention,⁷⁸ effective control of the State would entail human rights law obligations.

Furthermore, domestic criminal laws may provide for domestic jurisdiction over acts committed by nationals abroad. For instance, criminal provisions on war crimes (see Commentary to Statement 5), crimes against humanity, genocide,

74 International Code of Conduct for Private Security Service Providers Association, available at: www.icoc-ppsp.org/uploads/ICoC_Articles_of_Association.pdf.

75 See, e.g., ICCPR, Art. 2; ECHR, Art. 1; ACHR, Art. 1 (this article does not mention territorial limitation, but rather stipulates that States have the obligation to respect and ensure the free and full exercise of rights and freedoms provided by the convention for “all persons subject to their jurisdiction”).

76 See General Comment No 31, above note 10, para. 10; ECtHR, *Loizidou v. Turkey*, Series A, Vol. 310, Judgment (Preliminary Objections), 23 March 1995, para. 62; ECtHR, *Loizidou v. Turkey*, Judgment, *Reports of Judgments and Decisions 1996-VI*, 18 December 1996, para. 56; ECtHR, *Cyprus v. Turkey*, Judgment, *Reports of Judgments and Decisions 2001-IV*, 10 May 2001, para. 77; IACoMHR, *Coard v. the United States*, Case 10.951, Report No. 109/99, 29 September 1999, para. 37.

77 For instance, the ICJ states in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall*, above note 6, para. 109:

The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. The constant practice of the Human Rights Committee is consistent with this. Thus the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory.

78 See, e.g., ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, Appl. No. 61498/08, Decision on Admissibility, 30 June 2009; ECtHR, *Öcalan v. Turkey*, No. 46221/99, Judgment (Grand Chamber), 12 May 2005, para. 91; ECtHR, *Issa and Others v. Turkey*, No. 31821/96, Judgment, 16 November 2004; ECtHR, *Cyprus v. Turkey*, above note 76, *Loizidou v. Turkey*, 1995, above note 76, and *Loizidou v. Turkey*, 1996, above note 76; ECtHR, *Al-Skeini and others v. United Kingdom*, No. 55721/07, Judgment, 7 July 2011; ECtHR, *Al-Jedda v. United Kingdom*, No. 27021/08, Judgment, 7 July 2011.

terrorism, human trafficking or torture may provide for extraterritorial jurisdiction based on the nationality of the alleged perpetrator. In cases where the domestic law of the territorial State grants immunity to private contractors, Contracting States should make sure that their own domestic law provides for jurisdiction over criminal acts of the personnel of PMSCs that they contract with, in order to avoid jurisdictional gaps and impunity.⁷⁹

5. Contracting States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

This obligation to enact legislation to provide effective penal sanction in regard to the commission of grave breaches of the Geneva Conventions and AP I, where applicable, and to investigate, prosecute and punish the commission of grave breaches, is a core IHL obligation. States can also choose to hand suspects over for trial to another State if this State has made a *prima facie* case, or to an international criminal tribunal.⁸⁰

For any grave breach committed by personnel of PMSCs, all States have an obligation to search for persons, regardless of their nationality, alleged to have committed, or to have ordered to be committed, such grave breaches at least within their territory, and to bring these persons before their own courts or to hand them over for trial to another State, at least when these persons find themselves on their territory.⁸¹ That jurisdictional basis is additional to other bases of criminal jurisdiction used for common crimes: jurisdiction based on the territory on which the crime has been committed, on the nationality of the perpetrator, on the nationality of the victim, or on the protection of national interests or security.

The word “persons” used in Statement 5 can be read as including legal persons. It can be noted that in a number of countries, criminal law, including statutes on war crimes, applies not only to individuals but also to corporations.⁸²

79 See Montreux Document, above note 1, Part 2, Good Practice 22.

80 GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I, Arts 86 and 88.

81 From the wording of the grave breaches provisions, it is not entirely clear whether “to search for” means that all States have the obligation to search for alleged perpetrators of grave breaches everywhere in the world. While the wording seems to suggest as such (especially as opposed to the wording in some human rights treaties, such as the CAT, Art. 5), there is disagreement on the interpretation. The prevailing view is that the obligation to search for alleged perpetrators is limited to persons within the territory of the State.

82 See an overview of sixteen countries in Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law, A Survey of Sixteen Countries*, Report 536, Fafo, September 2006.

In these legal systems, not only the personnel or managers can be prosecuted for crimes, but also the company itself. Many domestic legal systems, especially common law countries, recognize corporate criminal responsibility.⁸³ The principle is also a developing one in continental law countries.⁸⁴ However, the doctrine used to affirm the criminal responsibility of corporations varies in different countries, from the one of the *directing mind*⁸⁵ to the one requiring the establishment of the guilty mind of the corporation as a whole⁸⁶ or by establishing a *corporate culture*.⁸⁷ Nevertheless, in most domestic legislations, for a corporation to be held liable, the criminal act must have been committed by an employee with a certain status, such as a director, or with a certain level of influence within the company and within the scope of his or her employment.⁸⁸

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

International law requires the criminalization of a number of acts. This obligation exists in varying forms in different treaties, which impose different types of jurisdiction for specific crimes. For instance, Article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) stipulates that each State Party must establish jurisdiction over the offence of torture when it is committed in any territory under its jurisdiction or on board of a ship or aircraft registered in that State, or when the alleged offender is a national of that State, or when the victim is a national of that State if that State

83 See Fafo, *Business and International Crimes. Assessing the Liabilities of Business Entities for Grave Violations of International Law*, Report 467, Allkopi Sarpsborg, Norway, 2004; A. Ramasastry and R. C. Thompson, above note 82.

84 Thomas Weigend, "Societas delinquere non potest? A German Perspective", *Journal of International Criminal Justice*, Vol. 6, No. 5, 2008, p. 928. For an overview of common law corporate criminal responsibility, see Celia Wells, *Corporations and Criminal Responsibility*, Oxford University Press, Oxford, 2001.

85 Under this doctrine, used in Canada and United Kingdom, for instance, a corporation may be held liable for the actions of its agents if these actions can be interpreted as being consistent with the intent of the corporation. Fafo, above note 83, p. 23.

86 The *mens rea* of the corporation can be demonstrated by actions or omissions of employees or by establishing that the directing management knew or should have known of the illegal pattern benefiting the corporation. This doctrine is used in the United States and also in the United Kingdom. *Ibid.*, p. 23. See also T. Weigend, above note 84.

87 See Australian Criminal Code Act 1995, Act No. 12 of 1995, Section 12.3(2)(c), Australian Criminal Code. See also Joanna Kyriakakis, "Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code", *Journal of International Criminal Justice*, Vol. 5, No. 4, 2007, p. 809; Allens Arthur Robinson, "Corporate Culture" as a Basis for the Criminal Liability of Corporations, documents prepared for the United Nations Special Representative of the Secretary-General on Human Rights and Business, February 2008, available at: www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf.

88 See A. Ramasastry and R. C. Thompson, above note 82, p. 13.

considers it appropriate; or when the alleged offender is present in any territory under its jurisdiction and it does not extradite him or her.⁸⁹ Other violations of international law that require criminalization in national law include slavery, trafficking in human beings,⁹⁰ child pornography,⁹¹ violent acts of racial discrimination,⁹² crimes against humanity,⁹³ genocide⁹⁴ and enforced disappearance.⁹⁵ Arguably, State practice also reflects an obligation to criminalize murder/extrajudicial executions. Murder is criminalized in all legal systems and, as discussed above, States have an obligation under IHRL to protect life by law.⁹⁶ States also have an obligation to investigate alleged perpetrations of these crimes.⁹⁷

In regard to PMSC personnel contracted by a State, the respect of this obligation may face some complex issues due to the fact that employees of PMSCs may have various nationalities and may operate in another territory. States must ensure that these complexities do not result in impunity and that they respect their international obligations in this regard.

Prosecution of international crimes must always be conducted in accordance with international standards of fair trial. The right of any person facing criminal charge to a fair trial is guaranteed by both IHL⁹⁸ and IHRL.⁹⁹ A fair trial must be held before a competent, independent and impartial tribunal established by law. It must also respect the fundamental judicial guarantees of the accused. Fundamental judicial guarantees include the right to be presumed innocent until proven guilty according to the law, the right to be informed without delay of the particulars of the alleged offence, the right and means of defence, the right to be present at one's own trial, the respect of the principle of non-retroactivity of the law, the right not be sentenced to a heavier penalty than

89 CAT, Art. 5.

90 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003), Art. 5.

91 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002), Arts 3, 4, 5.

92 CERD, Art. 4(a).

93 Rome Statute of the ICC, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (Rome Statute), Art. 7.

94 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951), Arts 4, 5, 6; Rome Statute, above note 93, Art. 6.

95 Declaration on the Protection of All Persons from Enforced Disappearance, UNGA Res. 47/133, 18 December 1992, Art. 4; International Convention on the Protection of All Persons from Enforced Disappearance (ICPPED), 20 December 2006, 2716 UNTS 3 (entered into force 23 December 2010), Arts 4, 9.

96 See notes 43 and 44 above. See also Resolution Adopted by the General Assembly: Extrajudicial, Summary or Arbitrary Executions, UNGA Res. 57/214, 25 February 2003, para. 5; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, UN Doc. E/1989/89, 24 May 1989, Principle 18.

97 For instance, in its second periodic report under the CAT, the United States stated that it had "conducted or initiated investigations" in respect to allegations of misconduct levied against PMSC personnel in the Abu Ghraib prison. UN Committee Against Torture, *Second Periodic Reports of States Parties Due in 1999: United States of America*, CAT/C/48/Add.3, 29 June 2005, p. 74.

98 See common Art. 3(1)(d); GC I, Art. 49(4); GC II, Art. 50(4); GC III, Arts 102–108; GC IV, Arts 5(3), 66–75; AP I, Art. 75(4); AP II, Art. 6; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956), Art. 17(2).

99 See, e.g., ICCPR, Arts 14, 15; ECHR, Arts 6, 7; ACHR, Arts 8, 9; ACHPR, Art. 7.

was applicable at the time of the commission of the offence, the right to benefit from the lighter penalty provided by the law at the time of the sentence, and the respect of the *ne bis in idem* principle.

7. Although entering into contractual relations does not in itself engage the responsibility of Contracting States, the latter are responsible for violations of international humanitarian law, human rights law or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are:

- a) **incorporated by the State into their regular armed forces in accordance with its domestic legislation;**
- b) **members of organized armed forces, groups or units under a command responsible to the State;**
- c) **empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorized by law or regulation to carry out functions normally conducted by organs of the State); or**
- d) **in fact acting on the instructions of a State (i.e. the State has especially instructed the private actor's conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct).**

This Statement incorporates the most relevant rules of attribution of international responsibility of States in respect to PMSCs, without including all possible ways in which State responsibility may be engaged. It is inspired mainly by the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARS).¹⁰⁰ While they are not, as such, binding, they draw on international practice and jurisprudence, and are meant to reflect to a large extent the current status of customary international law, especially by taking into account the comments of governments.¹⁰¹ They are therefore often cited as international standards in this area.

a) Organs of the State, including members of the regular armed forces

According to Article 4 of the ARS:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative,

100 ARS Draft Articles, above note 24. On this subject, see Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict*, Cambridge University Press, Cambridge, 2011; Marco Sassòli, "State Responsibility for Violations of International Humanitarian Law", *International Review of the Red Cross*, Vol. 84, No. 846, 2002, p. 401.

101 See Introduction in James Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, Cambridge, 2002, p. 60.

executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

A State may be responsible for the conduct of a PMSC or its personnel under this article if the PMSC or its personnel are formally incorporated by legislation into the State's armed forces or other organs of the State, such as the foreign affairs department, national police forces, or border control and immigration agencies, or if it can nevertheless be treated as an organ of the State due to the powers that it has or its relationship with governmental bodies.

On this last aspect, as stated by the second paragraph of Article 4 of the ASR, an organ of the State *includes* any person or entity having that status under the internal law of that State. The term "includes" means that reference to municipal law may not be the only way to characterize a private contractor or a PMSC as an organ of the State as in some countries this status might be determined by practice. The status of a private contractor or a PMSC may also be determined by its powers and its relation with other governmental bodies.¹⁰² The term "includes" is also aimed at preventing a State from "avoid[ing] responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law".¹⁰³ This has been clearly stated by the ICJ in the case of *Bosnia-Herzegovina v. Serbia and Montenegro*, in which the Court stated that in exceptional circumstances, a person or an entity can be regarded as an organ of a State for the purpose of State responsibility when that person or entity is in *complete dependence* on the State,¹⁰⁴ even in the absence of a domestic law establishing this status.

The status of a private contractor or PMSC as a State organ might in some circumstances be difficult to determine. Jurisprudence offers some guidance in this respect. For instance, in the case of *Blake v. Guatemala*,¹⁰⁵ the Inter-American Court of Human Rights found that members of the civil patrols, although they did not receive salary or social benefit from the State, were agents of the State as they were legally subordinated to the Ministry of National Defence. The Court also noted that the patrols have been created by the State as a part of its counter-

102 See ARS Draft Articles, above note 24, Commentary to Art. 4, para. 11, p. 42.

103 *Ibid.*

104 ICJ, *Bosnia-Herzegovina v. Serbia and Montenegro*, above note 33, para. 392:

according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.

105 IACtHR, *Blake v. Guatemala*, Series C, No. 36, Judgment (Merits), 24 January 1998.

insurgency strategy, and “enjoyed an institutional relationship with the Army, performed activities in support of the armed forces’ functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision”.¹⁰⁶

Although under international law of State responsibility private actions or omissions of individual members of a State organ, like a ministry of foreign affairs, do not entail the responsibility of that State, according to Article 3 of the Fourth Hague Convention and Article 91 of AP I, States will be responsible for all acts of members of their armed forces, including acts committed contrary to order or instruction and acts committed in a private capacity. In this case, IHL has to be considered as the *lex specialis* to the general rule of State responsibility.¹⁰⁷ Therefore, a State will be responsible for all acts or omissions contrary to international law committed by PMSC personnel incorporated into its armed forces.

An example of incorporation of PMSC personnel can be found in the contract signed between Sandline International and the Papua New Guinea (PNG) authorities in 1997 to support the PNG armed forces fighting the Bougainville Revolutionary Army. This contract foresaw that:

[a]ll officers and personnel of Sandline assigned to this contract shall be enrolled as Special Constables, but hold military ranks commensurate with those they hold within the Sandline command structure and shall be entitled to give orders to junior ranks as may be necessary for the execution of their duties and responsibilities.¹⁰⁸

b) All organized armed forces, groups or units under a command responsible to the State

This paragraph refers to Article 43(1) of AP I, which is also a rule of customary law in international armed conflict.¹⁰⁹ Article 43(1) specifies who is to be considered as members of the armed forces of a party to the conflict for the purposes of IHL. According to this article, a PMSC can also fall under the definition of armed forces of the State if it forms an organized armed force, group or unit under a command responsible to the State for the conduct of its subordinates. In this case, its personnel will be considered as members of the armed forces of the State and, according to the specific rule of IHL, the latter will be responsible for all their acts.¹¹⁰

¹⁰⁶ *Ibid.*, para. 76.

¹⁰⁷ See, e.g., ICJ, *Democratic Republic of the Congo v. Uganda*, above note 6, para. 214.

¹⁰⁸ “Agreement for the Provision of Military Assistance Dated this 31 day of January 1997 between the Independent State of Papua New Guinea and Sandline International” (Sandline Agreement), available at: http://psm.du.edu/media/documents/industry_initiatives/contracts/industry_contract_sandline-papua-new-guinea.pdf.

¹⁰⁹ ICRC Customary Law Study, above note 13, Rule 4.

¹¹⁰ See *ibid.*; AP I, Art. 91; Hague Convention IV, Art. 3.

Furthermore, PMSCs that are performing combat functions on behalf of a party to an international armed conflict may fall under the functional definition of armed forces under Article 43(1) of AP I or customary law.¹¹¹

There is no need for a formal incorporation of PMSCs into the armed forces under national law, since the definition of armed forces set forth by IHL does not depend on the different domestic law regimes. To be under a responsible command, it is not necessary for every single employee of the PMSC to be responsible to the State authorities. It suffices that the leader of the armed force, group or unit (who can be either civilian or military)¹¹² be responsible to that State.

c) Persons or entities empowered by law to exercise elements of governmental authority

Under international law, the conduct of a private contractor or PMSC which is not a State organ but which is empowered by the law of a State to exercise elements of governmental authority can be attributed to that State.¹¹³ Private companies can fall into this category “provided that in each case [they are] empowered by the law of the State to exercise functions of a public character normally exercised by State organs”.¹¹⁴ Attribution under Article 5 of the ARS is limited in the sense that only conduct of PMSCs empowered by domestic law to exercise elements of governmental authority will be attributable to the State under this article.¹¹⁵ According to the ILC: “The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community.”¹¹⁶ The term “internal law” should also be given a broader meaning than national legislation.¹¹⁷ For instance, in its commentaries, the ILC gives the example of private

111 See Louise Doswald-Beck, “PMCs under International Humanitarian Law”, in Simon Chesterman and Chia Lehnhardt (eds), *From Mercenaries to Market*, Oxford University Press, Oxford, 2007, p. 121. For the requirements to be fulfilled by the PMSC to fall into this category, see Michael Schmitt, “Humanitarian Law and Direct participation in Hostilities by Private Contractors or Civilian Employees”, *Chicago Journal of International Law*, Vol. 5, No. 2, 2005, pp. 527–531.

112 J. Pictet, above note 19, Commentary on Art. 4, p. 59.

113 ARS Draft Articles, above note 24, Art. 5: “The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

114 *Ibid.*, Commentary to Art. 5, para. 2, p. 43.

115 *Ibid.*, Commentary to Art. 5, para. 7. See also Marina Spinedi, “Private Contractors: Responsabilité internationale des entreprises ou attribution à l’État de la conduite des personnes privées ?”, *Internationale Law Forum*, Vol. 7, No. 4, 2005, p. 277.

116 ARS Draft Articles, above note 24, p. 43.

117 Indeed, the French version of Article 5 of the ARS Draft Articles on Responsibility of States for Internationally Wrongful Acts refers to “droit interne” (national legal order) and not “lois internes” (national legislation). By analogy, the commentary of the ILC on Article 3 of the ARS Draft Articles, which also refers to the term “internal law”, can be mentioned: “The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level. In the French version the expression *droit interne* is preferred to *législation interne* and *loi interne*, because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.” *Ibid.*, Commentary to Art. 3, para. 9, p. 38.

security firms contracted to act as prison guards, but without giving more details on to what extent and under which conditions a contract with such a firm can be a sufficient basis for attribution under Article 5 of the ARS.¹¹⁸ This question remains to be clarified over time but would most likely be an important factor. Some have even argued that, contrary to Article 5 of the ARS, international customary law does not require empowerment by the law of the State for attribution of conduct of a person or entity exercising elements of governmental authority.¹¹⁹

There is no clear definition in international law of “elements of governmental authority”, since the content of this notion depends to a large extent on the prevailing legal and constitutional traditions peculiar to each State. In general, activities such as judicial functions, national defence, foreign policy and police operations would commonly be understood as inherently governmental functions. For instance, private security firms contracted to exercise powers of detention and discipline pursuant to a judicial sentence or to prison regulations would exercise elements of governmental authority.¹²⁰ Drivers of private vehicles used to carry troops to the front, and private persons appointed by a State to carry out intelligence missions, to help insurrectional movements in a foreign country¹²¹ or to serve as auxiliaries in the police or the armed forces, would also fall under this category.¹²² In this sense, direct participation in hostilities on behalf of a State party to an international armed conflict should be considered as an element of governmental authority.¹²³ Other examples include powers related to immigration or border control.¹²⁴

118 *Ibid.*, Commentary to Art. 5, para. 2, p. 43.

119 For instance, in its judgment on *Democratic Republic of the Congo v. Uganda*, above note 6, the ICJ did not make reference to the law of the State for attribution under Art. 5 of the ARS, but rather made reference to an “entity exercising elements of governmental authority on its behalf” (para. 160). See also Lindsey Cameron and Vincent Chetail, *Privatising War: Private Military and Security Companies under Public International Law*, Cambridge University Press, Cambridge, 2013, pp. 165–171.

120 ARS Draft Articles, above note 24, Commentary to Art. 5, para. 2.

121 Third Report on State Responsibility, by Mr Robert Ago, Special Rapporteur: The Internationally Wrongful Act of the State, Source of International Responsibility, UN Doc. A/CN.4/246 and Add. 1–3, 1971 (Third Report on State Responsibility), para. 190.

122 *Ibid.*, para. 191. In this regard, the decision in the *Stephens* case of the Mexico/United States of America General Claims Commission can be mentioned. In this case, the Commission held that

[s]ince nearly all of the Federal troops had been withdrawn from this State and were used farther south to quell this insurrection, a sort of informal municipal guards organization – at first called “defensas sociales” – had sprung up, partly to defend peaceful citizens, partly to take the field against the rebellion if necessary. It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were “acting for” Mexico or for its political subdivisions.

...

Responsibility of a country for acts of soldiers in cases like the present one, in the presence and under the order of a superior, is not doubtful. Taking account of the conditions existing in Chihuahua then and there, Valenzuela must be considered as, or assimilated to, a soldier.

General Claims Commission, *Charles S. Stephens and Bowman Stephens (U.S.A.) v. United Mexican States*, Reports of International Arbitral Awards, 15 July 1927, pp. 265–268, paras 4 and 7.

123 On the notion of direct participation in hostilities, see ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (ICRC Interpretive Guidance), available at: www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf.

124 ARS Draft Articles, above note 24, Commentary to Art. 5, para 2.

PMSCs have been contracted out in the past to perform services that can be regarded as elements of governmental authority. The example of PMSCs contracted to act as interrogators in prisons can be mentioned in this respect, as well as those commissioned to provide intelligence services.¹²⁵ Operating checkpoints at the border of national or occupied territories is also an element of governmental authority.

Under IHL, some obligations must be undertaken by the State party to the conflict, and related conduct can be considered as an element of governmental authority. This is the case, for instance, for the administration of PoW camps or civilian internment facilities. As indicated above (Commentary to Statement 2), the Detaining Power remains responsible for the treatment of the prisoners and the facilities must be placed under the authority of a State official. From this it can be derived that conduct in relation to the running of the PoW camp or internment facility falls within the governmental authority of the Detaining Power. While it might outsource some of its activities, any activities in the camp or facility will be emanations of governmental authority.

Finally, it must be noted that, according to Article 9 of the ARS, in some situations such as revolution, armed conflict or foreign occupation,¹²⁶ a State may be unable to exercise some elements of governmental authority. In those cases, it could be held responsible for the conduct of a private actor, including a PMSC and its personnel, “if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority”.¹²⁷ For attribution under Article 9, no authorization by the State authorities or by national law is required as is the case for attribution under Article 5 of the ARS.¹²⁸ Indeed, situations foreseen by Article 9 are those in which the regular authorities have been dissolved or abolished, are collapsing or are inoperative.¹²⁹ Three conditions must be met for attribution under Article 9: the private entity’s conduct must be related to the exercise of an element of governmental authority; it must be carried out in absence or default of the State authorities; and the circumstances must call for the exercise of these elements of governmental authority. For instance, conduct of people taking part in a *levée en*

125 Again, the case of Sandline International in Papua New Guinea can be mentioned, as the PMSC was contracted to gather intelligence to support effective deployment and operations, to conduct offensive operations in Bougainville in conjunction with PNG defence forces and to provide follow-up operational support. The contract also provided that the PMSC shall “have such powers as are required to efficiently and effectively undertake their given roles, including but not limited to the powers to engage and fight hostile forces, repel attacks therefrom, arrest any persons suspected of undertaking or conspiring to undertake a harmful act, secure Sovereign assets and territory, defend the general population from any threat, and proactively protect their own and State Forces from any form of aggression or threat”. Sandline Agreement, above note 108.

126 ARS Draft Articles, above note 24, Commentary to Art. 9, para. 1, p. 49.

127 *Ibid.*, Art. 9.

128 The ILC gives the example of the conduct of people participating in a *levée en masse*; see *ibid.*, Commentary to Art. 9, para. 2.

129 *Ibid.*, Commentary to Art. 9, p. 49, para. 1.

masse would fall under this category.¹³⁰ The conduct of the Revolutionary Guards in the immediate aftermath of the revolution in the Islamic Republic of Iran has also been deemed as being covered by the attribution principle embodied in Article 9 by the Iran–United States Claims Tribunal.¹³¹

d) Persons in fact acting on the instructions of a State or under its direction or control

Article 8 of the ARS states:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.¹³²

Some PMSCs or members of their personnel acting alongside the State authorities could fall under this category of person. The terms “instructions”, “direction” and “control” are independent of one another, so that any one of them is sufficient to establish State responsibility.¹³³

On the instructions: instructions must be understood as clear orders for a certain task. This could be relevant, for instance, if PMSCs are subject to the orders of a military commander or other State official when they are operating alongside the armed forces. This does not mean that an order has to be given for the specific violation; rather, it need only be given for the specific task in the context of which the violation is being committed. If a PMSC employee is acting outside instructions, the State will nonetheless be responsible if the act is incidental to the task. In general a State should not bear the risk that lawful instructions are carried out in an unlawful way; but if persons have committed wrongful acts under the overall instructions of a State, the conditions for attribution may nonetheless be met if the acts are closely linked to the instructions.¹³⁴

Under its direction or control: under this rule, a number of activities carried out by PMSCs could be attributed to the State that contracts them. What exactly “direction or control” means in international law will have to be further clarified over time. For the purpose of attribution under the rules of State responsibility, the ICJ requires that for an act of a private entity (be it an individual or a member of an organized group) to be imputable to the State, the direction or effective control of the authorities over that specific act must be demonstrated, and not only in general and in respect of the overall actions taken

130 See Third Report on State Responsibility, above note 121, para. 189, in which the ILC considers participation in a *levée en masse* as the exercise of an element of governmental authority. See also M. Sassòli, above note 100, p. 409.

131 See, for instance, US–Iran Claims Tribunal, *Kenneth P. Yeager v. The Islamic Republic of Iran*, Partial Award No. 324-10199-1, Iran–US CTR, Vol. 17, 2 November 1987, p. 104, para. 43. See also ARS Draft Articles, above note 24, Commentary to Art. 9, para. 2.

132 *Ibid.*, above note 24, Art. 8, p. 47.

133 *Ibid.*, Commentary to Art. 8, para. 7.

134 *Ibid.*, Commentary to Art. 8, para. 8.

by the persons or groups of persons having committed the violations.¹³⁵ In the absence of such control over the specific act, it cannot be imputed to the State, even when committed by a group with a high degree of dependency on the State authorities.¹³⁶ In the same vein, the commentary to the ARS requires that the State directs or controls the specific operation.¹³⁷ A mere contract between a State and a PMSC would probably not fulfil the requirement of effective control, since not all contracts between a State and a private company lead to control by the State authorities over all the specific activities of the private company. The situation of a local military commander having overall control over an area and the capacity to broadly direct the movements of PMSCs would probably neither qualify as effective control as required by the ICJ, in case the personnel of PMSCs committed violations without being specifically ordered on certain operations by the commander or other authority. Nevertheless, the ILC's Commentary states that "it will be a matter of appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it".¹³⁸

Financial and material support as such does not seem to be sufficient for establishing control of a State over an entity:

Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.¹³⁹

As for actions going beyond the scope of authorization given by the State or its direction or control, the responsibility of that State for these actions may raise questions. These actions may trigger the responsibility of the State if they were incidental to the mission and did not clearly go beyond it.¹⁴⁰ It will be a question of fact whether the State authorities still had control or could have exercised it.

However, the criteria of "global" or "overall" control has also been used on some occasions by tribunals,¹⁴¹ the most significant case being the judgment of the International Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* case. For the purpose of armed conflict classification, the ICTY held that where a group is

135 ICJ, *Nicaragua v. United States*, above note 21, paras 115–116, and *Bosnia and Herzegovina v. Serbia and Montenegro*, above note 33, paras 400–406.

136 ICJ, *Nicaragua v. United States*, above note 21, para. 115.

137 ARS Draft Articles, above note 24, Commentary to Art. 8, para. 3.

138 *Ibid.*, Commentary to Art. 8, para. 5.

139 ICJ, *Nicaragua v. United States*, above note 21, para. 109.

140 ARS Draft Articles, above note 24, Commentary to Art. 8, para. 8.

141 On "global control", see ECtHR, *Loizidou v. Turkey*, above note 76, para. 56.

organized, such as an armed opposition group, it is sufficient that the State authorities exercise “overall control” over such an organized and hierarchically structured group to consider that the group belongs to that State in the context of hostilities against another State and where that situation is an international armed conflict, without a need for the State’s specific control or direction over the actions or omissions of the individuals.¹⁴² While it is unlikely that a mere contract would be sufficient to find such overall control, a PMSC could be considered to be under the overall control of a military commander if the commander has broad control over their movements and the power to at least impede certain actions of the company. The ICTY has also acknowledged that where the controlling State is not the Territorial State, more compelling evidence is required to show that the State is genuinely in control of units and groups.¹⁴³

Nevertheless, the ICJ has not yet established the “overall control” criteria as a sufficient basis for attribution under the rule of State responsibility and continues to require an effective control in that regard.¹⁴⁴

8. Contracting States have an obligation to provide reparations for violations of international humanitarian law and human rights law caused by wrongful conduct of the personnel of PMSCs when such conduct is attributable to the Contracting States in accordance with the customary international law of State responsibility.

Where the act of a PMSC or its personnel is attributable to the State, the responsible State is under an obligation to cease the violation and ensure reparation for the injury caused by the violation.¹⁴⁵ The obligation to afford reparation for unlawful conduct under international law is a long-standing principle of public international law.¹⁴⁶ This reparation may take the form of restitution,

142 ICTY, *Prosecutor v. Duško Tadić*, IT-94-1, Judgment (Appeals Chamber), 15 July 1999, para. 120. It is sometimes said that the question before the Tribunal was one of qualification of the conflict as non-international or international; nonetheless, the Tribunal decided this question in the light of the law of State responsibility, which is relevant for the purposes of this discussion.

143 *Ibid.*, paras 138–140.

144 See ICJ, *Democratic Republic of the Congo v. Uganda*, above note 6, para. 160, and *Bosnia and Herzegovina v. Serbia and Montenegro*, above note 33, para. 398–407. On this issue, see also Chia Lehnhardt, “Private Military Companies and State Responsibility”, in S. Chesterman and C. Lehnhardt (eds), *From Mercenaries to Market*, above note 111, p. 152; see also the analysis by Antonio Cassese, “The Nicaragua and Tadić Test Revisited in light of the ICJ Judgment on Genocide in Bosnia”, *European Journal of International Law*, Vol. 18, No. 4, 2007, pp. 649–668.

145 ARS Draft Articles, above note 24, Art. 31. See also Basic Principles on Reparation, above note 51.

146 Permanent Court of International Justice (PCIJ), *Opinion in the Lusitania Case*, 1 November 1923, *Recueil des sentences arbitrales*, Vol. 7, p. 35; PICJ, *Case Concerning the Factory at Chorzów (Jurisdiction)*, Collection of Judgments, Series A, No. 9, 26 July 1927, p. 21; PICJ, *Case Concerning the Factory at Chorzów (Merits)*, Collection of Judgments, Series A, No. 17, 13 September 1928, para. 125. See also ARS Draft Articles, above note 24, Arts 30, 31, 34, 35, 36, 37.

compensation, satisfaction or guarantees of non-repetition.¹⁴⁷ The responsible State has an obligation to compensate for the damage suffered by the State victim of the wrongful act, but also by *all natural or legal persons*.¹⁴⁸

The broad formulation of this statement is used to reflect the different legal consequences that arise under different treaties or bodies of law. For instance, for violations of IHL in international armed conflict, reparation is regulated by Article 3 of Hague Convention IV and Article 91 of AP I. The obligation to pay compensation under IHL should be distinguished from individual criminal responsibility arising from the commission of grave breaches. It should be noted that violation of any rule of IHL, be it a grave breach or not, gives rise to an obligation of reparation.¹⁴⁹ The obligation of States to make full reparation for loss or injury caused by violations of IHL for which they are responsible is also a rule of customary law in both international and non-international armed conflicts.¹⁵⁰ Articles 3 of Hague Convention IV and 91 of AP I only address the responsibility to pay compensation and not the question of who is entitled to such reparation. Although IHL does not limit the right of victims to reparation, this issue remains contentious, and doctrine and jurisprudence vary in this regard. Factors such as the preclusion of individual claims under peace settlement, sovereign immunity, or the non-self-executing nature of the right to reparations under international law have in many cases prevented victims from successfully bringing their claims.¹⁵¹ However, “[t]here is an increasing

147 *Ibid.*, Art. 34. See also Basic Principles on Reparation, above note 51, Principle 18.

148 ICJ, *Legal Consequences of the Construction of a Wall*, above note 6, para. 153, and *Democratic Republic of the Congo v. Uganda*, above note 6, para. 259.

149 On this issue of reparation for IHL violations, see, *inter alia*, Emanuela-Chiara Gillard, “Reparation for Violations of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 85, No. 851, 2003, p. 534; Riccardo Pisillo Mazzeschi, “Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview”, *Journal of International Criminal Justice*, Vol. 1, No. 2, 2003, p. 343; Rainer Hofmann, “Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation against States under International Law?”, in Pierre-Marie Dupuy, Bardo Fassbender, Malcom N. Shaw and Karl-Peter Sommermann (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat*, N. P. Engel Verlag, Kehl, 2006, p. 357; M. Sassòli, above note 100; Liesbeth Zegveld, “Remedies for Victims of Violations of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 85, No. 851, 2003, p. 497; and Friedrich Rosenfeld, “Collective Reparation for Victims of Armed Conflict”, *International Review of the Red Cross*, Vol. 92, No. 879, 2010, p. 731.

150 ICRC Customary Law Study, above note 13, Rule 150. This is also in line with ARS Draft Articles, above note 24, Art. 31, which state that:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

151 See E.-C. Gillard, above note 149, pp. 535 ff.

trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State".¹⁵² Developments in international criminal law also provide an opening for victim's claims.¹⁵³

In IHRL, the obligation to provide for reparation is regulated in the respective human rights treaties and the right of individual victims to remedy is expressly recognized (see also Commentary to Statement 4).¹⁵⁴ Article 75 of the

152 ICRC Customary Law Study, above note 13, Rule 150, Comments. For instance, the Eritrea/Ethiopia Claims Commission has jurisdiction over

all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party ... that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.

Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, Art. 5(1), available at: www.pca-cpa.org/showfile.asp?fil_id=138. As for the United Nations Compensation Commission established in 1991 by the Security Council with the mandate to process claims and pay compensation for losses and damages suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait, it also dealt with individual claims and even with claims brought by corporations. See United Nations Compensation Commission, available at: www.uncc.ch. The ICJ, in its advisory opinion concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, seemed to recognize an obligation of reparation towards the individual; above note 6, see paras 152, 153. However, in the case on *Jurisdictional Immunities of the State*, the ICJ noted that:

against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.

ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *ICJ Reports 2012*, para. 94. It can also be mentioned that in 2010, the International Law Association adopted a resolution on reparation for victims of armed conflict: *Reparation for Victims of Armed Conflict*, Resolution No. 2/2010, 74th Conference of the International Law Association, The Hague, 15–20 August 2010. Art. 6 of the resolution states: "Victims of armed conflict have a right to reparation from the responsible parties."

153 See Rome Statute, above note 93, Art. 75.

154 See, for instance, ICCPR, Art. 2(3); CAT, Art. 14; ECHR, Art. 41; ACHR, Art. 63. See also Universal Declaration of Human Rights, UNGA Res. 217A (III), 10 December 1948, Art. 8; and Basic Principles on Reparation, above note 51, Principle 15, which states:

Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

Statute of the International Criminal Court (ICC) recognizes the right of victims to reparation, including restitution, compensation and rehabilitation.¹⁵⁵

B. Territorial States

9. Territorial States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs operating on their territory, in particular to:

- a) **disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;**
- b) **not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;**
- c) **take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.**

The duty to ensure respect, as explained above,¹⁵⁶ exists for all States according to Article 1 common to the four Geneva Conventions and Article 1 of AP I. As for the Territorial State, it has an obligation to ensure respect for IHL within its territory: it must, for instance, ensure that appropriate instructions are given to the competent authorities, especially the military, and must ensure that they are carried out. The undertaking to ensure respect for IHL also means a commitment to promoting compliance with IHL, for instance through the dissemination of IHL and the texts of the Geneva Conventions not only to the State's armed forces but also to the civilian population, in particular civilians working for the private military and security services industry. The Territorial State must also refrain from encouraging violations of IHL by PMSCs.

Under IHL there is an obligation to enact criminal legislation, but the duty to ensure respect for IHL does not go as far as imposing a specific obligation on States to adopt legislative measures with respect to private companies whose activities affect persons in the context of an armed conflict, such as PMSCs. However, legislation to regulate the activities of such companies is a means of ensuring respect for IHL, and the Territorial State is in a particularly favourable position in this regard as it can enact domestic legislation restricting and

¹⁵⁵ Rome Statute, above note 93, Art. 79(1). See also *ibid.*, Art. 79, which provides for the establishment of a trust fund for the *benefit of the victims of crimes within the jurisdiction of the Court, and of the families of such victims* (emphasis added).

¹⁵⁶ See Commentary on Statement 3.

controlling PMSC activities within its boundaries in order to ensure respect for IHL. It could do so, for instance, by determining which services may or may not be carried out by PMSCs or their personnel and by establishing a licensing system for companies operating on its territory, or for particular services or contracts. The licensing regime could include requirements for the PMSCs such as background checks of the companies, appropriate vetting of the companies' employees, adequate training, an internal disciplinary regime that can enforce respect for IHL, or cooperation with official investigations.¹⁵⁷

As it contains details on the general obligation to respect and ensure respect for IHL, the Commentary to Statement 3 may also be relevant for Territorial States. The Commentary to Statement 11 below, on the obligation to provide effective penal sanctions in respect to grave breaches, may also be relevant here.

10. Territorial States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have an obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.

States have an obligation not only to respect human rights, but also to ensure that all persons within the State's territory or jurisdiction will be protected against conduct of third parties that impairs the enjoyment of their human rights. Territorial States must ensure that activities of PMSCs will not infringe on the human rights of people within their territory or jurisdiction and, if a violation occurs, that their organs will conduct an investigation and provide effective remedies to the victims. The nature of the services carried out by PMSCs and their personnel and the context in which they often operate probably call for specific measures and good practices such as systems and procedures of authorization, monitoring and control of PMSCs and their personnel, legislation on the use of firearms, training requirements, and accountability mechanisms.

For instance, in its *Report on Citizen Security and Human Rights*, the Inter-American Commission on Human Rights provides guidance on measures to ensure respect for human rights that should be implemented by States where PMSCs are allowed by law to carry out activities:

The domestic legal system must regulate the functions that private security services can perform; the types of weapons and materials they are authorized to use; the proper mechanisms to oversee their activities; introduction of licensing, and a system whereby these private security firms are required to report their contracts on a regular basis, detailing the typing of activities they perform. Likewise, the public authorities should demand compliance with

¹⁵⁷ See Montreux Document, above note 1, Part 2, Good Practices 31–52.

selection and training requirements that individuals hired by these private security firms must meet, specifying which public institutions are authorized to issue certifications attesting to the firms' employees.¹⁵⁸

The Commentary to Statement 4, which addresses the responsibility of the Contracting States to implement their human rights obligations, may also be relevant for Territorial States.

11. Territorial States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

As is explained in the Commentary to Statement 5, States have an obligation to enact legislation to provide effective penal sanction in regard to the commission of grave breaches of the Geneva Conventions and AP I, where applicable.¹⁵⁹ They also have an obligation to investigate, prosecute and punish serious violations of such grave breaches. They can choose to hand suspects over for trial to another State, in accordance with their national law, if this State has made a *prima facie* case, or to an international criminal tribunal.

As territoriality is the most common ground for jurisdiction and as victims, witnesses and evidence are generally located in the area where the crime has been committed, Territorial States have an important role to play in terms of prosecution and penal sanctions for perpetration of grave breaches. If a Territorial State is not in a position to investigate and prosecute grave breaches due to ongoing hostilities or a difficult post-conflict situation, it should cooperate with other States eventually asserting jurisdiction or with the international criminal tribunal.

The Commentary to Statement 5, which addresses this same obligation from the perspective of Contracting States, is also relevant for Territorial States.

12. Territorial States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under

158 OAS, Report on Citizen Security and Human Rights, OEA/Ser.L/V/II, Doc. 57, 31 December 2009, para. 73.

159 GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I, Art. 86.

international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

For the Territorial State, the obligation described above means that it has an obligation to investigate and, as the case may be, prosecute, extradite or surrender suspects of international crimes committed on its territory or involving suspects present on its territory. As victims, evidence and witnesses are generally located in the area where the crime has been committed, the Territorial State should cooperate with other States investigating or prosecuting suspects of international crimes committed on its territory.

If a Territorial State considers entering into agreements providing for immunity before its national courts for PMSC personnel acting on its territory (such as status of forces agreements), it has to ensure that no impunity results from that immunity, i.e. that in practice the perpetration of international crimes will be effectively investigated and, as the case may be, prosecuted, in whatever forum. This could be done, for instance, by ensuring that the Territorial State conditions the delivery of private military or security services on its territory to the existing legal basis for prosecution in the Home or Contracting State; or by ensuring that an agreement is being reached between the Contracting, Territorial and/or Home States to clarify which State or States will assert jurisdiction – for example, the Territorial State if the Home or Contracting State is unable or unwilling to prosecute crimes, or vice versa.¹⁶⁰

The Commentary to Statement 6, which addresses this same obligation from the perspective of Contracting States, is also relevant for Territorial States.

13. In situations of occupation, the obligations of Territorial States are limited to areas in which they are able to exercise effective control.

International obligations of a State under occupation can be limited by the loss of effective control over a part of its territory. As previously mentioned (see Commentary to Statement 1), the occupying State or States bear specific obligations under IHL towards the occupied territory and its population. Furthermore, should the Occupying Power let the local authorities carry out some activities in the occupied territory, it remains under the obligation to ensure that the protection conferred by IHL to the occupied population is not adversely affected thereby.¹⁶¹

Occupying Powers may have obligations comparable to those of Territorial States. If a territory is under occupation, the effective control lies with the

¹⁶⁰ See Montreux Document, above note 1, Part 2, Good Practices 51 and 52.

¹⁶¹ In that case, Art. 17 of the ARS Draft Articles, above note 24, would be applicable if its requirements are met: “A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if a) That State does so with knowledge of the circumstances of the internationally wrongful act; and b) The act would be internationally wrongful if committed by that State.” *Ibid.*, Commentary on Art. 17, paras 5 and 6.

Occupying Power, “the authority of the legitimate power having in fact passed into the hands of the occupant”.¹⁶² Under the law of occupation, the Occupying Power has an obligation to “take all measures in his power to restore, and ensure, as far as possible, public order and safety” and has a number of obligations that come with its control over the territory.¹⁶³ The Occupying Power may choose to delegate some activities to the local government. In such cases, the local government’s obligations will be commensurate to the degree of authority delegated.¹⁶⁴ However, the Occupying Power will always have a residual responsibility by virtue of its effective control over the occupied territory and will retain the overall responsibility vis-à-vis that territory, including for the competences it has transferred to the local authority.

C. Home States

14. Home States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs of their nationality, in particular to:

- a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;
- b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
- c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as administrative or other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.

As mentioned above, the obligation to ensure respect for IHL is binding on every State, including States in whose jurisdiction PMSCs are incorporated. As stated by the ICJ in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*:

It follows from that provision [common Article 1] that every State party to that Convention, 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.¹⁶⁵

162 Hague Convention IV, Art. 43; see also *ibid.*, Art. 42.

163 See, in particular, *ibid.*, Arts 42–56, and GC IV, Arts 47–78.

164 See, e.g., *Legal Consequences of the Construction of a Wall*, above note 6, para 162, where the ICJ recalled in an *obiter dictum* that “both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life”.

165 *Ibid.*, para. 158.

Measures that a State has to take in order to discharge its obligation to ensure respect will, in part, depend on its capacity to effectively influence the person or group of persons likely to commit violations. The geographical distance of the State from the events may make it more difficult for the Home State to actually prevent violations of IHL by a PMSC of its nationality.¹⁶⁶ However, the risk of IHL violations should be a factor in assessing the due diligence obligation of a State. In this regard, due to the nature of the services offered by PMSCs and the fact that their employees often carry arms and operate in situations of violence, the Home State should take specific measures to ensure respect of IHL by PMSCs of its nationality. Of course, as noted above, Home States must also refrain from encouraging or assisting in violations of IHL committed by PMSCs or their personnel.

The Good Practices of the Montreux Document make recommendations on how Home States can take steps to ensure respect for IHL. For instance, they can establish a licensing or notification system for the companies or for the export of specific services, thereby imposing a number of requirements which would contribute to respect for IHL by PMSCs, such as background checks of the companies, appropriate vetting of the companies' employees, adequate training, an internal disciplinary regime that can enforce respect for IHL, or cooperation with official investigations.

The Commentary to Statement 3, which addresses this same obligation from the perspective of Contracting States, may also be relevant for Home States.

15. Home States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.

Although its ability to do so may be limited when a PMSC is operating abroad, the Home State is nonetheless responsible for implementing its human rights obligations and ensuring that the activities of PMSCs of its nationality and their personnel respect human rights. Determining services that may be performed by PMSCs incorporated in the Home State's jurisdiction and establishing authorization systems and procedures are good practices that can be implemented by Home States in this respect.¹⁶⁷ Home States may have a particular role to play in regard to investigations on human rights abuses committed by PMSCs of their nationality, and their personnel. Contracting States, Territorial States or other States may request the Home State's assistance when conducting investigation about alleged misconduct of a PMSC incorporated

¹⁶⁶ See, by analogy, ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, above note 33, para. 430.

¹⁶⁷ See Montreux Document, above note 1, Part 2, Good Practices 53–67.

in its territory. Home States should cooperate with the authorities of these States in matters of common concern regarding PMSCs.¹⁶⁸

In regard to accountability and remedies for victims, Home States should establish close links between their authorities granting authorizations to PMSCs and their representatives in countries where they operate and/or with authorities of Territorial and Contracting States. They should also provide for accountability mechanisms, such as civil liability, and should require PMSCs to provide reparation to victims in cases of improper or unlawful misconduct by the company or its personnel.¹⁶⁹

The Commentary to Statement 4, which addresses this same obligation from the perspective of Contracting States, may also be relevant for Home States.

16. Home States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

As indicated above (see Commentary to Statement 5), States commonly base their jurisdiction on the principles of territoriality, nationality of the victim, nationality of the perpetrator or protection of national interests or security. The domestic legislation of Home States has to provide for criminal jurisdiction over grave breaches of IHL committed by PMSC personnel.¹⁷⁰ Home States could also consider providing for corporate criminal responsibility over grave breaches of IHL.¹⁷¹

In this respect, the most relevant obligation for Home States is probably the obligation to search for persons alleged to have committed, or to have ordered to be committed, grave breaches of the Geneva Conventions, and to bring such persons, regardless of their nationality, before their own courts or to hand them over for trial to another State. This obligation particularly comes into play if personnel alleged to have committed grave breaches of IHL abroad, or directors involved in the decision or policy which has led to the perpetration of grave breaches, find themselves on the Home State's territory.

168 See *ibid.*, Part 2, Good Practice 73.

169 See *ibid.*, Part 2, Good Practices 68, 70 and 72.

170 GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I, Arts 86, 88.

171 See Montreux Document, above note 1, Part 2, Good Practice 71.

The Commentary to Statement 5, which addresses this same obligation from the perspective of Contracting States, may also be relevant for Home States.

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

Although in general Home States have no, or limited, human rights obligations in respect to persons who are not on their territory or within their jurisdiction, it is worth recalling that international law may require that they investigate and prosecute persons or entities suspected of having committed international crimes. This is the case, for instance, under the CAT¹⁷² or the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).¹⁷³ States party to the Rome Statute also have an obligation to cooperate with the ICC in its investigations and prosecutions.¹⁷⁴

The Commentary to Statement 6, which addresses this same obligation from the perspective of Contracting States, may also be relevant for Home States.

D. All other States

18. All other States have an obligation, within their power, to ensure respect for international humanitarian law. They have an obligation to refrain from encouraging or assisting in violations of international humanitarian law by any party to an armed conflict.

The obligation of all States to ensure respect for IHL entails the obligation of States, including States not party to an armed conflict, to take all possible steps to ensure that the rules are respected by parties to the conflict. It is described in the Commentary to the Geneva Conventions as follows:

[I]n the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and 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 Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.¹⁷⁵

172 CAT, Art. 5.

173 ICPPED, above note 95, Art. 9.

174 Rome Statute, above note 93, Arts 86 ff.

175 J. Pictet, above note 19, Commentary on Art. 1, p. 18.

All States have an obligation to refrain from encouraging and assisting in violations of IHL by other armed forces or armed groups. Also, all States should, if they become aware of violations of IHL, take steps to make the violations cease. They have a number of methods at their disposal, such as repression of grave breaches, mutual assistance in criminal matters, bilateral diplomatic interventions or multilateral mechanisms.¹⁷⁶

The Commentary to Statements 3, 9 and 14, which address this same obligation from the perspective of Contracting, Territorial and Home States, may also be relevant for all other States.

19. All other States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations.

Although their relation to the activities of PMSCs may be more tenuous, and their capacity to prevent, investigate and provide remedies for misconduct by PMSCs and their personnel more limited, than Contracting States, Territorial States and Home States, other States are responsible for implementing their obligations under IHRL in this respect. Other States may be, for instance, States of nationality of the victims or of PMSC personnel or directors; States in which territory a person suspected of having committed international crimes is living or hiding; or States where a PMSC has assets or investments.

The Commentary to Statements 4, 10 and 15, which address this same obligation from the perspective of Contracting, Territorial and Home States, may also be relevant for all other States.

20. All other States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

Under the Geneva Conventions and AP I, all States Parties have an obligation to enact legislation to provide effective penal sanction in regard to the commission of grave breaches.¹⁷⁷ As noted above, “all other States” may include States of nationality of suspected perpetrators or States in whose territory they are present.

176 For example, a meeting of the High Contracting Parties in accordance with AP I, Art. 7, or resort to the Protecting Powers institution, AP I, Art. 5.

177 GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I, Arts. 86, 88.

All other States may also be States receiving requests for extradition or judicial cooperation from another State or an international criminal tribunal.

The Commentary to Statements 5, 11 and 16, which address this same obligation from the perspective of Contracting, Territorial and Home States, may also be relevant for all other States.

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

As stated above (see Commentary to Statement 6), international law requires criminalization of a number of acts and omissions in the internal legal order of States. For instance, under the CAT and the ICPPED, each State Party shall take appropriate measures to establish jurisdiction over the crime of torture or enforced disappearance, *inter alia*, when the alleged offender is a national of that State, when the victim is a national of that State, or when the alleged offender is present in its territory.¹⁷⁸ Any State may be the State of nationality of directors or personnel of PMSCs, of victims of international crimes committed by PMSCs or their personnel, or the State in which a person suspected of having committed international crimes is located. All States have to fulfil their obligation to investigate, prosecute, extradite or surrender persons suspected of having committed international crimes in relation to PMSC activities.

The Commentary to Statements 6, 12 and 17 may also be relevant for all other States.

E. PMSCs and their personnel

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

PMSCs, as private legal entities, do not have obligations under IHRL treaties or under IHL unless, in respect to IHL, they are parties to an armed conflict.¹⁷⁹

¹⁷⁸ CAT, Art. 5; ICPPED, Art. 9.

¹⁷⁹ Although this would be a highly exceptional case, the possibility of a PMSC being a party to the conflict cannot be excluded. In such a case, the PMSC would be bound by the rules of IHL. If PMSCs are taking part in hostilities without being part of the armed forces of a party to the conflict, they may be considered organized armed groups if they present a sufficient level of internal organization and command and the capacity to sustain military operations. In this case, they will also be bound by IHL. For a detailed analysis of the criteria, see ICRC, "How Is the Term 'Armed Conflict' Defined in International Humanitarian Law?", opinion paper, March 2008; and ICTY, *The Prosecutor v. Fatmir Limaj*, IT-03-66-t, 30 November 2005, paras 94–134.

However, national legislation may impose on private entities such as PMSCs obligations derived from IHL or IHRL. For instance, as mentioned above, the national criminal law of some countries provides for corporate criminal responsibility for international crimes such as war crimes, crimes against humanity and genocide,¹⁸⁰ and domestic law may provide for civil claims against private entities and individuals for violations of IHL and HRL.

PMSCs are obliged to comply with all the national legislation of the State in whose territory they carry out their activities and, as the case may be, with legislation of their Home State and Contracting State binding on them. States, whether Contracting, Territorial or Home, may adopt specific regulations on PMSCs limiting the scope of services that PMSCs can offer, submitting them to an authorization or licensing system or regulating the use and carrying of weapons.¹⁸¹

23. The personnel of PMSCs are obliged to respect the relevant national law, in particular the national criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality.

PMSC personnel, like anyone else, are obliged to respect the relevant domestic law of the State in which territory they operate. If applicable to them when operating abroad, they should also respect the national law of their States of nationality (see Commentary to Statements 6 and 22). As mentioned above, in addition international law may require States to provide for criminal jurisdiction for international crimes committed by their nationals abroad.

The fact that a Territorial State grants immunity for PMSC personnel before its national courts does not discharge the latter from the obligation to respect the law of that State and not to perpetrate international crimes. Immunity is a jurisdictional privilege and not a license to commit crimes. States granting such immunity should ensure that investigations will be conducted and that persons suspected of having committed a crime will be prosecuted and, as the case may be, punished by authorities of other States, for instance the Contracting State or the Home State.¹⁸²

24. The status of the personnel of PMSCs is determined by international humanitarian law, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved.

One of the core principles of IHL is the principle of distinction between civilians and combatants. This distinction is fundamental, as civilians have to be protected against the effects of hostilities.¹⁸³

IHL defines civilians negatively: “Civilians are persons who are not members of the armed forces.”¹⁸⁴ In international armed conflicts, Article 4 of the Third Geneva

180 See an overview of sixteen countries in A. Ramasastry and R.C. Thompson, above note 82.

181 See Montreux Document, above note 1, Part 2, Good Practices.

182 See Montreux Document, above note 1, Part 2, Good Practices 22, 51, 52 and 73.

183 AP I, Art. 48; AP II, Art. 13(2); ICRC Customary Law Study, above note 13, Rule 1 (also applicable in non-international armed conflicts).

184 See AP I, Art. 50; and ICRC Customary Law Study, above note 13, Rule 5.

Convention (GC III) establishes who is entitled to the status of prisoner of war and Article 43 of AP I provides a definition of “combatants”. Therefore, in this situation, any person not belonging to one of the following categories is a civilian:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that they fulfil the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
...
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.¹⁸⁵

Situations (1) and (2) are the most likely to apply to PMSC personnel.¹⁸⁶ When they are not entitled to combatant status, members of PMSCs will be civilians.

The determination of the status of a person is of a great importance. Indeed, only combatants have the right to participate directly in hostilities;¹⁸⁷ that is to say, they are immune from prosecution for their mere participation in hostilities, as long as they do not commit grave breaches of IHL or international crimes. They are also entitled to the status of PoW when they have fallen into the power of the enemy.¹⁸⁸ On the other hand, they can be the object of attack at any time. Persons who are not entitled to combatant status will be civilians and as such will be protected against direct attacks,¹⁸⁹ unless and for such time as they directly participate in

185 See GC III, Arts 4(A)(1), (2), (3) and (6); and AP I, Art. 50. See also AP I, Art. 43.

186 On this issue, see, for instance, Emanuela-Chiara Gillard, “Business Goes to War: Private Military/Security Companies and International Humanitarian Law”, *International Review of the Red Cross*, Vol. 88, No. 863, 2006, p. 525; and Lindsey Cameron, “Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation”, *International Review of the Red Cross*, Vol. 88, No. 863, 2006, p. 573.

187 AP I, Art. 43(2).

188 See GC III, Art. 4; AP I, Art. 44(1).

189 AP I, Art. 51(2); AP II, Art. 13(3); ICRC Customary Law Study, above note 13, Rule 1.

hostilities.¹⁹⁰ However, “their activities or location may ... expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities”.¹⁹¹ Employees of PMSCs having the status of civilians accompanying the armed forces under Article 4(A)(4) of GC III are entitled to PoW status.¹⁹²

In a non-international armed conflict, there is no combatant or PoW status. Therefore, for the purpose of the principle of distinction, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and are consequently entitled to protection against direct attack, unless and for such time as they take a direct part in hostilities. Members of organized armed forces of a non-State party to the conflict constitute the armed forces of that party and consist only of individuals whose continuous function is to take a direct part in hostilities.¹⁹³

The status of PMSC personnel should be determined prior to their mission and members of PMSCs should be aware of their status under IHL and of the legal consequences of that status.¹⁹⁴ PMSC personnel who are combatants should be identifiable as such.¹⁹⁵

Although relating to another legal issue, i.e. State responsibility, the Commentary to Statements 7(a) and (b) may also be relevant as it addresses the question of PMSC personnel having the status of combatants under IHL.

25. If they are civilians under international humanitarian law, the personnel of PMSCs may not be the object of attack, unless and for such time as they directly participate in hostilities.

During an armed conflict, attacks shall be directed only against combatants and military objectives.¹⁹⁶ Civilians shall be protected against attacks.¹⁹⁷ To enjoy this protection against attack, civilians working for PMSCs must respect one condition: not to participate directly in hostilities. If they fail to respect this condition, they will lose their protection against attacks, but only for such time as they directly participate in hostilities.¹⁹⁸

190 See Commentary on Statement 25.

191 ICRC Interpretive Guidance, above note 123, p. 37, Recommendation III.

192 “Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.” GC III, Art. 4(A)(4).

193 See *ibid.* See also Commentary on Statement 25.

194 See Montreux Document, above note 1, Part 2, Good Practices 10, 14, 30, 35, 40, 63 and 67.

195 “In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.” AP I, Art. 44 (3). See also Montreux Document, above note 1, Part 2, Good Practice 16.

196 AP I, Art. 48.

197 *Ibid.*, Art. 51.

198 *Ibid.*, Art. 51(3).

On the notion of direct participation in hostilities, the ICRC, after six years of expert discussions and research, published its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, which aims to clarify the meaning and consequences of direct participation in hostilities under IHL.¹⁹⁹ According to the Interpretative Guidance, for an act to constitute a direct participation in hostilities, three criteria must be fulfilled:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).²⁰⁰

Diverse tasks provided by PMSCs may amount to a direct participation in hostilities. For instance, driving ammunition to the front line,²⁰¹ providing intelligence of a tactical nature and directly related to military operations,

denying the adversary the military use of certain objects, equipment and territory, guarding captured military personnel of the adversary to prevent them being forcibly liberated, conducting electronic interference with military computer networks or wiretapping the adversary's high command or transmitting tactical targeting information for an attack could amount to direct participation in hostilities.²⁰²

199 See ICRC Interpretive Guidance, above note 123. See also ICRC Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law: Proceedings of the Expert Process (2003–2008), 2009, available at: www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm.

200 ICRC Interpretive Guidance, above note 123, p. 16. See the Interpretive Guidance for a detailed analysis of these criteria and of the notion of direct participation in hostilities.

201 See *ibid.*, p. 56.

202 See *ibid.*, p. 48.

Recruiting military personnel or providing training or weapon maintenance services to the armed forces as such do not amount to direct participation in hostilities.²⁰³ However, “where persons are specifically recruited and trained for the execution of a predetermined hostile act ... such activities [can] be regarded as an integral part of that act and, therefore, as direct participation in hostilities”.²⁰⁴

When the task they are carrying out constitutes direct participation in hostilities, PMSC personnel will lose their protection against attack for such time as they perform the task. In this regard, it should be pointed out that measures preparatory to a specific act of direct participation in hostilities, as well as the deployment to and return from the location of its execution, constitute an integral part of that act.²⁰⁵

The fact that the performing of a specific service may cause PMSC personnel to become involved in direct participation in hostilities should be taken into account by the PMSC when concluding a contract, and its personnel should be informed of the risks and consequences of directly participating in hostilities and properly trained in this respect. Furthermore, the activities performed by PMSC personnel, and their location, may expose them to an increased risk of incidental death or injury even if they do not directly participate in hostilities.²⁰⁶ In this respect, it would be advisable that they clearly distinguish themselves from combatants by avoiding wearing military-like uniforms, for instance.²⁰⁷

26. The personnel of PMSCs:

a) are obliged, regardless of their status, to comply with applicable international humanitarian law;

IHL is binding on every individual in a context of armed conflict. The majority of rules are intended to apply to parties to the conflict and members of their armed forces. However, civilians also have to respect IHL when their acts are linked with the hostilities. Furthermore, the status of a person as civilian or combatant does not impact his or her criminal responsibility in regard to war crimes.²⁰⁸ PMSC personnel should be aware of their rights and obligations under IHL and properly trained in this respect.

b) are protected as civilians under international humanitarian law, unless they are incorporated into the regular armed forces of a State or are members of organized armed forces, groups or units under a command responsible to the State; or otherwise lose their protection as determined by international humanitarian law;

203 See Y. Sandoz, C. Swinarski and B. Zimmermann, above note 19, Art. 47, para. 1806.

204 ICRC Interpretive Guidance, above note 123, p. 53.

205 *Ibid.*, p. 65, Recommendation VI.

206 See *ibid.*, p. 37, Recommendation III.

207 See Montreux Document, above note 1, Part 2, Good Practice 16.

208 See International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgment (Appeals Chamber), 1 June 2001, paras 443 and 444.

As mentioned above, under IHL, civilians are persons who are not members of the armed forces of a party to the conflict.²⁰⁹ In an international armed conflict, personnel of PMSCs are civilians unless they are either incorporated into the armed forces of a State or can be considered as members of the armed forces, groups and units which are under a command responsible to a party to the conflict (Article 43 of AP I).²¹⁰ Personnel of PMSCs with the status of civilian accompanying the armed forces are also civilians²¹¹ (see Commentary to Statements 8 and 24).

PMSC personnel not having combatant status will be protected against attack unless and for such a time as they directly participate in hostilities (see Commentary to Statements 24 and 25). However, the status of a civilian does not change if he or she directly participates in hostilities. If civilians directly participate in hostilities they lose their protection against attack during their participation,²¹² but do not thereby become combatants.

During a non-international armed conflict, as there is no status of combatant, personnel of PMSCs will be civilians protected against the attacks, unless and for such time as they take a direct part in hostilities. For the purpose of the principle of distinction, personnel of PMSCs working for an organized armed group belonging to a non-State party to the conflict and having a continuous combat function should be considered members of the armed forces of this non-State party and will lose their protection against direct attacks for the time that they exercise this function.²¹³

c) are entitled to prisoner-of-war status in international armed conflict if they are persons accompanying the armed forces meeting the requirements of article 4A(4) of the Third Geneva Convention;

PoW status is granted to some categories of persons during international armed conflict when they fall into the hands of an enemy. Combatants are entitled to PoW status. Generally civilians are not, except when they are accompanying the armed forces of a party to the conflict and meeting the requirement of Article 4 (A)(4) of GC III. This article defines those entitled to PoW status as:

Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.²¹⁴

209 See AP I, Art. 50; and ICRC Customary Law Study, above note 13, Rule 5.

210 See E.-C. Gillard, above note 186, pp. 532–541.

211 GC III, Art. 4(A)(4).

212 AP I, Art. 51(3).

213 See Commentary on Statements 24 and 25; and Recommendation II and Commentary in ICRC Interpretive Guidance, above note 123, p. 27.

214 For the identity card model, see www.icrc.org/ihl.nsf/FULL/375?OpenDocument.

However, as stated in the Commentary to GC III, the possession of a card is not an indispensable condition of the right to be treated as a prisoner of war, but rather a supplementary safeguard.²¹⁵

According to Article 4(A)(5) of GC III, “[m]embers of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law”, will also be entitled to PoW status. PMSC personnel entitled to PoW status shall be treated according to the requirements of GC III.

PoWs having combatant status cannot be prosecuted for taking direct part in hostilities. The Detaining Power may, nevertheless, prosecute them for possible war crimes and other international crimes. Their detention is not a form of punishment, but rather aims at preventing them from further participating in the conflict. However, it should be remembered that civilians (including those entitled to PoW status under Articles 4(A)(4) and (5)) are not entitled to combatant privilege (i.e. having the right to directly participate in hostilities). Therefore, they do not enjoy immunity from domestic prosecution for lawful acts of war – that is, for having directly participated in hostilities while respecting IHL.²¹⁶

d) to the extent they exercise governmental authority, have to comply with the State’s obligations under international human rights law;

In their standards of behaviour, PMSC personnel exercising an element of governmental authority, as well as those acting as State agents, have to comply with the State’s obligations under IHRL. They should be fully aware of the international obligations of the State on whose behalf they are performing their tasks and properly trained in this respect. Furthermore, domestic law may impose IHRL obligations directly on PMSC personnel exercising governmental authority.²¹⁷

As they address related issues, the Commentary to Statements 4, 7(c), 8, 10, 15 and 19 may also be relevant.

e) are subject to prosecution if they commit conduct recognized as crimes under applicable national or international law.

PMSC personnel are obliged to comply with the national law of the Territorial, Home or Contracting State, or any other State when applicable. International law establishes individual criminal responsibility for numerous acts, including war crimes, genocide and crimes against humanity.

215 J. Pictet, above note 19, p. 65, Commentary on Art. 4(A)(4).

216 See ICRC Interpretive Guidance, above note 123, p. 37, Recommendation III, and p. 83, Recommendation X.

217 See, on this topic, Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 460–499. See also *Kadic v. Karadzic*, above note 56, and *Ibrahim v. Titan Corp.*, 391 F Supp 2d 10 (D.D.C. 2005), para. 14; and Cour administrative d’Appel de Bordeaux, *Société nationale des chemins de fer v. MM. Georges Lipietz et S.*, No. 06BX01570, 27 March 2007 (affirmed by the Conseil d’État in December 2007: *MM. Georges Lipietz et S. v. Société nationale des chemins de fer*).

The involvement of an individual in the commission of a crime may take different forms. For instance, Article 25 of the Rome Statute of the ICC provides for individual criminal responsibility if a person commits a crime, orders, solicits or induces its commission, aids, abets or otherwise assists in its commission, in any other way contributes to the commission of such a crime by a group of persons acting with a common purpose, or attempts to commit such a crime. Individual criminal responsibility thus may cover a wide range of acts.²¹⁸

In addition, it can be recalled that only combatants have the right to directly participate in hostilities and can benefit from immunity from domestic prosecution for acts committed in accordance with IHL, but which may constitute crimes under domestic criminal law. Civilians do not benefit from such immunity and can be prosecuted for every act constitutive of a crime that they commit: murder, manslaughter, homicide, assault, bodily harm, acts of negligence, etc. Therefore, PMSC personnel having a civilian status in an international armed conflict or working in the context of a non-international armed conflict are subject to domestic criminal prosecutions for acts otherwise lawful under IHL.

As mentioned, States granting immunity for PMSC personnel before their national courts should ensure that an investigation will be conducted, and that persons suspected of having committed a crime will be prosecuted and, as the case may be, punished by authorities of another State or other States.²¹⁹

As it addresses related issues, the Commentary to Statement 23 may also be referred to.

F. Superior responsibility

27. Superiors of PMSC personnel, such as:

- a) **governmental officials, whether they are military commanders or civilian superiors, or**
- b) **directors or managers of PMSCs, may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. Superior responsibility is not engaged solely by virtue of a contract.**

The responsibility of **military commanders** for war crimes committed by their subordinates, based on the commanders' failure to take measures to prevent or

218 On this issue, see, for instance, Chia Lehnardt, "Individual Liability of Private Military Personnel under International Criminal Law", *European Journal of International Law*, Vol. 19, No. 5, 2008; Hans Vest, "Business Leaders and the Modes of Individual Criminal Responsibility under International Law", *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010; and Norman Farrell, "Attributing Criminal Liability to Corporate Actors: Some Lessons from International Tribunals", *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010.

219 See Montreux Document, above note 1, Part 2, Good Practices 22, 51, 52 and 73.

punish the commission of such crimes, is a long-standing rule of IHL.²²⁰ It is also a rule of customary law both in international and non-international armed conflicts.²²¹

This responsibility for failure to act is closely linked to the obligation of military commanders to take all necessary and reasonable measures within their power to prevent or repress the commission of violations or submit the matter to the competent authorities for investigation and prosecution.²²² While some aspects of superior responsibility are still being explored by international courts and tribunals, jurisprudence provides clarification on important elements of command responsibility.

Firstly, a commander is the one who possesses the power or authority either *de jure* or *de facto* to prevent a subordinate's crime or to punish the perpetrator of the crime after its commission.²²³ The standard test to determine command responsibility is the one of effective control: if the commander has effective control over his or her subordinates, to the extent that he or she can prevent them from committing crimes or punish them after they have committed crimes, s/he would be held responsible for the commission of the crimes if he or she failed to exercise such abilities of control.²²⁴

Secondly, commanders will incur individual criminal responsibility for acts of their subordinates if they knew or had reason to know about these acts,²²⁵ for instance if they had information which would put them on notice of possible unlawful acts by their subordinates.²²⁶ The Rome Statute of the ICC contains a slightly different *mens rea* by requiring that the commander either knew or, owing to the circumstances at the time, should have known that the forces were committing or were about to commit a crime.

Responsibility of superiors extends not only to military commanders but also to **civilian superiors**.²²⁷ Thus, superiors from the civilian State authorities or other

220 AP I, Art. 86(2); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993, UN Doc. S/RES/827 (ICTY Statute), Art. 7(3); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, 8 November 1994, UN Doc.S/RES/955 (ICTR Statute), Art. 6(3); Rome Statute, above note 93, Art. 28. See also International Military Tribunal at Nuremberg (IMT Nuremberg), *The United States of America v. Wilhelm von Leeb et al. (The High Command Trial)*, Case No. 12, Judgment, 30 December 1947–28 October 1948, and *List (Hostage Trial)* case, Judgment, 8 July 1947–28 October 1948; International Military Tribunal for the Far East (IMT Tokyo), *Case of the Major War Criminals*, Judgment, 4–12 November 1948; ICTY, *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, paras 189–198 and 222–241; and ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A, Judgment (Appeals Chamber, Reasons), 3 July 2002, paras 24–62.

221 See ICRC Customary Law Study, above note 13, Rule 153.

222 See AP I, Art. 87; and Rome Statute, above note 93, Art. 28(a)(ii).

223 ICTY, *Prosecutor v. Delalić*, above note 220, para.192.

224 *Ibid.*, para. 198.

225 *Ibid.*, para. 239.

226 *Ibid.*, paras 216–240.

227 Rome Statute, above note 93, Art. 28(b); ICTY Statute, above note 220, Art. 7(3); ICTR Statute, above note 220, Art. 6(3); ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgment (Trial Chamber), 2 September 1998, paras 490–449; ICTY, *Prosecutor v. Delalić*, above note 220, para. 196.

organizations, including businesses,²²⁸ could also be held criminally responsible under this rule. It is also a rule of customary law both in international and non-international armed conflicts.²²⁹

The scope of civilian superior responsibility is not yet entirely settled. The ICTY and International Criminal Tribunal for Rwanda (ICTR) applied the test of effective control and the *mens rea* requirement regardless of whether the superior is a military commander or a civilian.²³⁰ For instance, the ICTR held the director of a tea factory responsible as a superior for the conduct of his employees because he was exercising *de jure* authority over his employees as he “exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory”.²³¹

The Rome Statute limits the responsibility of civilian superiors to activities of subordinates that were within their effective responsibility and control,²³² a requirement that doesn’t exist for military commanders who, by the nature of military structures, have much tighter control over their troops (as well as a stricter disciplinary system at their disposal) than civilian superiors have over their subordinates.

Furthermore, the Rome Statute establishes a higher threshold of *mens rea* for civilian superiors than for military commanders. While the test for military commanders is whether they knew or should have known about the crime,²³³ the test for civilians is whether they knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or were about to

228 See, for example, ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment (Trial Chamber), 27 January 2000.

229 See ICRC Customary Law Study, above note 13, Commentary on Rule 153:

(i) *Civilian command authority*. Not only military personnel but also civilians can be liable for war crimes on the basis of command responsibility. The International Criminal Tribunal for Rwanda, in the *Akayesu* case in 1998 and in the *Kayishema and Ruzindana* case in 1999, and the International Criminal Tribunal for the former Yugoslavia, in the *Delalić* case in 1998, have adopted this principle. It is also contained in the Statute of the International Criminal Court. The Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone refer in general terms to a “superior[”], as do many military manuals and national legislation [references omitted].

230 See, e.g., ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A, Judgment (Appeals Chamber, Reasons), 3 July 2002, para. 50.

231 See *Prosecutor v. Musema*, above note 228, para. 880:

The Chamber notes that Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. The Chamber also finds that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes.

See also ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment (Trial Chamber), 25 June 1999, para. 78, where the tribunal:

considers that the superior’s ability *de jure* or *de facto* to impose sanctions is not essential. The possibility of transmitting reports to the appropriate authorities suffices once the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in the light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant.

232 Rome Statute, above note 93, Art. 28(b)(ii).

233 *Ibid.*, Art. 28(a)(i).

commit a crime.²³⁴ In other words, the civilian superior must have been “wilfully blind” to information that was available to him or her.²³⁵

Due to the fact that they may have to work in close cooperation with military units or organized armed groups, or due to the nature of their work, the possibility for a PMSC employee to be held responsible as a military commander cannot be excluded, even if this person holds civilian status under IHL. Indeed, Article 28(a) of the Rome Statute refers not only to military commanders but also to “person[s] effectively acting as ... military commander[s]”.²³⁶ Therefore, despite their civilian status and the fact that they are working for a private company, PMSC personnel could, under certain circumstances, be held criminally responsible under the standards applicable to military commanders.²³⁷

Superior responsibility for other crimes under international law: superior responsibility also exists for other crimes under international law, such as crimes against humanity and genocide.²³⁸ Furthermore, it is not settled whether and to what extent the principle of superior responsibility also applies, under existing international law, to other crimes. While it is not enshrined in the CAT, the Committee against Torture has considered that superiors are responsible if “they knew or should have known that such impermissible conduct was, or was likely, to occur, and they took no reasonable and necessary preventive measures”.²³⁹ The ICPPED enshrines the principle of superior responsibility in its Article 6. Certainly, international law does not prohibit States from enacting superior responsibility standards for further crimes. Indeed, this may be one way for States to promote and ensure respect for IHL and IHRL by PMSC personnel.

234 *Ibid.*, Art. 28(b)(i).

235 Kai Ambos, “Superior Responsibility”, in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 870.

236 On this notion, see ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Pre-Trial Chamber II), paras 408–410.

237 See Roberta Arnold and Otto Triffterer, “Article 28: Responsibility of Commanders and Other Superiors”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed., C. H. Beck Hart Nomos, Munich, 2008. On the requirements related to the military structure and the chain of command, see ICTY, *Prosecutor v. Mucić et al.*, Case No. IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, para. 193.

238 ICTY Statute, above note 220, Arts 4, 5 and 7(3); ICTR Statute, above note 220, Arts 2, 3 and 6(3); and Rome Statute, above note 93, Arts 6, 7 and 28.

239 Committee against Torture, General Comment 2, Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/CRP.1/Rev.4, 23 November 2007, para. 26; see, similarly, *Hilao v. Estate of Marcos*, 103 F.3d 767, paras 776–778 (9th Cir. 1996).