CHAPTER 6
PRIVATE SECURITY COMPANIES AND
PRIVATE MILITARY COMPANIES UNDER
INTERNATIONAL HUMANITARIAN LAW
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Introduction

Gone are the days when conflicts merely pitted the armed forces of one state against the armed forces of another, when all ‘fighters’ were clearly distinguishable from civilians not taking part in hostilities. In today’s conflicts, the number and nature of actors is ever changing, with soldiers, peacekeepers, humanitarians, and private contractors, to name but a few, present in the field of combat. In particular, the most recent conflicts, such as those in Afghanistan and Iraq, have seen a greater presence of private security companies (PSCs) and private military contractors (PMCs).1 The functions of PSCs/PMCs vary, and seem to include the provision of logistics, the protection of convoys and personnel for companies, the staffing of checkpoints, and in some situations even the interrogation of prisoners, the collection of intelligence, and direct participation in combat operations. Today, the activities of certain PSCs/PMCs appear to move away from the traditionally accepted ‘service support functions’. Indeed, on occasion, private contractors risk assuming core military functions.2 By their very presence in zones of armed conflict, and given the nature of their activities, PSCs/PMCs increasingly come into contact with both civilians and belligerents.

While certain commentators have argued that these new actors seem to act in a legal penumbra, where the applicable legal regimes appear ambiguous, it is clear that in times of armed conflict, there is no legal vacuum as such. Indeed, in these contexts, a corpus of law known as international humanitarian law (IHL) (also referred to as the laws of warfare) is applicable. The core rules and principles of IHL are to be found in the four Geneva Conventions of 1949 and their Additional Protocols of 1977, which are specifically intended to solve humanitarian problems arising from international or non-international armed conflict. At the time of writing, the Geneva Conventions have been universally ratified and more than 160 states have ratified Additional Protocols I and II.

* The views and opinions expressed in this paper are those of the author alone and do not necessarily reflect those of the ICRC.
IHL, as a body of law, affords protection to persons or property affected by the conflict and limits the rights of the parties to a conflict to use methods and means of warfare of their choice. It does not question the lawfulness of a conflict (*jus ad bellum*) but merely reflects a universal idea expressed by many cultures to limit the suffering caused during hostilities (*jus in bello*). IHL is applicable in both international and non-international armed conflicts. The present chapter will summarily review the question of distinction between civilians and combatants in determining the place of PSCs/PMCs in international armed conflicts. It will also highlight certain issues in relation to state and individual responsibility under IHL pertinent to PSCs/PMCs.

**The place of private security companies and private military companies under international humanitarian law**

Whilst PSCs/PMCs are not explicitly mentioned in the Geneva Conventions and their Additional Protocols, they are nonetheless bound to respect the norms of IHL. Their responsibilities, status and protection will depend to a large extent on whether, under IHL, they are deemed to be combatants or civilians. During armed conflicts, a distinction must be made between civilians and civilian objects on the one hand, and military targets on the other.

Civilians are defined as all persons who are not members of the armed forces of a party to the conflict or members of volunteer corps and resistance movements, not participants in a *levée en masse* and not combatants in general. As persons not taking part in the hostilities, they enjoy protection against the dangers of military operations (Geneva Convention IV; Protocol I, art 50). Civilians cannot be targeted as such, and the parties to the conflict must take the necessary precautions to ensure that no harm comes to civilian persons and objects (Protocol I, arts 57, 58). However, where a civilian takes part in the hostilities, the protection afforded to the individual against the effect of the hostilities falls away. If captured, a civilian is not entitled to prisoner of war status and may be tried for having participated in hostilities.

Combatants, in contrast to civilians, possess in international armed conflicts a so-called ‘combatant’s privilege’, an entitlement to take part in the hostilities and to fight the ‘enemy’. The flip side of this coin is that they are considered legitimate military objectives and can also be targeted. However, once placed *hors de combat*, for instance due to injury, surrender or capture, minimum treatment and conditions are to be afforded to them.
The Geneva Conventions and Protocol I list specific categories of individual who are to be treated as prisoners of war if captured. The Protocol goes further to describe specifically those entitled to combatant status and thus allowed to participate in the hostilities (Geneva Convention III, art 4(A); Protocol I, art 43). Members of the armed forces of a state are described as all organised armed forces, groups and units that are under a command responsible to that state for the conduct of its subordinates, and in most situations, they are easily identifiable. Although IHL does not exhaustively specify the characteristics of members of the armed forces, they have usually been conscripted or voluntarily enrolled, must be subject to an internal discipline system and under responsible command, wear uniforms and carry the necessary identification cards. It is in the best interest of a state to identify and distinguish its armed forces in times of armed conflict to ensure their protection under IHL.

Besides regular armed forces, IHL also considers members of militia or volunteer groups that join armed forces as combatants. Members of other militias, volunteer corps and resistance movements are also to be treated as prisoners of war if captured, provided that they are under responsible command, have fixed a distinctive sign recognisable at a distance, carry arms openly and conduct operations in accordance with the laws and customs of war (Geneva Convention III, art 4(A)). Accordingly, if a state considers a PSC/PMC to form part of its armed forces, then that state should take the necessary steps to clarify this, for instance by notifying the other parties to the conflict, as it is obliged to do in relation to paramilitary groups or law enforcement agencies that are incorporated into its armed forces (Protocol I, art 43(3)). Where a PSC/PMC asserts its right to take part in hostilities and engage in combat on behalf of a state that is a party to the conflict, it should do so only on sure legal footing and not merely rely on that state’s apparent approval. To fall outside the limited categories of those entitled to fight, deprives the individual of the so-called combatant’s privilege as well as prisoner of war status if captured.

Finally, IHL envisages that prisoner of war status is to be granted to persons accompanying the armed forces without actually being members thereof, such as supply contractors and members of services responsible for the welfare of the armed forces. To be within this category, the concerned individuals must have been authorised by a party to the conflict to accompany its armed forces and are to be issued with the necessary identity cards. Failure to obtain such express authorisation and identification cards to accompany the armed forces may trump the possibility of benefiting from prisoner of war status.
As mentioned earlier, individuals who do not fall in the above categories are deemed to be civilians and cannot be the object of attack. However, if they do take a direct part in the hostilities, this protection falls by the wayside for the duration of their participation, and, as a consequence, they can be attacked and prosecuted for such participation. There is no straightforward answer as to whether or not members of PSCs/PMCs fall within any of the above categories. Given the possible myriad of functions and contractual relationships, any assessment must be pragmatic, looking at the nature of the functions, their closeness to core military activities, the existence of chains of command, affiliations and so on. That which should be borne in mind is that irrespective of one’s affiliation or capacity in times of conflict, the provisions of IHL must be respected. It is therefore in the interests of all those involved in conflict zones to be fully aware of and to respect the relevant IHL norms at all times.

**Responsibility under international humanitarian law**

States bear the primary responsibility for ensuring that IHL is respected, and for punishing individuals who commit ‘war crimes’. In addition, businesses, such as PSCs/PMCs, operating in armed conflicts may attract legal liability if they, or their staff, act counter to the provisions of IHL.

**Individual criminal responsibility**

IHL, as reinforced by the jurisprudence of the various international criminal tribunals, is unequivocal inasmuch as the commission of grave breaches entails, as a matter of convention and custom, individual criminal responsibility. Members of PSCs/PMCs who commit such offences can therefore be brought to book whether they are acting on behalf of a party to the conflict or working for civilian entities, such as multinational companies.

Under IHL, individuals can be held criminally responsible for the most serious violations of the Geneva Conventions and the Additional Protocols, commonly referred to as grave breaches, which include wilful killing, torture or inhuman treatment, and wilfully causing serious injury. Grave breaches are subject to universal jurisdiction, whereby any state may prosecute any individual of any nationality, irrespective of where the offence was committed. States party to the Geneva Conventions and their Protocols are under the obligation to prosecute or to extradite alleged perpetrators of grave
breaches. Prosecutions for grave breaches and other war crimes may also be held before the permanent International Criminal Court, subject to the relevant jurisdiction prerequisites being met.

Moreover, IHL provides that commanders are to be held responsible not only for war crimes committed pursuant to their orders but also where they failed to prevent or punish their subordinates when they had reason to know that the same were about to commit or committed war crimes. This responsibility is applicable to both military and other superiors, including civilians (Protocol I, art 86, 87; Rome Statute, art 28). In practice therefore, in the case of PSCs/PMCs that form part of the armed forces of a state party to the conflict, responsibility for acts violating IHL committed by employees can be attributed to the immediate superior as well as further up the chain of command.

In relation to civilian superiors, international justice has widened its net, for instance even holding a director of a tea factory liable for acts of his employees during the genocide in Rwanda in 1994. With the these jurisprudential developments, theoretically, both the CEO of a company that has contracted the services of a PSC/PMC in a zone of international armed conflict, as well as the manager of the PSC/PMC, could therefore be held responsible as ‘superiors’ for war crimes committed by personnel of the PSC/PMC even though the CEO may never have set foot in the conflict zone. The cases against Slobodan Milosevic in The Hague, Jean Kambanda in Arusha and Charles Taylor before the Special Court for Sierra Leone are evidence that those at the very top of the pyramid, including heads of state and government, can be held accountable for acts of their ‘subordinates’.

**The responsibility of states to ensure respect of international humanitarian law**

Under common article 1 to the Geneva Conventions, states undertake to respect and ensure the respect for the Conventions in all circumstances. States must not only themselves respect the provisions of the Conventions, but are also obligated to ensure that all those under their authority or jurisdiction do not fall foul of said provisions. Where PSCs/PMCs are active in times of international armed conflict, the onus is therefore on states to give effect to this provision, and to ensure that PSCs/PMCs operate within the confines of IHL. How this is achieved in practice depends in part on the relationship of the state with the concerned PSC/PMC, for example, a hiring
state, a state on the territory of which the operations are conducted, the state of the company’s registration or the state of nationality of employees of the PSC/PMC.

So as to meet their IHL obligations to ensure the respect of IHL, it is therefore incumbent on states to adopt the necessary civil and criminal legislation to ensure that serious violations of IHL do not go unpunished. In addition, states should look into codes of conduct and regulations to ensure that PSCs/PMCs over which they have jurisdiction are cognisant of the applicable laws, in particular IHL, in times of armed conflict. A number of states have recognised the need for regulation in this domain, for instance the UK, the US, South Africa and Switzerland. Representatives of PSCs/PMCs, such as international peace operations and the British Association of Private Security Companies, likewise consider some form of regulation of the industry vital. Recently, an intergovernmental process was initiated by the Swiss Federal Department of Foreign Affairs Government, with the involvement of the International Committee of the Red Cross, as custodian of IHL. The initiative, which is a process between states, is looking into the role of states in promoting respect for IHL and human rights law by PSCs/PMCs.

The official objectives of the initiative are, inter alia, to contribute to an inter-governmental discussion on the issues raised by the use of PSCs/PMCs, and to reaffirm and clarify the existing obligations of states and other actors under international law, in particular under IHL and human rights law. The initiative will look into developing regulatory models and other appropriate measures at the national, and possibly at the regional and international levels, and to making, based on existing obligations, recommendations and drafting guidelines to best assist states in ensuring respect for IHL and human rights law.

**Conclusion**

In the eyes of many, conflict zones are seen as multi faceted, lacking order and regulation, often in a state of chaos, with PSCs/PMCs operating in a legal vacuum. However, during international and internal armed conflicts, IHL is applicable, and it provides a universal and binding legal framework that aims at protecting civilians and others not taking part in the conflict from the effect of the hostilities. As many PSCs/PMCs come into contact with the vulnerable and other persons protected by IHL, it is essential for them to know and respect this body of law.
Notes

1 For the purposes of the present chapter, the terms PMCs and PSCs will be used interchangeably.

2 For instance, see Lieutenant Colonel Paul Christopher (Ret) (Journal of International Peace Operations, 2(2):9): ‘As a private contractor working in Iraq for the past two years, I have observed confusion over the roles of the military and the private sector. In one case, while responsible for the perimeter security of an Iraqi military base, our staff were instructed by senior U.S. military officers to conduct combat patrols up to 10 kilometres outside the perimeter, and apprehend and interrogate civilians. Not only were such actions clearly outside the terms of our contract, but they would also have been violations of our charter as civilian security employees.’

3 The ICRC is at present undertaking a process to clarify the meaning of ‘a direct part in hostilities’. The ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 4787, suggests a possible objective standard as being ‘acts of war that by their very nature or purpose struck at the personnel and material of enemy armed forces’.

4 The International Criminal Tribunal for Rwanda (ICTR) has confirmed that for an offence to be considered a war crime it must be committed in conjunction with the armed conflict and that the perpetrator must have acted in furtherance of or under the guise of the armed conflict. See for instance the ICTR Appeals Judgment in the case of The Prosecutor v Georges Rutaganda.

5 Grave breaches are listed in Geneva Convention I, article 50; Geneva Convention II, article 51; Geneva Convention III, article 130; Geneva Convention IV, article 147; Protocol I, articles 11, 85).

6 In terms of the four Geneva Conventions and Protocol I, a state must enact national legislation prohibiting and punishing grave breaches—either by adopting a separate law or by amending existing laws. Such legislation must cover all persons, regardless of nationality, committing grave breaches or ordering them to be committed and including instances where violations result from a failure to act when under a legal duty to do so. It must cover acts committed both within and outside the territory of the state.

7 See the ICTR case of The Prosecutor v Alfred Musema, Case no ICTR-96-13-T, 20 April 1999.

8 As explained in the ICRC’s Commentary on the First Geneva Convention: “The Contracting Parties do not undertake merely to respect the Convention, but also to ensure respect for it. The wording may seem redundant. When a state contracts an engagement, the engagement extends eo ipso to all those over whom it has authority […]. The use of the words “and to ensure respect” […] were intended to emphasize and strengthen the responsibility of the Contracting Parties”.

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