

**EXPERT MEETING ON PRIVATE MILITARY  
CONTRACTORS: STATUS AND STATE  
RESPONSIBILITY FOR THEIR ACTIONS**

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## Abbreviations:

API	- Additional Protocol I of 1977 to the 1949 Geneva Conventions
AP II	- Additional Protocol II of 1977 to the 1949 Geneva Conventions
CIVPOL	- International Civilian Police
DASR	- The International Law Commission's draft Articles on State Responsibility
ECHR	- European Court of Human Rights
GCs	- Geneva Conventions of 1949
GC I	- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949
GC II	- Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949
GC III	- Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
GC IV	- Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
HRL	- International Human Rights Law
IAC	- International armed conflict
ICC	- International Criminal Court
ICJ	- International Court of Justice
ICRC	- International Committee of the Red Cross
ICTR	- International Criminal Tribunal for Rwanda
ICTY	- International Criminal Tribunal for the former Yugoslavia
ILC	- International Law Commission
IHL	- International Humanitarian Law
NATO	- North Atlantic Treaty Organisation
NIAC	- Non-international armed conflict
OAU	- Organisation of African Unity
OECD	- Organisation for Economic Co-operation and Development
PMC	- Private military contractor
POW	- Prisoner of War
PSO	- Peace support operation / peacekeeping operation
ROE	- Rules of engagement
UK	- United Kingdom
UN	- United Nations
US	- United States

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## **Executive Summary**

There is a great deal of discussion currently on how to better regulate private military contractors (PMCs) under international and domestic law. Any such further regulation must build upon a solid understanding of what the existing law is. Accordingly, the purpose of this meeting was to elucidate the existing international law relating to the status of PMCs and their members under international humanitarian law (IHL) as well as the State responsibility for their conduct in all situations in which they might be employed.

### **The status of members of PMCs in international armed conflict under IHL**

The experts discussed the status of members of PMCs under IHL where they are employed in an international armed conflict (IAC). The experts concluded that a PMC could be said to constitute the armed forces of the State within the meaning of Article 43 of AP I where it was placed under a “command responsible” to the State and the conditions of Article 43(1) are satisfied. (§ B-1-a)) The members of the PMC will only be combatants where the PMC constitutes the armed forces of the State or an allied militia under Article 4A(2) of GC III. Otherwise, the members of the PMC are civilians and may come within Article 4A(4) of GC III where they are providing services to the State’s armed forces; such PMC members must refrain from directly participating in hostilities, the experts agreed, if they are not to lose the POW status Article 4A(4) confers on them. (§ B-2-a)) The experts also concluded that members of a PMC could constitute mercenaries under Article 47 of AP I as well as under the OAU and UN mercenary conventions. (§ B-3)

### **State responsibility where the conduct of the PMC is attributable to the State**

Whether the conduct of the PMC is attributable to the State, the experts observed, is governed by Articles 4, 5 and 8 of the International Law Commission’s draft Articles on State responsibility (DASR). Where the PMC constitutes the “armed forces” of the State within the meaning of Article 43 of AP I, the PMC will either constitute a State organ under Article 4 of the DASR or will be exercising governmental functions under Article 5 DASR and in both cases its conduct will be attributable to the State. (§ B-1-b))

Where the PMC is not a State organ, its conduct will be attributable to the State if it is empowered under the State’s law to exercise elements of governmental authority under Article 5. The experts discussed what functions would require the exercise of governmental authority, observing that the Commentary to the DASR provides a number of examples. The obligations imposed by the Geneva Conventions require the State to undertake a number of military functions; such military functions, the experts agreed, entail the exercise of governmental authority. Not all the duties imposed by the GCs would, however, require the performance of tasks requiring governmental authority, e.g., those obligations requiring the State to provide services to protected persons. (§ B-2-b))

The experts also discussed attribution under Article 8 of the DASR. Where the PMC is acting under the direction or control of the State, the conduct of the PMC will be attributed to that State, regardless of the nature of the functions it is carrying out. Likewise, the conduct of the PMC will be attributable to the State where the PMC operates “on the instructions of” the State. Most experts thought that the PMC would not have to be instructed to carry out the unlawful conduct but that there would be State responsibility where the unlawful acts are carried out during a mission given to the PMC, especially if the PMC is acting on instructions which do not indicate with sufficient clarity how the PMC is to carry out its tasks so as not to

commit unlawful acts. The experts observed that the issuance of good ROE would help the State ensure that its instructions are clear. (§ B-2-c))

The experts agreed that it made no difference for purposes of attribution under Articles 4, 5 or 8 of the DASR whether the PMC is operating in an IAC or a NIAC. (§ B-4)

The experts discussed the situation where one PMC subcontracts with another PMC. The conduct of the subcontracted PMC could be attributable under Articles 5 or 8. The experts noted here that, where the conduct is attributable to the State under Article 5, Article 7 of the DASR indicates that the ultra vires conduct of the PMC will be attributable to the State. Where the PMC's conduct is attributable to the State under Article 8, however, the ultra vires conduct of the PMC will not be attributable to the State. (§ B-2-d))

The experts also considered whether there is a liability gap with respect to private conduct as between the armed forces of the State and a PMC whose conduct is attributable under Article 5 of the DASR. If Article 3 of Hague Convention IV / Article 91 of AP I is seen as providing that the State is responsible for the conduct of members of its armed forces acting in their private capacity, then there would be such a liability gap. (§ B-2-e))

Where the State sends the PMC as its military contingent to a Peace Support Operation (PSO) conducted by an international organization like the UN, the conduct of the PMC would be attributable to the State under Articles 4, 5 or 8 no less than in the non-PSO context. Some experts felt that the mere sending of a PMC to a PSO would result in this PMC exercising elements of governmental authority irrespective of the sort of tasks the members of this PMC are carrying out. Other experts thought that not all the functions which a PMC might perform on a PSO entail the exercise of governmental authority, e.g., the delivery of humanitarian aid or demining. All the experts felt that there would have to be some continuing relationship between the State and the PMC in order for the State to be considered as having sent the PMC to the PSO; the conduct of the PMC will not be attributable to the State where the PMC is merely funded by the State. Finally, the experts noted that conduct of the PMC will be attributable to the international organization which employs it under certain draft articles on the international responsibility of international organisations provisionally adopted by the International Law Commission. (§ C)

#### **State responsibility where the conduct of the PMC is not attributable to the State**

Where the conduct of a PMC is not attributable to the State, the State may nevertheless incur responsibility for its failure to exercise due diligence with respect to the activities of the PMC. The experts observed that there are potentially three States which owe such obligations of due diligence: the State which hires the PMC, the State in which the PMC operates, and the State in which the PMC is incorporated. (§ D-2) The duty to exercise due diligence under HRL imposes an obligation on States to prevent, to investigate and to punish abuses. Some experts felt that that States are obliged to take positive measures to prevent abuses in either of two situations: 1) where the State has reason to believe, or should have reason to believe, that the particular PMC poses a risk, and 2) also where the PMC is engaged in an inherently dangerous activity, e.g., guarding an oil pipeline in a conflict situation. The experts also explored whether the obligation to exercise due diligence under HRL imposes an obligation on States to regulate the PMC industry as a whole. Such an obligation, some experts felt, could be seen as flowing from Article 2(2) of the International Covenant on Civil and Political Rights. Also, these experts observed, the European Court of Human Rights has required States to enact or amend legislation where necessary in order to prevent systematic violations



of human rights. The right to a remedy, one expert suggested, is also relevant: where the State has failed to adequately regulate the PMC industry, an individual is arguably the victim of unnecessary endangerment. (§ D-3)

A number of experts observed that the requirement of due diligence under HRL obliges States to investigate and punish private acts of violence. Due diligence includes the right of access to the courts. Some experts felt that a State is under an obligation to ensure that foreign plaintiffs are able to bring claims against PMCs with which the State has some connection, e.g., where the PMC is incorporated in the State. (§ D-4)

The experts then discussed whether IHL imposes a duty analogous to due diligence. The experts observed that Article 144(2) of GC IV imposes an obligation to instruct civilians who undertake functions related to protected persons. States which hire PMCs to carry out such functions must therefore exercise due diligence in this respect. (§ E-1-a))

A number of experts felt that the Geneva Conventions impose obligations of result. Where the State devolves the fulfilment of an obligation arising under the GCs, and the PMC fails to fulfil this obligation, the State is in breach of that substantive obligation and incurs responsibility for this breach, irrespective of whatever action it took to ensure that the PMC would properly perform this function. Under this view, the State is responsible even if the conduct of the PMC is not attributable to it. Some experts felt that the Geneva Conventions impose obligations of result because of the duty imposed by Common Article 1 to “ensure respect” of any specific treaty obligation while other experts felt this result was necessitated by the specific treaty obligation alone. (§ E-1-b)) The experts discussed other obligations which may flow from Article 1, including whether the State is obliged to enact legislation allowing it to prosecute persons for committing violations of the GCs other than grave breaches. (§§ E-2, E-3)

### **Reparations where the PMC commits violations of IHL and HRL**

The experts discussed the ways in which victims of the unlawful conduct of PMCs could obtain reparation both where the conduct of the PMC is and is not attributable to the State. Where violations of HRL are attributable to the State, individuals have a clear right to bring a claim for reparation against the State. In contrast, it is less clear whether individuals may bring a claim for violations of IHL committed by the State or by a PMC. The experts also considered the direct liability of the PMC itself where it commits torts, crimes and violations of IHL. It is not clear, some experts observed, whether private actors such as PMCs are under an obligation to make reparation where they commit IHL violations, or even that PMCs (as companies, i.e., as opposed to their members) can commit IHL violations. (§ F)

### **Unclear areas in the law and suggestions as to how PMCs could be better regulated**

The experts explored the idea of transportable courts which could try members of PMCs in theatre in order to avoid impunity. The experts also considered whether regulation should address when PMCs are permitted to be deployed in a given situation and whether they should be prohibited from conducting combat operations. The experts observed that members of PMCs must be aware of their status under IHL where they are deployed in armed conflicts. While the experts identified certain areas in the law where there gaps, the experts observed that the meeting had clearly demonstrated that there is no major vacuum in the international law governing PMCs. (§ G)

## **A. Introduction**

There is a great deal of discussion currently on how to better regulate private military contractors (PMCs) under international and domestic law. However, any such further regulation must build upon a solid understanding of what the existing law is. Accordingly, the purpose of this meeting was to elucidate the existing international law relating to the status of PMCs and their members in various contexts, and State responsibility for their conduct. The experts addressed these issues as well as the existing law relating to the direct liability of PMCs. Throughout the meeting the experts made a number of suggestions as to how PMCs could be better regulated, most of which are related in the last section. This report reproduces presentations made during the meeting and provides a summary of the main points that emerged during the discussions.

The meeting brought together experts in international humanitarian law and human rights law, governmental officials, a political scientist as well as a member of the PMC industry, all attending in their personal capacity. While a list of the participants is provided in the Annex, the meeting was otherwise conducted according to the Chatham House Rule, which provides that “participants are free to use the information received, but neither the identity nor affiliation of the speaker(s), nor that of any other participant, may be revealed.” Accordingly, in relating the discussions that occurred during the meeting, this report does not attribute any of the opinions expressed.

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The University Centre for International Humanitarian Law (UCIHL) would like to thank the Directorate of International Law of the Swiss Federal Department of Foreign Affairs (DFA) for providing the funds which enabled this meeting to take place.

## **B. State responsibility where the conduct of the PMC is attributable to the State**

The experts discussed the State responsibility which could arise both where the conduct of the PMC can be attributed to the State and where its conduct cannot be. This Sections B and C relate the experts' discussion with respect to State responsibility where the conduct of the PMC is attributable to the State. Sections D and E relate their discussion regarding the international responsibility a State may incur where it fails to exercise due diligence with respect to the conduct of the PMC.

The experts addressed first the issue of State responsibility for the conduct of a PMC in the context of an IAC where members of the PMC constitute 1) combatants within the meaning of Article 43 of AP I or Article 4A(1) or (2) of GC III; 2) civilians, and possibly "civilians accompanying the armed forces" of a State within the meaning of Article 4(A)(4) of GC III; or 3) mercenaries within the meaning of Article 47 of AP I and under two other international conventions.

### **1. State Responsibility where the members of the PMC are combatants**

The experts considered whether members of PMCs are combatants in certain cases in IAC. They observed that, for this to be the case, the PMC's members would have to be seen as constituting "members of the armed forces" of the State under Article 43(2) of AP I, members of the armed forces or militias forming part of the armed forces under Article 4A(1) of GC III, or members of independent, allied militias or "other volunteer corps" under Article 4A(2) of GC III.

#### **a) Can PMCs constitute the "armed forces" of a State within the meaning of Article 43 of AP I? Can PMCs constitute "other militias and...volunteer corps...belonging to a Party to the conflict" under Article 4A(2) of GC III?**

One expert made a brief presentation addressing this question. This expert began by considering Article 43 of AP I.

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

The crucial requirement under Article 43 is that the group be "under a command responsible" to the Party to the conflict. In the view of this expert, PMCs would probably not fulfil this requirement. The present inability of many States to subject members of a PMC to their criminal jurisdiction in theatre would preclude the applicability of Article 43. This expert noted, for example, that, while the UK in 1956 introduced legislation enabling it to try civilians who commit offences abroad, and moreover, to try those civilians in theatre, this

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<sup>1</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977, 1125 U.N.T.S. 3, Art 43.

jurisdiction is limited to those who are directly employed by Her Majesty's Government.<sup>2</sup> Consequently, members of a PMC would not generally be under the jurisdiction of the British Government and thus not "under a command responsible" to the UK.

This expert considered Article 4A(2) of GC III as well, observing that there are four conditions which independent, allied militias and volunteer corps must fulfil in order for their members to be entitled to POW status:

- (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.<sup>3</sup>

In the opinion of this expert, most PMCs would not, as a group, comply with any these conditions except perhaps (c) regarding the carrying of arms openly. And in this respect, this expert noted, most private contractors do not even carry weapons.

A second expert was of the opinion that, in some cases, a PMC could constitute a State's "armed forces" within the meaning of Article 43(1) of AP I. This expert pointed to the drafting history of Article 43. Article 43(1) was drafted as it was so as to provide greater clarity as to what groups would be considered a State's "armed forces." Article 4A of GC III makes a distinction between "armed forces" and "militias forming part of the armed forces," on the one hand, and "other militias...and volunteer corps" on the other. Article 43 revises this approach and makes all groups "armed forces," as long as they comply with the requirements of Article 43(1). The intention behind this revision, this expert observed, was to avoid having to make reference to a State's domestic law in order to determine who is a member of the armed forces and who is not. This expert cited the Commentary written by Michael Bothe et al, which stresses that Article 43 was aimed at including as "armed forces" all groups which have some sort of factual link to the regular armed forces: "if the independent force acts on behalf of the party to the conflict in some manner and if that party is responsible for the group's operations," then the group is part of the State's "armed forces."<sup>4</sup> During the drafting of AP I, this expert pointed out, many developing countries argued for this clarification, given that many of them did not have substantial regular armed forces and had to rely on guerrilla troops to a large extent. In light of the way in which Article 43 sought to broaden and simplify the definition of "armed forces" for purposes of IHL, it must be arguable that, where a State hires a PMC to wage an IAC on its behalf, and the PMC is "responsible to" to that State such that the other requirements of Article 43 are fulfilled, this PMC should be considered part of that State's "armed forces." Such an interpretation, this expert observed, is in keeping with the functional approach taken by Article 43: whether a group is part of the "armed forces" depends primarily on whether the group is fighting on behalf a party to the conflict.

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<sup>2</sup> The current legislation providing for the Standing Civilian Court is The Standing Civilian Courts Order, 1997, UK Statutory Instruments, No. 172 ; and The Standing Civilian Courts Order (Amendment), 1997, UK Statutory Instruments, No. 1534, available at <http://www.uk-legislation.hmso.gov.uk/stat.htm>.

<sup>3</sup> Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135, Art. 4A(2).

<sup>4</sup> Michael Bothe, Karl Josef Partsch and Waldmar A. Solf, New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, Martinus Nijhoff Publishers, The Hague, 1982, p. 234.

Another expert agreed that, while the drafters of AP I certainly did not envision the existence of PMCs back in 1977, Article 43 does leave open this possibility. The other expert observed that, since PMCs were not envisioned by the drafters, whether a PMC can come within Article 43 essentially becomes a question of State practice.

One expert suggested that where the State which hires the PMC has no armed forces itself, e.g., Costa Rica, there is a stronger argument that this PMC will constitute its armed forces than where the hiring State already has a “regular armed forces.”

One expert observed that the question of whether an individual member of a PMC is entitled to combatant or POW status must be addressed at three different levels. First, the individual must be a member of a PMC which has a combatant role in the armed forces and not merely a member of a PMC which is “accompanying the armed forces” within the meaning of Article 4A(4) of GC III and Article 50 of AP I. Second, under Article 43 AP I, the group itself must be entitled to combatant status. Where an individual complies with IHL, and the group of which he is member does not, he will not be entitled to combatant status. Third, the individual member of the PMC must comply with the fundamental rules relating to the principle of distinction, i.e., carry one’s arms openly during engagements in accordance with Article 44(3) of AP I in order to retain his POW status. In the view of this expert, therefore, it was possible that a PMC could qualify as a State’s, or part of a State’s, armed forces under Article 43(1) and its members be combatants under Article 43(2).

This expert noted, however, that a PMC would probably not constitute an “other militia” or “other volunteer corps” within Article 4A(2) of GC III. There is a crucial difference here between AP I and GC III: Article 43 requires that the group be “under a command responsible” to a Party to the conflict, while Article 4A(2) requires that the group can be described as “belonging to a Party to the conflict.” While a PMC could probably not be regarded as “belonging” to the State, it could be put “under a command responsible” to the State. Members of a PMC therefore probably could qualify for combatant status under Article 43(2), assuming they fulfilled the conditions to be combatants.

The experts took up the question of what a State would have to do to put the PMC “under a command responsible” to it within the meaning of Article 43(1). All the experts observed that this requirement, as well as that the group be “subject to an internal disciplinary system,” is aimed at ensuring that the State can “enforce compliance with the rules of international law applicable in armed conflict,” as Article 43 makes expressly clear.

In the view of one expert, the contract concluded between the PMC and the State hiring the PMC could be such that its terms would make the PMC “responsible” to the State within the meaning of Article 43(1). Such a contract, this expert observed, could put the PMC under the command of the State which hires it. Another expert observed that, in practice, some PMCs maintain that they are commissioned by governments to participate in conflicts. In such circumstances, this expert felt that the contract could serve to put the PMC under a command responsible to the State which is party to the conflict.

Other experts doubted whether the contract between the State and the PMC could itself be sufficient to bring the PMC under a command responsible to the State. One expert felt that the requirement of being “under a command responsible” implies far more than merely belonging to a party to the conflict and exercising elements of governmental authority such that the party would incur State responsibility for the conduct of the group. Rather, for this

expert, “under a command” describes a situation in which the group has been brought within the military chain of command of the State’s regular armed forces. A second expert agreed, noting that, currently, PMCs do not lie within the military chain of command. The current US field Manual, for example, specifies that all contractors are outside the military chain of command.

For this expert, in order for a PMC to constitute the “armed forces” of a State, or part of it, the State would have to formally incorporate a PMC into its armed forces by adopting domestic legislation which places the PMC under the command of the State’s armed forces. Where a State incorporates paramilitary or law enforcement agencies into its armed forces, the State is required under Article 43(3) to notify the other parties to the conflict that it has done so. This notification requirement implies an obligation on the State to formally incorporate such groups into its armed forces. If a paramilitary organisation or law enforcement agency must be formally incorporated, how is it that a State could merely hire a PMC and thereby make it part of its armed forces? Another expert agreed that the State would somehow have to enable itself to exercise jurisdiction over members of PMC in order to make them “subject to an internal disciplinary system” as required under Article 43(1).

One of these experts also observed that Article 50 of AP I does not exclude persons referred to in Article 4A(4) of GC III from being civilians. Where persons “accompany” the armed forces under GC III, they cannot be members of the armed forces under Article 43 of AP I. Looking at GC III and AP I together, it would not make sense for the drafters to have included someone as a civilian under Article 50 because he “accompanies the armed forces,” as described by Article 4A(4), and yet at the same time exclude that person from being a civilian under Article 50 because he falls under Article 43. A couple of other experts disagreed; a member of a PMC could fall within Article 4A(4) but nevertheless also fall within Article 43; such person would, therefore, be excluded from Article 50, and would not, therefore, be a civilian.

While the experts disagreed as to exactly what a State would need to do in order to comply with the “command” and “disciplinary system” requirements of Article 43(1) and the possible “incorporation” requirement of Article 43(3), all the experts ultimately agreed that a PMC could qualify as a State’s armed forces under Article 43(1) and its members qualify as combatants under Article 43(2) if these requirements were fulfilled.

The experts observed that, where members of a PMC qualify as combatants under Article 43(2), they will enjoy POW status under Article 44(1). As combatants, they have the right to participate directly in hostilities and enjoy immunity from prosecution for their mere participation.

One expert emphasized that, where members of a PMC are considered civilians, e.g., under Article 4A(4) of GC III, they can only be lawfully targeted for such time as they directly participate in hostilities. Where, in contrast, a PMC comes within Article 43 such that it constitutes the armed forces of the State, its members, as combatants, could lawfully be targeted at all times. That is, members of the PMC may be targeted on the basis of their membership in the PMC, which is, the armed forces of the State. Thus, employees of such a PMC who do not fulfil fighting role, e.g., drivers and cooks, may also be targeted at all times, irrespective of what they are doing.

**b) State responsibility under the DASR where members of the PMC are combatants**

The experts observed that where a PMC constitutes the armed forces, a militia or a volunteer corps forming part of such armed forces within the meaning of Article 4A(1) of GC III, this PMC will constitute a State organ within the meaning of Article 4 of the DASR. Paragraph one of Article 4 provides that:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central or of a territorial unit of the State.<sup>5</sup>

Accordingly, the conduct of such a PMC would be attributable to the State for purposes of State responsibility. Where the PMC constitutes an independent militia within the meaning of Article 4A(2) of GC III, however, this PMC will not constitute a State organ under Article 4. Article 5 of the DASR, however, provides that:

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 the State to exercise elements of 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.<sup>6</sup>

As the experts discussed later, a PMC fulfilling the requirements of Article 4A(2) is necessarily engaged in an activity which requires the exercise of elements of governmental authority, i.e., fighting an IAC on behalf of the State.<sup>7</sup> In this case, the conduct of such a PMC would also be attributable to the State.

Where the PMC constitutes armed forces within the broader, more flexible definition provided by Article 43 of AP I, this PMC may or may not constitute “an organ of the State” within the meaning of Article 4 of the DASR. Where it does not, however, its conduct will nevertheless be attributable to the State under Article 5.

**2. State responsibility where members of the PMC are not combatants**

The experts next considered the issue of State responsibility where the members of the PMC are seen as “civilians accompanying the armed forces without being members thereof” within the meaning of Article 4A(4) of GC III.

**a) Could the members of a PMC constitute “persons who accompany the armed forces” within the meaning of Art 4A(4) of GC III?**

One of the experts made a brief presentation on this question. This expert began by observing that the law prior to the 1949 Geneva Conventions had already recognized that there are persons who accompany the armed forces but who are not members of those armed forces and

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<sup>5</sup> Commentaries to the draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session, Report of the International Law Commission on the work of its Fifty-third session (2001), *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), Chap.IV.E.2), p. 44, (hereafter, Commentaries to the draft Articles on State Responsibility.)

<sup>6</sup> *Id.*, pp. 44, 92.

<sup>7</sup> The experts discussed what activities would require the exercise of governmental authority for purposes of Article 5 of the DASR in greater depth later in the meeting, as related in the following subsection.

who require legal protection if they are captured. Such persons, including “contractors” and “sutlers,” were granted POW status in the earlier 1929 Geneva Conventions, the Hague Regulations of 1899 and 1907 and even in the 1863 Lieber Code.<sup>8</sup> Article 4A(4) of GC III continued and refined this protection:

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.<sup>9</sup>

Clearly Article 4A(4) provides this POW status to some private contractors. This expert noted that, while the Article refers only to “supply contractors,” there is no reason to think that this protection is not available to all private contractors who accompany the armed forces. However, a State cannot confer this status on contractors merely by issuing them the “identity card” required by Article 4A(4). Rather, there must be some nexus between the contractor and the armed forces. An additional implicit condition is the absence of direct participation in hostilities for a person to enjoy POW status under Article 4A(4), as such persons are clearly civilians. Where such persons do take a direct part in hostilities, this expert argued, they must lose their POW status. As civilians, such persons could be prosecuted for their mere participation.

This expert nevertheless related two other positions on this question. The position recently taken by the US holds that such persons do not lose their POW status as a result of their direct participation in hostilities. This position notes that, while civilians lose the “protection afforded by this Section...for such time as they take a direct part in hostilities” under Article 51(3) of AP I, this provision is referring only to Section I of Part IV: General Protection Against Effects of Hostilities. The issue of POW status, this position observes, is dealt with in a Section II of Part III: Combatant and Prisoner-of-War Status. Where persons falling within Article 4A(4) do take a direct part in hostilities, this will not, therefore, deprive them of POW status if captured. A third and similar position, this expert noted, also holds that a person falling within 4A(4) will not lose his POW status, provided, however, that he complies with the four conditions laid down in Article 4A(2). The presenting expert noted that advocates of this position point to the fact that Article 4A(4) includes certain people who might be expected to take a direct part in hostilities in certain circumstances, namely “civilian members of military aircraft crews.” If one accepts the view that there is no implicit condition that Article 4A(4) persons refrain from taking a direct part in hostilities, a State could merely authorize a PMC to accompany its armed forces and issue them identity cards, and the members of this PMC would all fall within Article 4A(4), whether they directly participated in hostilities or not.

Notwithstanding the narrow example of civilians on military aircraft provided in Article 4A(4), the presenting expert felt that these positions were not supported by a close reading of

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<sup>8</sup> Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, Art. 81, in D. Schindler and J.Toman, The Laws of Armed Conflicts, Martinus Nijhoff Publisher, 1988, pp. 341-364; Regulations respecting the laws and customs of war on land, annexed to the Convention Respecting the Laws and Customs of War on Land (Hague Convention IV), 18 October 1907, Art. 13, in D. Schindler and J.Toman, pp. 69-93; and Instructions of the Government of the United States Armies in the Field (the Lieber Code), 24 April 1863, Art. 81, in D. Schindler and J.Toman, pp.3-23.

<sup>9</sup> Geneva Convention III, *supra* note 3, Art. 4A(4).



GC III and AP I. This expert observed that Article 44(6) of AP I recognizes that there are categories of persons under Article 4 of GC III other than combatants who enjoy POW status; this Article therefore seems to acknowledge that Article 4A(4) persons are not combatants and therefore may not participate in hostilities. The definition of the category in Article 4A(4) itself, “persons who accompany the armed forces without actually being members thereof,” suggests that this is category of persons who do not engage in the core function of the armed forces, i.e., fighting. Finally, the notion that Article 4A(4) persons could participate in hostilities is inconsistent with the other provisions of Article 4. Article 4A(2) (“militias and...volunteer corps”) and Article 4A(6) (the *levée en masse*) carefully create two categories of combatants who are not members of the armed forces, obliging such persons in either case to “carry arms openly and respect the laws and customs of war.” How then could Article 4A(4) be regarded as creating another category of persons who are not members of the armed forces but who may participate in hostilities without specifying these minimum obligations?

Another expert observed that where a State hires a PMC to undertake tasks which will require its members to take a direct part in hostilities and at the same time authorizes these PMC members as persons falling under Article 4A(4), the State would be putting them in a very bad position indeed. Such persons would be employed to act as combatants, though they would not enjoy POW status. This expert wondered whether the current US position is necessitated by the fact that the US is not a party to AP I and cannot avail itself of the broader, more liberal definition of “armed forces” under Article 43. This US position therefore seems to be an attempt at extending POW protection to a new category of persons the State has in fact hired to fight on its behalf.

With the possible troublesome exception of the civilian aircraft crew member noted earlier, all the experts agreed that, in contrast to Article 4A(1) and 4A(2), Article 4A(4) describes a category of persons who are not expected to do the fighting. Among the examples given, there is no parallel in Article 4A(4) with the member of the PMC who is hired by the State to fight on its behalf. Where PMCs “accompany” the armed forces in order to provide the sort of supply services that have historically been provided by private contractors, all the experts agreed that members of such PMCs would fall neatly within Article 4A(4). Where a State hires a PMC to fight, however, the experts felt that the members of such a PMC could not fall within Article 4A(4). They agreed with the presenting expert that, as civilians, persons falling within Article 4A(4) are not entitled to take a direct part in hostilities and, where such persons do, they must lose their POW status.

The presenting expert also pointed out that, in order for members of a PMC to fall within Article 4A(4), one must be able to describe them as “persons who accompany the armed forces.” Whether or not this means that members of the armed forces must be physically present where the PMC is operating is not clear, but at the very least, they must be providing some sort of service to the armed forces, as opposed to merely performing a contract for the State.

In the view of this expert, members of a PMC fit within Article 4A(4) better than within any other provision, at least where they are not expected to directly participate in hostilities. It makes sense that members of such a PMC should enjoy POW status, since, where captured, they will be held by enemy forces for the duration of the armed conflict. Article 4A(4) thus conforms to the reality of the situation and ensures that such persons are treated as well as combatants who have been captured.

**b) State responsibility under Article 5 of the DASR: “Conduct of persons or entities exercising elements of governmental authority”**

State responsibility, the experts observed, will arise where persons or entities who are not State organs exercise governmental authority. Article 5 of the DASR provides that:

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 the State to exercise elements of 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.<sup>10</sup>

The key requirement, therefore, the experts noted, is that the conduct of the PMC or its members constitutes the exercise of governmental authority. A second requirement is that the PMC or its members be “empowered by the law of State” to exercise this authority.

***i. “Governmental authority:” intrinsic State functions and treaty obligations***

One expert noted that the Commentary to Article 5 gives a number of examples of areas of governmental authority: “powers of detention and discipline pursuant to a judicial sentence or to prison regulations,...powers in relation to immigration control or quarantine.”<sup>11</sup>

A second expert wondered whether governmental authority was not in fact somewhat narrower than governmental activity. That is, the State could undertake functions which are not necessarily in the exercise of its governmental authority.

Yet another expert felt that, in other respects, governmental authority is in fact broader than governmental activity. Where a function, the exercise of which requires governmental authority, is privatized, then this is an example of where the governmental authority is in fact broader than governmental activity. Certain such functions, the exercise of which require governmental authority, can be considered intrinsic State functions. Where a PMC undertakes such functions, the “governmental authority” requirement of Article 5 is met. Another expert agreed. The focus of Article 5 is on “governmental authority.” The crucial question is whether the entity performing the function, whether a PMC or the government itself, requires governmental authority in order to carry out the function.

One expert was of the view that, while there is neither a definition of what constitutes an intrinsic State function nor an exhaustive list of what are all of the intrinsic State functions under international law, the case-law of various human rights bodies makes clear that certain functions most certainly are, thus providing a hardcore list for which there is consensus. For this expert, intrinsic State functions include anything related to policing, prisons and judicial administration as well as the armed forces. In contrast, while education may well be a governmental activity in many States, it is not an intrinsic State function.

Another expert raised a problem posed by increasing privatization: given that there is no definition of what an intrinsic State function is and that we rely rather on the fact that a particular function has historically been carried out by the State, it will become increasingly difficult to determine which functions are intrinsic State functions as more and more functions are privatized. Where a once clearly governmental function has been privatized, over time

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<sup>10</sup> Commentaries to the draft Articles on State Responsibility, *supra* note 5, pp. 44, 92.

<sup>11</sup> *Id.*, p. 92.

this function will no longer be considered a governmental function unless there is consensus at some point that it must always be considered an intrinsic State function.

This expert was of the view that another means of determining whether a particular function requires governmental authority is to ask whether the State is under a treaty obligation to ensure that the particular function is carried out. An Occupying Power, for example, is obliged to maintain public order and safety under the Hague Regulations and GC IV. Where the protection of oilfields, for example, is viewed as a specific duty necessitated by this general obligation, then the function must be viewed as an inherently governmental function such that, where it is privatized, the conduct is nevertheless attributable to the State.

A second expert agreed with this view: where the treaty imposes an obligation to carry out a task or achieve a given result, the State Party is under an international obligation to do this and cannot evade international responsibility by contracting out this task to a private entity. If the State is under a treaty obligation, the obligation itself constitutes a function, the exercise of which requires governmental authority within the meaning of Article 5 of the DASR.

In the view of another expert, however, this criterion is too broad. A State may be under an obligation imposed by a human rights treaty to ensure that the right to education is respected. Nevertheless, providing education is not an intrinsic State function. The State would not, therefore, incur direct responsibility for the conduct of school officials where this function had been privatized. Here, State responsibility would become a question of derived responsibility, i.e., under the due diligence rule. In contrast, while the State is under an obligation imposed by GC III to run a POW camp properly, the State would incur direct responsibility for the conduct of those running the POW camp, regardless of whether this task had been privatized or not, given that running a POW camp is an intrinsic State function.

Another expert felt that virtually anything associated with the conduct of hostilities must be a function the exercise of which requires governmental authority. A second expert agreed. Everything a PMC would do in a war zone would have to constitute such a function. Every task, including running the film at a movie theatre on a military base, is a military function, since only military personnel or persons authorized by the military can even be present in the war zone.

Another expert, however, thought this conclusion was a bit broad. Suppose, during the occupation of Iraq, an oil company hires a PMC to guard its oilfields. In the view of this expert, the conduct of the PMC would not be attributable to the US merely because the US is the Occupying Power. A second expert agreed, at least where there is no contract between this oil company and the Occupying Power. Another expert felt the answer depended on whether one viewed the protection of oilfields in the context of a military occupation as constituting an intrinsic State function.

Ultimately, all the experts agreed that the obligations imposed by the GCs require the State Party to undertake activities, many of which constitute military functions. Military functions entail elements of governmental authority within the meaning of Article 5 of the DASR. Consequently, the experts observed, where the State privatizes these functions and contracts with a PMC to have them carried out, the conduct of the PMC and its members will be attributable to the State and give rise to international responsibility. Not all the obligations imposed by GCs, however, require the performance of tasks entailing the exercise of governmental authority. The experts observed that the performance of many duties “in

respect of protected persons,” e.g., the duty under Article 55 of GC IV to ensure the provision of food and medical supplies, may not require the exercise of governmental authority. Where members of a PMC carry out such GC IV duties, their conduct would not be attributable to the State under Article 5 of the DASR and thus give rise to State responsibility on this basis.

*ii. The PMC must also be “empowered by the law of the State”*

One expert pointed out, however, that it is not sufficient that the PMC is performing a function which entails governmental authority. Assume, for example, that guarding oilfields is such a function, either because it is required under the law of occupation or because, where undertaken, it constitutes an intrinsic State function. Nevertheless, where a PMC guards these oilfields, for the conduct of the PMC to be attributable to the State, the PMC must have been “empowered by the law of the State” to carry out this function. That is, the PMC cannot merely arrive in theatre and begin guarding these oilfields for its conduct to be attributed to the State. In the view of this expert, there must be an explicit law empowering the PMC to undertake this function.

Another expert wondered how specific this “law” must be. Yet another expert observed that Article 5 requires that the entity be “empowered by the law” rather than “a law.” That is, the State need not enact a particular law empowering each PMC to undertake functions which entail governmental authority. Rather, in the opinion of this expert, where the law of the State empowers a specific governmental authority to delegate its powers to a PMC, and this governmental authority contracts with the PMC, this requirement is satisfied.

**c) State responsibility under Article 8 of the DASR: Conduct directed, controlled or instructed by the State**

The experts generally were of the opinion that PMCs would most often come within Article 5 of the DASR, given that military operations are functions which are inherently governmental. Article 8 will become relevant, one expert noted, only where the PMC is not exercising “functions of a public character normally exercised by State organs.”<sup>12</sup> Article 8 provides that:

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.<sup>13</sup>

One expert observed that one must distinguish between “on the instructions of” and “under the direction or control of” the State. The idea of control implies that the State is in a position of being able to exercise some level of operational control over the group. Likewise, where a State hires a PMC to guard an oilfield, this PMC is not “under the direction of” the State unless the State is physically present and supervising. In contrast, the group is merely acting “on the instructions of” the State where the State is not able to exercise any level of control after the instructions have been given.

Two experts wondered whether “instructions” in Article 8 referred to instructions to commit the unlawful act itself, given that the first paragraph to the Commentary on Article 8 of the

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<sup>12</sup> Id., p. 92.

<sup>13</sup> Id., p. 45.

DASR speaks of “instructions of the State in carrying out the wrongful act.”<sup>14</sup> These experts referred to the *Nicaragua* case which required a close link in the form of direction and control for there to be State responsibility.<sup>15</sup>

Two experts disagreed with the basis for this theory. The first felt that the ICJ’s holding in the *Nicaragua* case would not always require that the State actually instruct the group to commit an internationally wrongful act. Had the ICJ determined that the US exercised “effective control” over the Contras, all of the conduct of the Contras would have been attributable to the US.<sup>16</sup> The second expert pointed out that the *Nicaragua* case-type situation is addressed in the third and fourth paragraphs of the Commentary to this article.<sup>17</sup> The issue of “instructions,” however, is addressed in the second paragraph (quoted below). Here, the conduct of the group would not be attributable to the State because the State exercised “effective control” over the group but because the State issued instructions “to carry out particular missions.” The first paragraph of the Commentary states that what is needed is the “existence of a real link between the person or group performing the act and the State machinery,” and not instructions to carry out a wrongful act.

The experts then discussed what type of instructions would lead to State responsibility. One expert felt that the contract concluded between the PMC and the State would certainly constitute “instructions” within the meaning of Article 8. A second expert disagreed, consulting the Commentary to Article 8, paragraph 2 of which reads:

The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence. In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves “governmental activity.” Most commonly cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as “auxiliaries” while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specially commissioned by that State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as “volunteers” to neighbouring countries, or are instructed to carry out particular missions abroad.<sup>18</sup>

Where a State issues ROE as part of the contract, for example, the contract would certainly constitute “instructions” under Article 8.

Another expert felt that attribution under Article 8 would depend upon how clearly the State indicates to the PMC how it wants the contract to be performed. By providing vague instructions, the State bears the risk that such instructions will be interpreted in such a way as to result in the PMC committing internationally wrongful acts. Were the rule otherwise, it would simply encourage States to give vague instructions so as to evade international responsibility. The vaguer the instructions are, the more likely it is that the conduct of the PMC, including internationally wrongful acts, will be within those instructions, thus giving rise to State responsibility. Another expert agreed. For a contract’s mission to be lawful, the contract must define that mission in legal terms. Where a contract to guard an oilfield fails to include ROE, for example, the contracted mission is to guard the oilfield *and* take whatever measures these guards subjectively consider necessary. With respect to this last view, a

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<sup>14</sup> Id., p. 104.

<sup>15</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, 27 June 1986, I.C.J. Reports 1986, paras. 109, 115.

<sup>16</sup> Id., paras. 115-116, 216.

<sup>17</sup> Commentaries to the draft Articles on State Responsibility, *supra* note 5, pp. 104-105.

<sup>18</sup> Id., p. 104.

number of experts observed, therefore, that in the context of contracts concluded between States and PMCs, the issuance of good ROE is crucial. There was general agreement on this point.

**d) State responsibility under Articles 5 and 8 where the PMC subcontracts**

The experts next discussed the issue of State responsibility for the conduct of a PMC which is subcontracted by the PMC contracted by the State. Where the hiring State permits the PMC to subcontract other PMCs to perform all or part of the work, a number of experts were of the opinion that the State would be responsible for the conduct of the subcontracted PMC no less than it would for the conduct of the PMC with which it contracted.

One expert felt that there would be straightforward attribution under Article 5 where the subcontracted PMC exercises governmental authority. Another expert agreed. The real question is whether the subcontracted PMC is empowered by the law of the State to carry out the given governmental function. Where the State contracts with a PMC to run a POW camp, and this PMC subcontracts with another PMC to run the camp, the only relevant question is whether this subcontracted PMC is empowered by the law of the State to run the POW camp, and if so, there would be attribution under Article 5.

The experts then considered the situation under an Article 8 scenario. One expert pointed out that a crucial issue will be whether the State requires that the PMC with which it contracts to incorporate into any subcontract the same terms as are in the State-PMC contract, e.g., those terms related to the ROE, the substance of which may determine whether the conduct can be attributed to the State. Where the contract between the State and the PMC does not permit subcontracting, but the PMC subcontracts anyway, this PMC will have exceeded its authority within the meaning of Article 7 of the DASR; its act in subcontracting would be *ultra vires*.<sup>19</sup> Therefore, unlike where the conduct is attributable under Article 5, the State would not be responsible.

Where the contract is silent on the possibility of subcontracting, one expert was of the view that the PMC would not have exceeded its authority were it to subcontract. Therefore there would be State responsibility.

Another felt that, if the conduct occurred within the State's jurisdiction, the State would be responsible because it would have failed in its duty to exercise due diligence by not specifically addressing the ability to subcontract in the State-PMC contract.

**e) Is there a liability gap with respect to responsibility for private acts where the PMC is not the armed forces of the State?**

One expert observed that, where the conduct of the PMC is attributable to the State under Article 5 of the DASR, i.e., where the PMC does not constitute the armed forces of the State, the State will only incur responsibility for violations which occur while this PMC or its members are acting in their official capacity in exercising governmental authority. This

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<sup>19</sup> Id., p. 44. Article 7 provides that:

The conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

expert pointed out, therefore, that there would appear to be a difference between armed forces and such a PMC with respect to the attribution of private acts. Article 91 of AP I restates the rule provided in Article 3 of Hague Convention IV of 1907:

A Party to the conflict which violates the provisions of the Conventions of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.<sup>20</sup>

Article 91, therefore, seems to provide for absolute responsibility with respect to the conduct of members of the armed forces, including private acts. The Commentary to Article 91 of AP I, however, refers only to responsibility for acts *ultra vires*, i.e., conduct committed by persons acting in their official capacity, even where they exceed their competence or contravene instructions.<sup>21</sup> Such persons are acting with authority or with the appearance of authority. The Commentary to Article 7 of the DASR cites the Commentary to Article 91, which notes that Article 91 “corresponded to the general principles of law on international responsibility.”<sup>22</sup> It is not entirely clear, therefore, whether the private acts of soldiers will be attributable to the State *because* they are soldiers or alternatively whether their acts will be attributable to the State because soldiers exercise apparent authority for much of what they do in the theatre of a conflict.<sup>23</sup> Consequently, it is not clear whether there exists a liability gap

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<sup>20</sup> Additional Protocol I, supra note 1, Art. 91.

<sup>21</sup> Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary to the Additional Protocols of 1977*, ICRC, Geneva, 1987, para. 3660.

<sup>22</sup> Commentaries to the draft Articles on State Responsibility, supra note 5, p. 101. Paragraph 8 of the Commentary to Article 7 draws the distinction between *ultra vires* conduct and private conduct. In the view of the Commentary, the distinction is ultimately a matter of whether the individuals are “acting with apparent authority.” While sometimes an important distinction, the Commentary also suggests that the “problem of drawing the line between unauthorized but still “official” conduct, on the one hand, and “private” conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it.” In such a situation, as may have been true in the case between Congo and Uganda described below, the fact that the State failed to exercise due diligence, or “vigilance,” with respect to its forces may obviate the need to draw this distinction, as the conduct will be attributable on this latter basis. It should also be noted, however, that the International Law Commission previously seems to have regarded IHL, as the *lex specialis*, as providing for absolute responsibility for members of the armed forces, i.e., including responsibility for acts committed by soldiers in their capacity as private individuals. *Yearbook of the International Law Commission*, 1975, Vol. II, p. 69, 27<sup>th</sup> Session, UN Doc. A/CN.4/SER.A/1975/Add.1.

<sup>23</sup> Since this Expert Meeting was held in August of 2005, the ICJ has decided a case in which it arguably addressed this question, *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, I.C.J. Reports 2005. Citing Article 91 of AP I, the Court made clear that, with respect to the conduct of the Ugandan armed forces, it is “irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority,” para. 214. Congo argued, however, that Uganda was responsible for all acts of plunder and illegal expropriation of its resources, including where members of the Ugandan forces acted in their private capacity, para. 227. Without explicitly rejecting this claim, the Court merely reiterated that Uganda is responsible for the *ultra vires* acts of members of its armed forces, para. 243. The Court then stated that, “whenever members of the UPDF were involved in looting, plundering and exploitation of natural resources in the territory of the DRC, they acted in violation of the *jus in bello*, which prohibits the commission of such acts by a foreign army in the territory where it is present,” para. 245. The Court then concluded that Uganda was responsible “for acts of looting, plundering and exploitation of the DRC’s natural resources by members of the UPDF in the territory of the DRC, for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as occupying Power in Ituri in respect to all acts of looting, plundering and exploitation of natural resources in the occupied territory,” para. 250. The Court, therefore, seems to find three bases for responsibility: 1) the fact that “acts” were committed by Ugandan soldiers, 2) that Uganda failed to fulfil its obligation of “vigilance” with respect to “these acts,” and 3) that Uganda failed to fulfil its obligations as an occupying Power with respect to “all acts” of this nature. Since Uganda was responsible for “all acts” by virtue of being an occupying Power, as opposed to only “acts” of its

between PMCs exercising elements of governmental authority under Article 5 of the DASR and members of the State's armed forces performing the same functions.

### **3. State responsibility where PMCs or their members are mercenaries**

The experts next explored the issue of State responsibility where PMCs or their members are mercenaries and their conduct is attributable to the State.

#### **a) Could a member of a PMC be a mercenary under international law?**

One expert made a presentation on the question of whether members of a PMC could constitute mercenaries under international law. This expert took Article 47 of AP I as the principal standard for determining who is a mercenary but noted that there are two other international conventions in force which provide wider definitions. States and PMCs, this expert cautioned, must therefore be aware of these conventions as well: the OAU Convention for the Elimination of Mercenarism,<sup>24</sup> and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, i.e., the UN Convention.<sup>25</sup>

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armed forces, it may be that the Court is recognizing that there may be some acts of plunder, looting and exploitation by its soldiers for which Uganda was not responsible on the basis that they were committed by Ugandan soldiers. While Uganda was clearly held responsible for some acts of its soldiers committed *ultra vires*, it is not clear the full extent to which Uganda was held responsible for such acts where committed under apparent authority. Before stating the *ultra vires* rule for attribution, however, the Court notes that "Uganda is responsible both for the conduct of the UPDF as a whole and for the conduct of individual soldiers and officers of the UPDF in the DRC," para. 243, indicating that Uganda was being held responsible for some conduct which was probably committed under apparent authority. The Judge *ad hoc* appointed by Uganda to serve on the Court, Judge Kateka, dissented on this holding, noting that the Court relied on the Report of the Porter Commission, which was established by Uganda to investigate allegations made by earlier UN reports; this Commission found that "individual soldiers engaged in commercial activities and looting, were acting in a purely private capacity," *Dissenting Opinion of Judge ad hoc Kateka*, para. 50, 53. Indeed, relying on the Commission, the Court notes that the "exploitation had been carried out, *inter alia*, by senior army officers working on their own and through contacts inside the DRC; by individual soldiers taking advantage of their postings...", *Judgment*, para. 241. That the Court recognizes this factual finding, and proceeds to hold Uganda accountable for "acts" committed by members of Uganda's armed forces, may indicate that the Court takes the view that, while private acts of soldiers are not attributable to the State as such, many or most acts by soldiers will be attributable given that soldiers are quite often acting under apparent authority. Also, as suggested in Paragraph 8 of the Commentary to Article 7 of the DASR, the Court may have felt that the need to clearly distinguish between which acts by Ugandan soldiers were *ultra vires* and which were private acts was obviated by the fact that the conduct seems to have been widespread such that Uganda was responsible for all these acts on the basis that it failed in its duty to exercise due diligence or "vigilance." Judge Kateka, however, dissented on the grounds that these acts of plunder were committed by Uganda soldiers in their private capacity. He points to the distinction between *ultra vires* conduct and private conduct as described in Paragraph 8 of the Commentary to Article 7 of the DASR, *Dissenting Opinion*, para. 54.

<sup>24</sup> Convention of the OAU for the Elimination of Mercenarism in Africa, Libreville, 3 July 1977. O.A.U. Doc. CM/817 (XXIX) Annex II Rev.1. (1977), reprinted in Gino J. Naldi, ed., Documents of the Organisation of African Unity 58 (1992). See also the draft Convention on the Prevention and Suppression of Mercenarism, produced by the International Commission of Inquiry on Mercenaries, Luanda, June 1976, reprinted in P.W. Mourning, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 Virginia J. Int'l L. (1992) p. 613. The Luanda draft Convention, this expert noted, invents the crime of mercenarism, hitherto unknown to the law, (hereafter, OAU Convention).

<sup>25</sup> International Convention against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. 44/34, 44 UN GAOR Supp. No. 49 at 306, UN Doc, no. A/44/49 (1989), (hereafter, UN Convention).



Article 47 of AP I provides the principal definition of a mercenary, a definition upon which the other international conventions build. AP I, of course, applies only in IACs. Under Article 47(2) a mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.<sup>26</sup>

One must satisfy all six conditions to qualify as a mercenary. In the view of this expert, this definition is narrow, and few persons would fall within it. It would also be difficult to apply, given the requirement in 47(c) that the person be motivated by personal gain, which would be difficult for States to assess and prove. This expert suggested there were three categories of people where questions could arise.

One such category would be those who accompany the armed forces of a State but who are not members of those armed forces, including those within the meaning of Article 4A(4) of GC III. Take, for example, persons accompanying the armed forces of the US during the IAC with Iraq. To be a mercenary under Article 47, such a person must not be a member of the armed forces of the US (paragraph 2(e)), must have been recruited to fight in the conflict (paragraph 2(a)), must have in fact taken a direct part in hostilities (paragraph 2(b)), and must have been motivated primarily by the desire for private gain (paragraph 2(c)). If such a person is a US national, however, he will not satisfy paragraph 2(d) and thus will fall outside this definition, presumably regardless of where the PMC for which he works is incorporated. If the person is of another nationality, however, one question becomes whether they have “been sent by a State not a Party to the conflict on official duty as a member of its armed forces.” If the person accompanying the US armed forces is a German soldier on an official mission, for example, he will also fall outside definition (paragraph 2(f)).

Where this German, however, has not been sent by Germany on an official mission, he could come within the definition, assuming that sub-paragraphs (a-c) are satisfied. The only remaining question is whether this German is a resident of US within the meaning of paragraph 2(d). This German conceivably could be. The more interesting question, this presenting expert raised, is whether there is an argument that, as an employee of a PMC incorporated in the US, for instance, this German employee acquires the nationality of his US employer for purposes of paragraph 2(d). If this argument can be made, this expert questioned, what happens in the reverse situation where a US national is employed by a German PMC in the IAC in Iraq?

Another area of difficulty is the requirement in Article 47(2)(a) that the person be “specially recruited to fight.” One can envision certain circumstances in which this would be satisfied

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<sup>26</sup> Additional Protocol I, *supra* note 1, Art. 47.

beyond a doubt. The answer might be less clear, this expert observed, in a situation where members of a PMC are hired to engage in security operations of a defensive character.

The second category of persons are members of PMCs hired to protect the personnel of international organisations, e.g., personnel providing humanitarian relief working for either governmental or nongovernmental organisations. Again, the question becomes whether the members of the PMC are effectively “recruited to fight.” Where the members of the PMC are envisioned as having to use force defensively in order to protect such personnel, this expert felt that an argument could be made that they do not come within the meaning of Article 47(2)(a).

The third category is that of foreigners who are recruited to overthrow governments. In such a situation, AP I would not necessarily be applicable, since there may never be an IAC. Here, therefore, the OAU and the UN Conventions become important.

Article 1(1) of the OAU Convention provides the same definition of mercenary as provided by Article 47. Article 1(2), however, provides for the crime of mercenarism, which is “committed by the individual, group or association, or body corporate registered in that State, representative of a State or the State itself with the aim of opposing by threat or armed violence a process of self-determination, stability or the territorial integrity of another State.” The Convention therefore, this expert observed, expressly envisions and attempts to encompass the coup d’état sort of situation.

The UN Convention also does not require the existence of an armed conflict for a person to qualify as a mercenary. Article 1(1) provides almost the same definition as in Article 47(2) of AP I, leaving out the requirement in 47(2)(b) that the person “does, in fact, take a direct part in hostilities.” Under Article 1(1) there need not have been an armed conflict, though the person must have been recruited to fight in one. Article 1(2) provides another definition, applicable “in any other situation.” A mercenary is a person who:

- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at :
  - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
  - (ii) Undermining the territorial integrity of a State;
- (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
- (c) Is neither a national nor a resident of the State against which such an act is directed;
- (d) Has not been sent by a State on official duty; and
- (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.<sup>27</sup>

This definition is clearly aimed at situations other than armed conflicts, including coup d’état attempts. This expert noted as well that, for a person to fall within this provision, it makes no difference whether or not the State of nationality of that person is party to the Convention.

*i. Article 47(2)(d): nationality / residency of the PMC or the member of the PMC*

The experts considered the question the presenting expert posed as to whether the nationality of the PMC itself is relevant for determining whether its members would come within the mercenary definition.

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<sup>27</sup> UN Convention, supra note 25, Art. 1.

The presenting expert indicated that the situation was not clear. Article 47 was not intended to address companies, but the existence of a company perhaps makes a difference. In this expert's view, there was a good argument that, for purposes of 47(2)(d), an individual acquires the nationality of the PMC for which he works, nationality being based on where the PMC is incorporated. Therefore if the nationality of the PMC itself is determinative, members of that PMC would not fall within the definition merely because they do not share the nationality of one of the parties to the conflict. Also, members of a PMC who do share the nationality of one of the parties to the conflict, but who work for a PMC which did not, might arguably satisfy 47(2)(d) and constitute mercenaries. Here, the particular PMC is a "mercenary company."

One expert questioned whether Article 47 definition was intended to encompass mercenary groups as such. This expert consulted a Commentary to AP I on Article 47: it was in 1977 "implicit in both custom and conventional international law that the combatant's privilege and entitlement to prisoner of war status did not extend to members of armed groups which operate essentially for private ends and do not belong to a Party" to an IAC.<sup>28</sup> The reference to "armed groups" implies the possibility of taking into account the group's, or the PMC's, nationality.

Other experts felt that Article 47(2)(d) required an individualized determination and that the nationality of the PMC is irrelevant. One expert was of the view that the text of 47(2)(d) makes this clear.

Article 47(2)(d) does provide that residency will remove a person from the definition, another expert pointed out. The difficulty here, however, as yet another expert observed, lies in determining what it means to be a resident of a State.

In this case, one expert observed, the German working for an American PMC during the IAC in Iraq would fall within Article 47, while his American and British co-workers would not. A number of experts felt, therefore, that finding oneself a mercenary under Article 47 is a real possibility for some members of PMCs.

## *ii. Article 47(2)(c): the required motivation*

The presenting expert felt that what would probably make Article 47 unworkable in practice is the requirement under 47(2)(c) that the person be "motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party." First, this expert pointed out, it may be very difficult to determine that an individual is not primarily motivated by ideological considerations or a sense of adventure. Second, it will be difficult to prove that the promised compensation is "substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party" given the roles members of PMCs perform for which there may be no clear equivalent a State's armed forces.

Other experts disagreed. Most often this analysis would be fairly straightforward to conduct. One would start with the function that the member performs, e.g. guarding, and consider the

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<sup>28</sup> Bothe et al, *supra* note 4, p. 268.

rank of the soldier most likely performing this function. The salary of the member of the PMC, these experts pointed out, will invariably be many times greater than the salary of this soldier. Likewise, one expert observed, employees of PMCs, almost all of who are former soldiers, will themselves frequently have made clear that they are motivated to work for the PMC because of the high pay.

*iii. Article 47(2)(a): whether recruited to fight*

The experts also considered the requirement set out in 47(2)(a) that the person is “specially recruited...to fight in an armed conflict.” Often, one expert observed, these individuals do not regard themselves as having been recruited to fight. Rather, even where these individuals do end up directly participating in hostilities, they will have been recruited merely to guard something or someone or provide military training.

One expert pointed to the example of an American PMC, Military Professional Resources Incorporated (MPRI). This firm essentially planned and commanded military operations for Croatia during its war with the Serbia. Nevertheless, the contract specified that the firm was to provide training in civil-military relations. Another expert felt that MPRI was clearly “recruited...to fight” within the meaning of 47(2)(a). Regardless of what the contract specified, none of the members of this PMC really thought they were hired by Croatia to make PowerPoint presentations. Surely, the contract alone is not decisive for determining whether the firm has in fact been recruited to fight.

In the view of one expert, Article 47(2)(a) is satisfied where the PMC is recruited to undertake activities which may involve its members taking a direct part in hostilities. This can become a delicate question, this expert noted, since security services which might normally be privatized in peacetime may well, during an IAC, involve direct participation in hostilities. Certainly, that members of the PMC carry arms is not sufficient. Under Articles 22(1) of GC I and 35(1) of GC II, medical personnel may be armed and use their weapons in defence of themselves and the wounded and sick in their charge, and such action will not constitute direct participation in hostilities and therefore not deprive them of their immunity from attack. Medical personnel are not, however, permitted to defend a hospital or sick bay itself where enemy armed forces seek to take control of it. Where members of a PMC are armed, and are envisioned as using their arms only in self-defence, and perhaps in defence of non-combatants or combatants *hors de combat*, then they would likewise not be envisioned as persons who will take a direct part in hostilities and, therefore, not as persons who have been recruited to fight within the meaning of Article 47(2)(a). This expert observed, however, that in a situation such as Iraq, given the amount of disorder in the country, it would not always be easy to distinguish between a use of force by a PMC which constitutes a lawful effort at defending something from criminals and one which constitutes a direct participation in hostilities. And again, the question is not merely whether the PMC members do directly participate in hostilities under 47(2)(b) but whether they were envisioned and contracted to take a direct part in hostilities such that they can be said to have been recruited in order to fight under 47(2)(a).

Another expert advanced the view that, at least for perhaps the majority of PMCs, who are hired to guard something, the crucial question is whether the thing which they are hired to guard is a military objective. Article 52(2) of AP I provides that “attacks shall be limited strictly to military objectives.” Article 49(1) defines “attacks” as “acts of violence against the adversary, whether in offence or defence.” Where the PMC is considered to be guarding

something which is a military objective, and is guarding this object during an IAC against the other party to the IAC, then any act of violence in defence of this object constitutes an “attack” within the meaning of Article 49(1). Where a PMC is hired to defend a military objective against attacks from enemy forces, it is essentially recruited to engage in “attacks” itself and must therefore be viewed as having been “recruited...to fight” within the meaning of Article 47(2)(a). Members of a PMC cannot therefore claim to fall outside 47(2)(a) because they merely provide security. Rather, the question becomes, first, whether the object they are hired to guard is a military objective, and second, whether the PMC has been hired to defend this military objective against enemy forces or merely against criminal activity.

The other experts agreed with this analysis. Nevertheless, as a couple experts observed, it may not always be clear at a given time whether an object constitutes a military objective. In fact, any object can become one during the course of the war. Clearly, where the PMC is hired to defend something, which at the time of hiring is a military objective, Article 47(2)(a) would be satisfied. A number of experts felt, however, that this conclusion was too narrow and suggested that, where a PMC is hired to defend something which, at the time of hiring, was likely to become a military objective, Article 47(2)(a) would also be satisfied. Another expert felt that, where the object becomes a military objective after the PMC is already been hired to guard it, and the members of the PMC choose to defend it nevertheless, then they would satisfy Article 47(2)(a).

The experts also considered the other element of this analysis: that the members of the PMC must have been recruited to defend this military objective against enemy forces rather than merely against criminal activity. One expert agreed with this analysis but pointed out that, in practice, it may be very difficult to distinguish between hostile attacks by enemy forces from pure criminality. The experts agreed that whether members of the PMC are armed is not itself determinative; they may be armed for self-defence purposes. One expert suggested that the ROE issued to the members of the PMC would be helpful in determining whether the PMC members are permitted to use their weapons merely in self-defence and in defence of the object against criminals or whether they are also authorized to use their weapons in defence of the object where it comes under attack from enemy forces.

#### **b) Legal consequences where a member of a PMC is a mercenary**

The experts then considered the legal consequences where someone constitutes a mercenary under Article 47 and under the UN and OAU Conventions.

Article 47(1) provides that a “mercenary shall not have the right to be a combatant or a prisoner of war.” One expert observed that, where the PMC constitutes the State’s armed forces under Article 43, its members cannot fall within Article 47. Where members of the PMC fall within Article 4A(4) of GC III, there are competing theories as to whether this person would lose POW status as a result of directly participating in hostilities. Where such members are considered to be entitled to POW status, but otherwise fall within the mercenary definition of Article 47, the Detaining Power would no longer be obliged to accord these persons POW status.

Another expert questioned whether it makes any real difference whether or not a person constitutes a mercenary under Article 47. A civilian who participates in hostilities will not be entitled to POW status and can be prosecuted for mere participation. The mercenary, who may have been entitled to POW status under Article 4A(4) of GC III, will not be entitled to

POW status and may also be prosecuted for mere participation, having no “right to be a combatant.”

As the presenting expert noted previously, however, being a mercenary and related activities are criminalized under both the OAU and UN Conventions, both of which also provide broader definitions as to who is a mercenary.

**c) State responsibility where members of the PMC are mercenaries**

The experts agreed that, for purposes of State responsibility under Articles 5 and 8 of the DASR, it would make no difference whether the members of the PMC constitute mercenaries under Article 47 of AP I.

The OAU and UN Conventions, the experts noted, may create additional legal bases for responsibility for State-Parties where the members of the PMC fall within the broader definitions provided by these Conventions.<sup>29</sup>

**4. State responsibility where a State hires a PMC in a NIAC**

One expert made a presentation on this issue, outlining the main questions that must be addressed. In a NIAC, i.e., where a State employs a PMC to help it put down an insurrection, there are no formal categories of combatants and no thus no issue of POW status. For purposes of State responsibility based on Articles 4, 5 or even 8 of the DASR, this expert began by wondering whether it makes any difference that the State has hired the PMC to operate in a NIAC as opposed to an IAC. With respect to the issue of “instructions” within the meaning of Article 8 of the DASR, this expert could not see how it would make any difference.

Otherwise, for the conduct of an entity to be attributed to the State, one must decide that the entity either constitutes a State organ under Article 4 or that it exercises elements of governmental authority under Article 5. This expert questioned whether perhaps the threshold for making either of these determinations might be lower in the context of a NIAC than it is in the context of an IAC.

Similarly, this expert wondered whether the term “armed forces” is broader under AP II for NIAC than under AP I for IAC and thus more likely to encompass a PMC for purposes of determining that the PMC constitutes the State’s armed forces and thus a State organ under Article 4 of the DASR. The expert consulted the Commentary to Article 1(1) of AP II, which provides that the “term ‘armed forces’ of the High Contracting Party should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested, such as, for example, ‘regular armed forces,’ in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries.”<sup>30</sup>

One expert posed a practical question. For there to be State responsibility, some entity whose conduct is attributable to the State must have committed an internationally wrongful act. This expert wondered whether a PMC could commit an internationally wrongful act against citizens of the State to whom its conduct is attributable, i.e., against its “own” citizens. Another expert responded to this question by pointing out that citizens quite often bring

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<sup>29</sup> OAU Convention, *supra* note 24, Arts. 5 and 6; and the UN Convention, *supra* note 25, Arts. 5, 6 and 7.

<sup>30</sup> Commentary to the Additional Protocols of 1977, *supra* note 21, para. 4462.

claims against their own States arising out of the conduct of State organs, conduct which could include internationally wrongful acts committed by PMCs. Citizens bring such claims in domestic courts as well as in international courts such as the ECHR. In the latter case, the fact that the conduct constituted internationally wrongful conduct would be crucial.

**a) State responsibility under Article 4 of the DASR**

The experts noted that, where a PMC constitutes “armed forces” within the meaning of Article 1(1) of AP II, the PMC may constitute a State organ within the meaning of Article 4 for purposes of State responsibility. Nevertheless, one expert noted, the State may not bear responsibility for the conduct of its armed forces to the same extent as it would in the context of IAC. As discussed earlier, the private acts of members of the State’s armed forces may be attributable to the State in IAC by virtue of Article 91 of AP I, which is not applicable in NIAC. Under this view, Article 91 is exceptional and would thus create a difference between IAC and NIAC.

**b) State responsibility under Article 5 of the DASR**

One expert felt that fighting a civil war certainly constitutes an exercise of elements of governmental authority under Article 5 of the DASR. Where the State hires a PMC to help it put down an insurrection, the conduct of that PMC will most certainly be attributable to the State. A second expert observed that the case-law of the ECHR supports this view. The Court has held that Turkey is responsible for the conduct of “village guards,” such persons are armed and paid by the State but are not members of the armed forces or the gendarmerie or otherwise employees of the State.<sup>31</sup> The experts agreed that, in most cases, State responsibility for the conduct of PMCs in NIAC would arise under Article 5.

**c) State responsibility under Article 8 of the DASR**

The experts also agreed with the presenting expert that, for purposes of attribution under Article 8, it would not make any difference whether the PMC operated in an IAC or a NIAC.

**C. International responsibility where PMCs are hired to participate in Peace Support Operations (PSOs)**

The experts next turned to the question of international responsibility where a PMC is hired to participate on a PSO, focusing primarily on the State responsibility that would arise under Article 5 of the DASR.<sup>32</sup> The experts considered this issue in the context of PSOs conducted by organisations such as the UN, NATO, the European Union or the African Union.

**1. State responsibility where a State hires a PMC and sends it to a PSO**

For the conduct of a PMC to be attributable to the State under Article 5 of the DASR, the PMC would have to be “empowered by the law of that State to exercise elements of governmental authority.”

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<sup>31</sup> See, for example, *Acar and Others v. Turkey*, ECtHR, App. Nos. 36088/97 and 38417/97, Judgment of 24 May 2005, paras. 68-86.

<sup>32</sup> This analysis assumes that the PMC is not part of the armed forces of the State under Article 4A(1) of GC III such the conduct of the PMC would be attributable to the State under Article 4 of the DASR.

**a) Relationship between the State and the PMC contingent**

A couple of experts suggested that, where a State hires and officially sends a PMC as its contribution to a PSO, the conduct of that PMC will be attributable to the State on this basis alone. Since the contribution of troops is itself an inherently governmental function within the meaning of Article 5, it may not be crucial to determine whether the functions these troops perform on the PSO constitute the exercise of governmental authority. Under this view, the conduct of the PMC on the PSO would be attributable to the State, regardless of whether or not that PMC performs inherently governmental functions.

One of these experts stressed that only where the PMC constitutes a contingent will the mere sending of it by the State amount to an exercise of governmental authority such that its conduct will be attributable to the State under Article 5 of the DASR.

This expert observed that the notion of a “military contingent” implies a group that operates as a group, some members of which exercise military, if only peacekeeping or policing, functions, and which operates under a military command structure. Also, for this group to constitute a military contingent, there would have to be a continuing connection with the State that sends it. With respect to UN PSOs, at least, the sending State would have to be able to exercise criminal jurisdiction over the members of the contingent. This requirement has always been mandated by the agreements concluded between the UN and States contributing troops for UN PSOs<sup>33</sup> and is set out in the Secretary-General’s Bulletin.<sup>34</sup> While it may be unclear how a State that wished to send a PMC as a military contingent on a UN PSO would provide for such jurisdiction, this expert felt that the UN would never accept a PMC contingent unless this requirement was met.

In the view of this expert, the distinction between officially sending and merely funding a PMC amounts to whether the State is providing the group or the money for the group. Where the State does not send the PMC as a “contingent” and does not maintain a continuing relationship with the PMC, arguably including the ability to exercise criminal jurisdiction over its members, the conduct of that PMC will not be attributable to the State, regardless of the functions it performs.

All the experts agreed that where a State merely funds a PMC deployed on a PSO, the conduct of the PMC would not be attributable to the State. By way of analogy, one expert pointed out that, in practice, Western States often fund peacekeeping activities conducted by the armed forces of African States. Clearly in this instance, the conduct of these forces would not be attributable to the funding States. Likewise, all of the experts agreed that, where a State were to refer a PMC to an international organisation for a given PSO and volunteer to fund its activities, the conduct of that PMC would not be attributable to that State. Furthermore, the conduct would not be attributable regardless of whether the PMC performed functions requiring the exercise of governmental authority. Here, one expert pointed out, the conduct of the PMC would likely be attributable to the international organisation, since it is the international organisation that is sending the PMC. Another expert observed that the UN’s use of CIVPOL presents an analogous situation. Members of CIVPOL are recruited

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<sup>33</sup> Model Contribution Agreement between the United Nations and Participating State Contributing Resources to The United Nations Peacekeeping Operation, annex to Administrative and Budgetary Aspects of the Financing of The United Nations Peacekeeping Operations, UN Doc. A/50/995 (1996), section X.

<sup>34</sup> Observance by United Nations forces of international humanitarian law, ST/SGB/1999/13 (1999), Section 2.



individually by the UN, and the UN is solely responsible for their conduct. This expert also observed that, given the clear distinction between the military and civilian components of UN PSOs, where a PMC is funded by one State and made available to the military contingent of another State deployed on the PSO, its conduct might well be attributable to the latter State, at least where the PMC is answerable to that State's military contingent.

All of the experts agreed, therefore, that the State must, in some sense, "send" the PMC rather than merely fund its activities for the conduct of the PMC to be attributable to the State under Article 5. One expert agreed that there must be some sort of nexus between the State and the PMC. Another felt that there would have to be some sort of contractual relationship between the State and the PMC which provides for some measure of control.

#### **b) Functions performed by the PMC**

Some experts were of the view that, where a State sends a PMC "military contingent," the mere sending of it might be sufficient itself to trigger attribution under Article 5, even where some members of this contingent perform non-military or even non-governmental functions. However, most experts were of the opinion that not only must the State send the PMC, rather than merely fund its activities, it must send the PMC to the PSO to perform inherently governmental functions. There must be a genuine link between the State and the actual exercise of governmental authority by the PMC. For its conduct to be attributed to the State under Article 5, one expert observed, the PMC would have to "be empowered by the law of that State to exercise elements of governmental authority."

What functions constitute the exercise of governmental authority, therefore, becomes a crucial question. Where a State sends a PMC to perform the sort of peacekeeping functions which a military contingent composed of members of the State's regular armed forces would perform, a number of experts observed, the PMC would probably be performing governmental functions. A PSO quite often constitutes an exercise in nation building. While nation building is perhaps not an inherently military function, the experts agreed that it is an inherently governmental function.

Other experts were unsure, however, whether all the functions that might be performed by a PMC on a PSO would constitute governmental functions. One expert gave the example of delivering humanitarian aid. This is a function quite often undertaken by non-governmental organisations. Likewise, where a State sends a PMC to establish and run a field hospital, a second expert observed, the PMC would not be exercising elements of governmental authority. Demining is another good example. While demining might once have been considered a governmental function, humanitarian organisations regularly hire PMCs to do this nowadays.<sup>35</sup>

One expert observed, however, that the focus of Article 5 is on "governmental authority." The crucial question is whether the entity performing the function, whether a PMC or the government itself, requires governmental authority in order to carry out the function. While only an entity exercising governmental authority can detain and imprison people, anyone can undertake to remove landmines from a minefield.

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<sup>35</sup> One expert pointed out that demining, therefore, is also a good example of the impact of increasing privatization on the question of what constitutes a governmental function. As more and more functions become privatized, fewer and fewer functions will be seen as governmental functions.

The experts again consulted the Commentary to Article 5 which gives a number of examples of functions requiring the exercise of governmental authority: “powers of detention and discipline pursuant to a judicial sentence or to prison regulations,...powers in relation to immigration control or quarantine.”<sup>36</sup> The exercise of police powers is therefore clearly an exercise of governmental authority.

All the experts, therefore, agreed that, where the State sends a PMC to perform policing or peacekeeping functions on a PSO, the conduct of that PMC will be attributable to the sending State under Article 5.

## **2. The international responsibility of the international organisation for the conduct of the PMC**

A couple of experts observed that where the international organisation conducting the PSO hires and sends the PMC, which may have been referred to it and funded by a State, the conduct of that PMC will be attributable to the organisation such that the organisation will bear the responsibility for internationally wrongful acts committed by the PMC. The International Law Commission has recently drafted certain provisional articles on the international responsibility of international organisations.<sup>37</sup> Article 4(1) of these draft Articles provides that:

The conduct of an organ or agent of an international organisation in performance of functions of that organ or agent shall be considered as an act of the international organisation under international law whatever position the organ or agent holds in respect of the organisation.<sup>38</sup>

Where the PMC is hired by the international organisation, these experts observed, the PMC will constitute an organ or agent of that organisation for purposes of attribution.

## **D. State responsibility where the conduct of the PMC is not attributable to the State: the concept of due diligence under HRL**

The experts first considered obligations imposed on a State in relation to the conduct of PMCs by the due diligence concept under HRL, and later turned to obligations imposed by any equivalent concept under IHL, as related in Section E.

### **1. The due diligence concept under HRL**

One expert began the discussion by making a presentation on the concept of due diligence under HRL. Due diligence, this expert observed, is an old concept under international law, originally designed to allow States to protect their nationals when abroad. When a national of one State was harmed by a private person or entity while in another State, the State exercising

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<sup>36</sup> Commentaries to the draft Articles on State Responsibility, *supra* note 5, p. 92.

<sup>37</sup> Responsibility of International Organisations, Report of the International Law Commission on the work of its Fifty-fourth session (2002), *Official Records of the General Assembly, Fifty-seventh session, Supplement No. 10* (A/57/10), chp. VIII.); Responsibility of International Organisations, Report of the International Law Commission on the work of its Fifty-fifth session (2003), *Official Records of the General Assembly, Fifty-eighth session, Supplement No. 10* (A/58/10), chp. IV.); Responsibility of International Organisations, Report of the International Law Commission on the work of its Fifty-sixth session (2004), *Official Records of the General Assembly, Fifty-ninth session, Supplement No. 10* (A/59/10), chp. V.).

<sup>38</sup> Commentaries to the draft Articles on State Responsibility, *supra* note 5, p. 44.

diplomatic protection could invoke the due diligence rule to question whether the latter State had done everything required of it to protect its national. This expert was of the view that the standards for determining whether or not a State has failed to exercise due diligence in the context of diplomatic protection have been overtaken by the advent of HRL.<sup>39</sup> Also, the State's obligation to exercise due diligence under HRL applies to all persons in a State's jurisdiction, whether foreigners or nationals.

This expert sought to establish what the standard is for determining whether the State has failed to exercise due diligence, citing the case of *Osman* before the ECHR involving an alleged deprivation of the right to life. The Court set out the nature of the obligation:

It is thus accepted by those appearing before the Court that the right to life under the convention may also apply, in certain defined circumstances, a positive obligation on the authorities to take preventive, operational measures to protect an individual whose life is at risk from the criminal acts of another individual.<sup>40</sup>

In applying this rule, this expert felt the Court set quite a high standard for finding that the State has failed to exercise due diligence, at least with respect to the right to life. The *Osman* case involved a teacher who had become obsessed with one his pupils, a boy. The teacher was sacked, and the police were alerted that the boy was at risk. Ultimately, this teacher went to the boy's house and shot and killed the boy's father, missing the boy. The Court held that there had been no violation of the right to life, since it was not clear that the police knew or should have known of the existence of a real and immediate risk to the life of the family.<sup>41</sup>

With respect to inhuman and degrading treatment, however, this expert felt that the standard for determining whether a State has failed to exercise due diligence seems to be a bit lower. The case of *E. and Others v. UK* involved the abuse of children in their home. The Court found that, given its contact with the family, the governmental authority responsible for social services should have been aware of the abuse and should have taken measures to protect the children and held that:

fuller co-operation and communication between the authorities under the duty to protect the applicants and closer monitoring and supervision of the family would not necessarily have either uncovered the abuse or prevented it. The test under Article 3 however does not require it to be shown that "but for" the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.<sup>42</sup>

This expert noted that the Inter-American Court and Commission on Human Rights imposes the same positive obligations on the State, as does the Human Rights Committee, given its General Comment 31.<sup>43</sup>

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<sup>39</sup> This expert pointed out that the Special Rapporteur on diplomatic protection, John Dugard, has suggested that, with respect to the denial of justice, the relevant standard for diplomatic protection is provided by HRL. Diplomatic Protection, Report of the International Law Commission on the work of its Fifty-fourth session (2002), *Official Records of the General Assembly, Fifty-seventh session, Supplement No. 10 (A/57/10)*, chp. V.), para. 278; and Diplomatic Protection, Report of the International Law Commission on the work of its fiftieth session (1998), *Official Records of the General Assembly, Fifty-third session, Supplement No. 10 (A/53/10)*, chap. V.), para. 91.

<sup>40</sup> *Osman v. UK*, ECtHR, App. No. 87/1997/871/1083, Judgment of 28 October 1998, para. 115.

<sup>41</sup> *Id.*, paras. 128-130.

<sup>42</sup> *E. and Others v. UK*, ECtHR, App. No. 33218/96, Judgment of 26 November 2002, para. 98.

<sup>43</sup> General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 7.

One can envision a situation in which a PMC is engaged in trafficking such that the State would be under a positive obligation to take measures, at least where it was aware that this was occurring. On the basis of the *Osman* and *E. v. UK* cases, while the standard for proving a violation of due diligence is high, it is nevertheless a flexible test. In the view of this expert, the State is under an obligation to take reasonably available measures to protect persons threatened by a PMC.

Where the conduct of a PMC cannot be attributed to the hiring State under Articles 5 or 8 of the DASR, this expert felt that a court would apply this HRL due diligence standard. Where the State itself has not hired the PMC, a court would probably apply the HRL standard for due diligence less strictly, as such a State cannot be expected to have the same knowledge about the PMC's activities as would a State that hired it.

The presenting expert also observed that the issue of State responsibility for the conduct of PMCs is being overtaken by events to some extent, as victims of wrongful conduct are increasingly bringing cases directly against the PMC itself in civil cases, e.g., filing suits under the US Alien Tort Claims Act.<sup>44</sup>

## **2. States which owe due diligence obligations with respect to a PMC**

The presenting expert observed that there are potentially three different States under an obligation of due diligence with respect to a particular PMC: 1) the State which hires the PMC; 2) the State in which the PMC conducts its operations, and 3) the State in which the PMC is incorporated. While in some instances, any three of these States might be the same, the concrete obligations which flow from the due diligence rule may differ according to the State's relationship to the PMC. In discussing the nature of these obligations, therefore, the experts throughout the meeting sought to distinguish among these different States.

One expert also observed that, where a due diligence obligation requires a State to bring a criminal prosecution for a violation of an international crime, an obligation would flow to the State of nationality of the particular employee of the PMC.

Another expert felt that, as a practical matter, the issue of the duty to regulate will probably arise first in the ECHR with respect to the State of incorporation. In this expert's view, where the State has merely hired the PMC, its connection to the PMC is much weaker than where the State has permitted the PMC to incorporate or operate its territory. Where the State hires a private company, and this company, rather than the State, hires the PMC, the PMC's connection with the State is yet weaker. The farther removed a State is from the employee who actually commits the acts, the less likely it is that the State will be found to have failed in its due diligence obligation.

With respect to the hiring State, one expert was of the view that there is a strong argument that, where a State hires a PMC to conduct operations in certain situations, e.g., in area of hostilities, that State is under an obligation to exercise due diligence in regulating the contract. The State must regulate how the PMC carries out its operations and whom it employs.

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<sup>44</sup> "Alien Tort Claims Act," Title 28, § 1350 of the United States Federal Code. Adopted in 1789, the law, in its entirety, provides that 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."

Several experts observed that the State exercising control (i.e., jurisdiction) over territory in which a PMC operates would clearly be under a due diligence obligation to protect. Where a territory is under belligerent occupation, for instance, the Occupying Power is such a State.<sup>45</sup> Under HRL, however, the issue is whether the State exercises effective control over the territory, regardless of whether the State's presence is regarded as a military occupation or not. This State is certainly under an obligation to protect with respect to the violent conduct of PMCs operating in such a territory.

One expert brought up the issue of States which do not exercise effective control over parts of their own territory, e.g., Nigeria and Columbia. Another expert observed, however, that Nigeria is certainly not a failed State, and thus, to the extent that this duty to protect requires Nigeria to put in place a legal regime for regulating the activities of PMCs in its territory, Nigeria can be held accountable for its failure to do so.

Another expert described how PMCs working in Iraq are regulated. When the Coalition Provisional Authority was exercising authority as the Occupying Power, it investigated incidents involving PMCs. After the Coalition Provisional Authority ceased to exercise authority, PMCs could go to the American Embassy in Iraq and request an investigation when an incident occurred, and it would be carried out by Iraqi police and the US military together.

### **3. The obligation to protect**

The obligation to exercise due diligence, several experts observed, is derived from the State's obligation under HRL to protect life and to protect persons from torture and inhuman and degrading treatment. One expert noted that, in addition to the cases mentioned by the presenting expert, there are other cases involving wrongful conduct by paramilitary forces in which Human Rights bodies have imposed an obligation to exercise due diligence with respect to the right to life, e.g., the *Velásquez-Rodríguez* case,<sup>46</sup> the *Kaya* case,<sup>47</sup> and the *Kiliç* case.<sup>48</sup> In these cases, the claimant was unable to prove that the government was directly linked to the paramilitary force's activities, but the State was nevertheless found to be in violation of the right to life, since it failed to exercise due diligence in preventing the violence and failed to properly investigate what had happened. A second expert agreed. The right to life imposes a duty to prevent and to investigate incidents. A State is obliged to prevent private persons from harming other private persons where the latter are at a foreseeable risk of violence. A State is also obliged to investigate when someone is the victim of violence. Both duties are essentially of a due diligence nature, though what will constitute a failure to exercise due diligence, this expert noted, may differ in these two contexts.

#### **a) The obligation to prevent human rights abuses**

The presenting expert noted that there is a fairly high threshold for determining when a State has failed in its due diligence obligation because it failed to take measures to prevent a private person from harming another private person. With respect to a duty to regulate PMCs, this

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<sup>45</sup> See footnote 62 below regarding the recent *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, I.C.J. Reports 2005.

<sup>46</sup> *Velásquez-Rodríguez. v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C, No. 4, para. 172.

<sup>47</sup> *Mahmut Kaya v. Turkey*, ECtHR, App. No. 22535/93, Judgment of 28 March 2000, paras. 101, 108-109.

<sup>48</sup> *Kiliç v. Turkey*, ECtHR, App. No. 22492/93, Judgment of 28 March 2000, paras. 77, 83.

expert felt that there is a very high threshold for a court to conclude that a State's regulatory regime is deficient such that it constitutes a breach of the State's due diligence obligation.

This expert cited a couple of cases before the ECHR where the adequacy of the State's legislation protecting persons from violence committed by private persons was called into question. In the first, the claimant, who had been raped, alleged violations of Article 3 (inhuman and degrading treatment) and Article 13 (right to a remedy) due, in part, to the way in which the State's criminal code defined rape. The Court here noted that that the criminal codes of other States defined rape in the same way and held there was no violation by the State on the grounds that this legislation was deficient. Rather, the Court found the State only in violation of its Article 3 obligation to protect the claimant from inhuman and degrading treatment as a result of the approach taken by the State's agents in investigating and prosecuting the rape.<sup>49</sup> The second case involved a boy who was beaten by his stepfather. The stepfather was tried for assault and permitted under the State's law to argue that the treatment constituted lawful punishment. The stepfather was found innocent by a jury, and the claimant alleged violations of Articles 3 and 13. The Court found the State in violation of Article 3 because its law provided that a person charged with assault of a child could raise the defence that the treatment merely constituted lawful punishment. The State's legislation regarding children, the Court held, did not adequately protect the child. Since the treatment in this case constituted inhuman treatment under Article 3, and since the jury did not convict the stepfather, the State was held in breach of Article 3.<sup>50</sup> In this expert's view, therefore, the State's legislation must be pretty egregious before the Court will determine that the legislation itself puts the State in breach of its obligation to exercise due diligence.

Another expert felt that the threshold might not be quite so high in the context of PMCs. Where the PMC is seen as closely linked to the State, though not such that there is attribution under Article 5 of the DASR, a court is going to be more willing to find a State's regulation deficient and thus in breach of its obligation to prevent human rights violations. Likewise, where a private entity is performing an inherently dangerous activity, whether providing security or running a railroad, a court will also be more willing to find that a State owes an obligation to regulate sufficiently.

**b) Duty where there is known risk of violence or the activity is inherently dangerous**

An expert stated that there is an obligation of due diligence to take positive measures to prevent violent conduct by a PMC in either of two situations.

The first situation is where the State has, or should have, reason to believe that a particular PMC is engaged in conduct that would constitute violations of HRL, were the State engaged in this conduct. This situation is covered by the rule articulated in the *Osman* case, though, in the view of this expert, the State need not have reason to believe that there is a risk to a particular individual; rather, there is an obligation to prevent where the State regards or should regard the PMC itself as suspect. Likewise, where a PMC is not suspect, but there is a certain class of persons who are at a foreseeable risk of being victims of violence, there would also be an increased obligation on the State to take positive measures to prevent the violence. One

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<sup>49</sup> *M.C. v. Bulgaria*, ECtHR, App. No. 39272/98, Judgment of 4 December 2003, paras. 169-170, 185, 187, 201.

<sup>50</sup> *The case of A. v. United Kingdom*, ECtHR, App. No. 100/1997/884/1096, Judgment of 23 September 1998, paras. 7-14, 23-24, 29-30.

such instance might occur where a PMC composed of members of one ethnic group is hired to work in a situation where there are persons of another, rival ethnic group.

The second situation is where the PMC is engaging in an inherently dangerous situation. Where a PMC is hired to guard an oil pipeline for instance, its use of force in defence of that pipeline is foreseeable and thus there is a real possibility of killings which would be considered arbitrary killings if they were committed by the State. In such a situation, this expert felt that there was a strong argument that the hiring State in particular was under an obligation to take measures to prevent such killings, e.g., by providing a sufficient regulatory framework requiring, for instance, that PMCs operate under clear ROE. A second expert agreed. Guarding a pipeline in a volatile situation is a good example. Here, even a State's best trained soldiers would likely find the situation difficult.

Another expert agreed that the nature of this due diligence obligation to prevent human rights violations depends on this two couple of factors. The more a State knows about a PMC and the greater the State's involvement with the PMC, the greater are the obligations of due diligence. Likewise, the riskier the situation in which the PMC is permitted to operate, and the greater the threat to life or human dignity, the greater these obligations are. This expert also sought to clarify what an obligation to regulate might entail. Not only would the State be obliged to regulate the contract of the particular PMC; the State could also be seen as under an obligation to enact industry-wide regulation, e.g., to ensure that the State can exercise influence and jurisdiction over the PMC and its members. Moreover, such obligations would bind the hiring State, the State in which the PMC is conducting its operations as well as the territorial State, i.e., the State in which the PMC is incorporated. Such parameters should be seen as increasing or decreasing the State's substantive obligations of due diligence, and they would apply in the context of the duty to investigate and provide a remedy as well as in the context of the duty to prevent human rights abuses.

Another expert agreed that there is strong argument that where a State hires a PMC to conduct operations in area of hostilities, that State is under a due diligence obligation to regulate the contract. The State must regulate how the PMC will carry out its operations as well as whom the PMC hires as employees. Yet another expert agreed but observed again that the farther removed a State is from the employee who actually commits the acts, the less likely it is that the State will be found to have failed in its due diligence obligation.

#### **c) An obligation to regulate the industry derived from the obligation to protect**

Other experts sought to explore further whether a State might be under an obligation to enact legislation regulating the PMC industry as a whole, or segments of it. One expert felt that Article 2 of the International Covenant on Civil and Political Rights provides the basis for such an obligation. Article 2(2) provides that:

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 legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.<sup>51</sup>

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<sup>51</sup> U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Art. 2.

While the European Convention on Human Rights does not provide so explicitly for this requirement,<sup>52</sup> this expert pointed out that the ECHR has held that a State may in some instances be obliged to enact legislation in order to prevent systematic violations of human rights, citing a case against Poland involving the expropriation of land for which the claimant did not receive adequate compensation.<sup>53</sup> A second expert agreed that HRL does impose an obligation to regulate in a particular area where necessary, and that the Committee of Ministers of the Council of Europe will often call for the State to enact the necessary legislation.<sup>54</sup> Another expert observed that the Special Rapporteur on torture has called upon States to enact legislation in order to comply with their obligations under the Convention Against Torture.<sup>55</sup>

The obligation on the State to provide an effective remedy is also relevant with respect to its duty to regulate PMCs. Article 13 of the European Convention provides that

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.<sup>56</sup>

One expert felt that, where the State is under an obligation to protect, and thus to exercise due diligence, and the State fails in this duty, the right to an effective remedy becomes relevant, even with respect to violence which has not occurred. An Iraqi, for example, could invoke the right to a remedy in this respect, even though this claimant himself or herself had not been killed. In this expert's view, there would probably have to be evidence, for instance, that a

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<sup>52</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, Art. 2(1), (hereafter, European Convention).

<sup>53</sup> *Broniowski v. Poland*, ECtHR, App. No. 31443/96, Judgment of 22 June 2004. The Court observed that it was "inherent in the Court's findings that the violation of the applicant's right guaranteed by Article 1 of Protocol No. 1 originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons," para. 189. The Court then held that the "violation has originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the "right to credit..." and that Poland "must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question... in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1," para. 200. In the context of the right to life, the ECHR recently found Greece in violation of Article 2 as a result of its legislation regulating the use of force by police forces. The Court held that the legislation, which dated from the German occupation during the Second World War, was clearly deficient. The Court did not order that Greece amend it, however, as Greece already had. *Makaratzis v. Greece*, ECtHR, App. No. 50385/99, Judgment of 20 December 2004, paras. 57, 61-63, 70-72. Both *Broniowski* and *Makaratzis* were concerned, however, with the failure of the State's legislation to protect the claimant from acts of the State (the expropriation of land or the use of force by police) rather than from the acts of private persons.

<sup>54</sup> See Interim Resolution DH (2005) 58 concerning the Judgment of the European Court of Human Rights of 22 June 2004 in the case of *Broniowski* against Poland, adopted by the Committee of Ministers on 5 July 2005 at the 933<sup>rd</sup> Meeting of the Ministers' Deputies, available [http://www.coe.int/T/CM/WCD/humanrights\\_en.asp#](http://www.coe.int/T/CM/WCD/humanrights_en.asp#). The Committee called for Poland to repair its legislation, "stressing the obligation of every state, under Article 46, paragraph 1, of the Convention, to abide by the judgments of the Court; Recalling that High Contracting Parties are required rapidly to take the necessary measures to this end, *inter alia* by preventing new violations of the Convention similar to those found in the Court's judgments; Recalling that the adoption of such measures is particularly pressing in cases where a judgment which points to structural or general deficiencies in national law or practice has been delivered, and a large number of applications to the Court concerning the same problem are pending or likely to be lodged..."

<sup>55</sup> See, for example, the interim report of the Special Rapporteur on torture, Manfred Nowak, in which he "calls upon States to abolish all forms of judicial and administrative corporal punishment without delay." U.N. Doc. A/60/316 (2005) pp. 8-9.

<sup>56</sup> European Convention, *supra* note 52, Art. 13.



given PMC was engaging in arbitrary killings. The claimant could invoke the right to a remedy, arguing that he or she is a victim in the sense of unnecessary endangerment owing to the State's failure to regulate.

#### **4. Issues relating to the obligation to investigate, prosecute and provide jurisdiction**

The duty to protect, a number of experts observed, imposes an obligation on the State to investigate incidents of violence. As one expert observed earlier, the ECHR has found States in violation of the right to life as a result of their failure to conduct a proper investigation following instances of violence perpetrated by private actors, citing two cases brought against Turkey.<sup>57</sup> The Inter-American Court has likewise found States in violation of their duty to protect the right to life where they have failed to properly investigate, prosecute and punish those responsible as well as to pay compensation.<sup>58</sup>

One expert felt that there is a strong argument that the State of incorporation must be in a position to bring criminal prosecutions against members of PMCs who commit serious crimes abroad. To some extent, this obligation may depend on the activity or crime. Where a PMC is running a detention centre and is routinely ill-treating detainees, there is already an obligation to provide for criminal jurisdiction for those States party to the Convention Against Torture.<sup>59</sup>

Where the PMC is incorporated in one State and some its members are nationals of another State, in this expert's view, the State of nationality would also be under an obligation to prosecute its nationals for the commission of serious, international crimes such as war crimes and crimes against humanity. Failure to prosecute in this instance would amount to a failure to exercise due diligence under HRL with respect to the relevant rights which were violated.

One expert questioned whether there would be an obligation to prosecute or provide for criminal jurisdiction with respect to lesser, non-international crimes. One can envision, this expert pointed out, members of a PMC engaging in widespread robberies and thefts while deployed in another State. Were the UK the State in which this PMC is incorporated, for example, the UK would not be able to exercise criminal jurisdiction over the members of the PMC for these crimes. The other expert agreed that the failure to provide for criminal jurisdiction or bring a prosecution for the commission of lesser offences may not result in a violation of HRL.

Where there is a duty to prosecute, another expert questioned, what is the standard for determining whether or not the State has complied with this obligation in the event it chooses not to bring a prosecution? States must exercise some discretion, as a State may often have very good reasons for choosing not to prosecute. One expert suggested that the standard is the same as for determining negligence generally. What if a State, having conducted a proper investigation and identified the likely perpetrator, chose not to prosecute on the grounds that the prosecution might exacerbate the security situation in the country? Another expert felt

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<sup>57</sup> See *Mahmut Kaya*, supra note 47, paras. 101, 108-109; and *Kiliç*, supra note 48, paras. 77, 83.

<sup>58</sup> See, for example, *Velásquez-Rodríguez*, supra note 46, paras. 176-178; *Godínez-Cruz v. Honduras*, Inter-American Court of Human Rights, Judgment of 20 January 1989, Series C, No. 5, paras. 175, 182, 187-198; *Trujillo-Oroza v. Bolivia*, Inter-American Court of Human Rights, Judgment of 27 February 2002, Series C, No. 92, para. 99; and *Del Caracazo v. Venezuela*, Inter-American Court of Human Rights, Judgment of 29 August 2002, Series C, No. 95, paras. 115-119.

<sup>59</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/39/51 (1984), art. 4.

that a Human Rights body would take this rationale into account but would not necessarily reach the same conclusion as the State.

The right of access to courts is also relevant. Article 6(1) of the European Convention on Human Rights, for instance, provides that

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

In the view of one expert, the obligation to provide this right with respect to individuals wishing to bring claims against a PMC would bind the territorial State, i.e., the State in which the PMC is incorporated. This State must ensure, therefore, that its rules on jurisdiction allow for foreign plaintiffs to bring claims against such a PMC.

With respect to civil claims brought against PMCs, however, this expert felt that the case-law of the ECHR makes clear that such claims must allege conduct that already constitutes a tort under the State's domestic law. The right of access to courts under Article 6(1) cannot be relied upon to create civil wrongs which do not already exist under the domestic law of the State. Claimants can rely on Article 13, however, another expert pointed out, whenever there is a violation of rights enjoyed under Convention, regardless of whether the State's domestic law already provides that the conduct constitutes a civil wrong. But in this situation, the other expert observed, the individual is claiming against the State, as only the State can violate HRL.

### **E. State Responsibility under an analogous due diligence concept under IHL**

One expert made a presentation on this issue and began by noting that unlike violations of HRL, which can only be committed by States, both States and private persons can commit violations of IHL. In the context of PMCs, therefore, both the State can be in violation of IHL for the conduct of PMCs as well as members of a PMC themselves. This expert also noted that there is the possibility that a PMC itself might be bound by IHL but did not explore this issue.

This expert suggested that Common Article 1 of the GCs provides a concept somewhat analogous to the concept of due diligence under HRL. Article 1 requires that State Parties "undertake to respect and ensure respect for the present Convention in all circumstances." Article 1 requires a State which hires a PMC and entrusts it with its obligations under the Conventions to ensure this PMC carries out these obligations properly. It is therefore responsible for all violations committed by the PMC. A State cannot wash its hands of these obligations by contracting these functions out to a PMC rather than performing them itself through its armed forces or other State organs.

This expert described a number of ways by which the hiring State could comply with its obligation under Article 1. States should ensure that the PMCs which they hire are properly trained. Even where a PMC hires former soldiers, who presumably have already been trained in IHL, States should not rely on this past training but should ensure that members of the PMC are trained in IHL in such a way as to take into account the tasks they will performing

under the contract, especially with respect to PMCs which are hired to fulfil the State's obligations under the GCs, such as those hired to perform tasks related to POWs or protected persons in an occupied territory. Likewise, another means by which a hiring State can comply with its Article 1 obligation is by ensuring that members of the PMC operate under clear ROE and standard operating procedures which reflect their obligations under IHL. Also, States should impose an obligation on the PMC to report to it whenever violations are committed.

This Article 1 obligation to “ensure respect,” however, is not only relevant for the State which hires a PMC but for other States as well. Aside from the hiring State, two other States are well placed to take measures to ensure respect of IHL by PMCs: the State in which the PMC is incorporated and the State in which the PMC operates. While, as the experts discussed earlier, there may be an obligation to regulate PMCs under HRL, the presenting expert suggested that enacting a regulatory framework for PMCs would be a very good way by which these States could discharge their Article 1 obligation. Regulation might require IHL training, ROE to be issued, and investigations to be carried out where violations of IHL are committed. Such a regulatory framework, this expert added, might well address issues beyond merely compliance with IHL such as transparency and political accountability. Some States have put such regulatory frameworks in place, such as South Africa, a State of incorporation, and Sierra Leone and Iraq, States in which PMCs operate.<sup>60</sup> Regulation could 1) address whether a mere license to operate is required to conduct operations or whether the government must approve each contract a PMC wishes to conclude; 2) set out criteria for determining where a PMC may operate; and 3) forbid PMCs from undertaking certain functions, such as conducting combat operations.

This expert did not feel, however, that the failure to adopt such a regulatory framework by the State would itself constitute a violation of Article 1 under the current state of IHL. Finally this expert observed that all States are under an obligation to suppress violations of IHL.<sup>61</sup>

## **1. Responsibility of the hiring State for violations of IHL committed by the PMC**

The experts sought to explore more fully the conclusion that a State is responsible for any violation of IHL committed by a PMC it hires.

### **a) Are there obligations of due diligence nature under IHL?**

The experts next considered whether a State could incur international responsibility under IHL for a failure to exercise due diligence.<sup>62</sup> One expert questioned whether there is a

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<sup>60</sup> See, for example, the Regulation of Foreign Military Assistance Act, enacted by South Africa in 1998, Government Gazette, vol. 395, No. 729, available at <http://www.info.gov.za/gazette/acts/1998/a15-98.pdf>.

<sup>61</sup> This point was discussed further later in the meeting; see Subsections E-2 and E-3.

<sup>62</sup> The ICRC Commentary to Article 91 suggests that a State may be under a duty to exercise due diligence with respect to the conduct of private individuals in certain situations. “As regards damages which may be caused by private individuals, i.e., by persons who are not members of the armed forces (nor of any other organ of the State), legal writings and case-law show that the responsibility of the State is involved if it has not taken such preventive or repressive measures as could reasonably be expected to have been taken in the circumstances. In other words, responsibility is incurred if the Party to the conflict has not acted with due diligence to prevent such acts from taking place, or to ensure their repression once they have taken place.” Commentary to the Additional Protocols, *supra* note 21, para. 3660.

Since this Expert Meeting was held in August of 2005, the ICJ has decided a case in which it addressed the issue of a State's duty to exercise due diligence, or “vigilance,” where the State is an occupying Power, *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, I.C.J. Reports 2005. Having found that Uganda was an occupying Power in the Ituri district of

concept of due diligence under IHL. Certainly, this expert pointed out, the term never appears anywhere in the GCs. Accordingly, the experts considered what substantive obligations of a due diligence character are set out in the GCs.

The experts began by considering whether there are obligations to instruct which flow from the duty imposed by Article 1 to “ensure respect.” One expert felt that Article 1 merely refers to an overall policy to taken by a State to ensure that it generally respects IHL. Specific obligations to instruct and train cannot be seen as flowing from Article 1.

Articles 47 of GC I<sup>63</sup> and 48 of GC II,<sup>64</sup> another expert observed, oblige the State to disseminate the Conventions such that the “principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.” This obligation, a second expert pointed out, is neither very precise nor taken seriously by States. There is no obligation binding on a State to ensure that its entire civilian population is trained in or knowledgeable about IHL. A more precise and accepted obligation, this expert observed, is set out in Article 127(2) of the GC III:

Any military or other authorities, who in time of war assume responsibility in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions<sup>65</sup>.

This expert noted, however, that the consensus earlier in the meeting had been that the performance of many functions relating to obligations which arise under the Conventions require the exercise of governmental authority, e.g., those functions which relate to POWs. Consequently, the issue of due diligence is irrelevant with respect to these functions, since where a PMC is performing them, this PMC will fall within the meaning of Article 5 of the DASR such that its conduct will be attributable to the State.

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the DRC within the meaning of Article 42 of the Hague Regulations of 1907, the Court observed that Uganda was obliged under Article 43 of the Hague Regulations to “take all measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area,” para. 178. The Court then observed that a duty to exercise due diligence with respect to the conduct of private actors flowed from this Article 43 obligation. “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 a third party,” para. 178. Accordingly, the Court found that “Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account,” para. 179. The Court here seems to assert that this obligation of due diligence, or “vigilance,” flows from Article 43 alone, i.e., it arises under IHL rather than under international human rights law. Later in the decision, however, the Court reaffirmed its previous holding that “international human rights instruments are applicable ‘in respect of all acts done by a State in the exercise of its jurisdiction outside its own territory,’ particularly in occupied territories,” para. 216, citing the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, paras. 107-113. Having established that a State must be able to exercise its authority in the territory for its presence to be considered an occupation under Article 42, para. 172, the Court might be seen as having implicitly concluded that Uganda exercised jurisdiction in occupied Ituri within the meaning of international human rights law and therefore has a duty to exercise due diligence, or “vigilance,” with respect to private acts of violence. The Court did not hold Uganda responsible for failing to prevent acts of violence committed by private persons in areas where it was not an occupying Power, though it did not explicitly indicate that it refrained from doing so.

<sup>63</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 U.N.T.S. 31, Art. 47.

<sup>64</sup> Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 U.N.T.S. 85, Art. 48.

<sup>65</sup> Geneva Convention III, *supra* note 3, Art. 127(2).

Also, Article 127(2) refers to “military or other authorities.” This expert questioned whether this reference limits this duty to an obligation to instruct governmental “authorities”? In other words, the reference to “authorities” would seem to bring those performing these functions within either Article 4 of the DASR, i.e., as they would constitute State organs, or within Article 5 of the DASR, i.e., where they are exercising elements of governmental “authority.” Certainly, this expert observed, the drafters of the GCs did not have PMCs in mind back in 1949 but were thinking rather of governmental entities when they used the term “authorities.”

Notwithstanding what the drafters had in mind, one expert felt that such a reading of “authorities” was too narrow. PMCs cannot be excluded on the basis of this term.<sup>66</sup>

Another expert pointed to a similar obligation set in Article 144(2) of GC IV:

Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions.<sup>67</sup>

The obligation to instruct is considerably wider here, this expert pointed out, as the provision includes “any civilian.” Certainly, the performance of many duties “in respect of protected persons,” e.g., the duty to ensure the provision of food and medical supplies, may not constitute the exercise of governmental authority within the meaning of Article 5 of the DASR. In this case, where private civilian entities carry out such GC IV duties, their conduct may not be attributable to the State for the purpose of State responsibility. In such a case, an obligation of a due diligence character could indeed be relevant.

One expert suggested that the interpretative focus of Articles 127(2) and 144(2) should be on the term “assume responsibilities.” In the view of this expert, this phrase seems to have been used intentionally in order to keep the obligation to instruct open so as to include any entity which is entrusted with these conventional obligations with respect to POWs and protected persons.

Another expert pointed to Article 86 of AP I which obliges States more generally to “repress grave breaches, and to take measures to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.”<sup>68</sup> In the view of this expert, this provision implies the existence of a duty to take preventative action such as instruction.

#### **b) Are the obligations imposed by the Geneva Conventions obligations of result?**

In the view of some experts, with respect to the hiring State, there is no need to find a specific duty of a due diligence nature in the GCs, such as a duty to instruct those who are charged

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<sup>66</sup> Following the Abu Ghraib abuse scandal, the US Government commissioned a number of reports. The so-called Schlesinger Report found that 35% of the private contractors hired to conduct interrogations at Abu Ghraib “did not receive any formal training in military interrogation techniques, policy or doctrine.” The Report concluded that future “contracts must clearly specify the technical requirements and personal qualifications, experience and training needed.” Final Report of the Independent Panel to review DoD Operations, August 2004, p. 69, <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.

<sup>67</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 U.N.T.S. 287, Art. 144(2).

<sup>68</sup> Additional Protocol I, *supra* note 1, Art 86.

with carrying out obligations imposed by the Conventions. They explained that given the obligation “to ensure respect” in Article 1, the obligations imposed by the Conventions are obligations of result. Whenever the State devolves the fulfilment of an obligation imposed by one of the Conventions to the PMC, and the PMC fails to fulfil this obligation, this gives rise to State responsibility automatically. One expert pointed out that, given this obligation of result flowing from the State’s duty to “ensure respect” under Article 1, it must be the case that a hiring State is obliged to put in place a regulatory framework for the PMC it hires.

Other experts agreed that the Conventions impose an obligation of result, but based on the substantive provisions of the Conventions alone. Where the PMC fails to fulfil the obligation, the State is in breach of this substantive provision and not of Article 1. It is inherent in the nature of international obligations which arise under a treaty that, where a private entity is charged with fulfilling these obligations, the State has a duty to ensure that those substantive obligations are fulfilled.

One expert sought to clarify the limits of the State responsibility which arises under this view. Where a State, for example, devolves the function of shipping food to the population of an occupied territory, as it may be required to do under Article 55 of GC IV, the State will incur responsibility for the failure of that PMC to deliver the food. The State would only be held responsible, however, for the conduct of that PMC in shipping the food to the extent that its conduct could be attributed to the State under Article 5 or 8 of the DASR. While the State may not be responsible for incidents which occur as the food is being trucked into the territory, the State will always be held responsible for its failure to comply with Article 55 of GC IV whenever the food is not delivered to the population.

The experts observed that the obligations of result imposed by the GCs differ from the obligations imposed under the due diligence rule under HRL. Such an obligation under the GCs is broader in the sense that it covers the acts of PMCs in areas where the State is not necessarily exercising its jurisdiction. The obligation is narrower, however, in the sense that HRL requires the State to exercise due diligence with respect to private entities other than the PMC which it hires to carry out its obligations under the Conventions.

## **2. Obligations of States which have a connection to the PMC other than the hiring State**

The experts next discussed the obligations under IHL of States which have not hired the PMC to help it fulfil its obligations under IHL but which nevertheless have some connection to the PMC. The experts focused primarily on the State in which the PMC is incorporated and the State in which the PMC operates. Either of these States may or may not be a party to the conflict, though the State in which the PMC operates very often will be.

The presenting expert reiterated that, while Article 1 imposes an obligation on all States to “ensure respect” for IHL, failure by the State of incorporation or the State in which the PMC operates to adopt a regulatory regime is not itself a breach of Article 1 under current IHL. Adopting such a regime is merely an excellent way of complying with this obligation, especially for these two States. Another expert observed that under the current state of IHL, Article 1 is certainly not interpreted as an obligation of result for States not Party to the conflict.<sup>69</sup>

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<sup>69</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, ICRC, Cambridge, Rule 144, Vol. I, Rules, pp. 509-513 and Vol. II, Practice, pp. 3288-3302.

One expert observed that, as discussed, the duty of the State of incorporation to regulate is better grounded in the due diligence rule under HRL. Consequently, given that PMCs may often be involved in armed conflict situations, the State may be under an obligation to ensure their respect for IHL as a matter of HRL if the victims of the breach are subject to its jurisdiction. Another expert agreed but noted that the duty to regulate may flow to States other than merely the State of incorporation, especially where the PMC is not incorporated in any State. A State which finances a PMC might well incur international responsibility given the duty under customary international law to refrain from financing activities aimed at the “violent overthrow of the regime of another State.”<sup>70</sup> Therefore, the act of financing a PMC may give rise to an obligation to regulate how such a PMC behaves. Other experts felt that mere financing did not constitute a sufficiently close nexus between the State and the PMC to create such a duty.

### **3. Obligations of all States**

One expert noted that, while it may not be entirely clear what must be done in order to prevent violations of IHL, there are clear obligations binding on States to suppress and repress violations that have occurred or that are ongoing.

#### **a) Grave breaches: obligatory universal jurisdiction under the Geneva Conventions**

The experts observed that, with respect to the commission of grave breaches, States are required to exercise universal jurisdiction over such offenders under Common Article 49(2) / 50(2) / 129(2) / 146(2) of the GCs.<sup>71</sup> In implementing the obligation relating to grave breaches, one expert noted, State practice has not been consistent. Some States have required the alleged offender to be a national, others that he be within its jurisdiction and yet others that there be some sort of connection between him and the State.

One expert wondered whether the issue of criminal liability of bodies corporate is a matter of international law or merely domestic law. Some legal systems do provide for such liability, this expert noted, and the Nuremberg Tribunals provide some precedent for it under international law.<sup>72</sup> Where, for example, a PMC were to commit a grave breach, the PMC itself doing so as a company decision, would a State like the UK be in breach of Common Article 49(2) / 50(2) / 129(2) / 146(2), given that the UK is not in a position to prosecute this PMC under its law?

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<sup>70</sup> UN General Assembly Res. 2625, 24 October 1970, para. 26 after the “following principles.”

<sup>71</sup> Geneva Convention I, supra note 63, Art. 49; Geneva Convention II, supra note 64, Art. 50; Geneva Convention III, supra note 3, Art. 129.; Geneva Convention IV, supra note 67, Art. 146.

<sup>72</sup> Article 9 of the Nuremberg Charter provided the Tribunal with the power to find that a group or organisation constituted a criminal organisation. Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 279. See, for example, *United States v. Krupp*, United States Military Tribunal, Nuremberg, in TRIALS OF WAR CRIMINALS BEFORE THE NUERNBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10, Vol. 9, pp. 1327-1452 (1950) and the *United States v. Krauch (the I.G. Farben case)*, United States Military Tribunal, Nuremberg, TRIALS OF WAR CRIMINALS, Vol. 8, pp. 1152-1153. The Tribunal in both cases took note of the fact that the defendants committed their crimes through these corporations but ultimately imposed criminal liability on the individual members and owners of the corporations.

**b) Prosecution of foreigners for other violations of the Geneva Conventions<sup>73</sup>**

One expert felt that that the GCs also impose an obligation on States to ensure that their rules on criminal jurisdiction are such as to allow for the prosecution of persons who are alleged to have committed violations of the Conventions other than grave breaches where the State can exercise jurisdiction over the individual on the basis of nationality or territoriality. This expert pointed to the language of Common Article 49(3) / 50(3) / 129(3) / 146(3): “Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.” In the view of this expert, while this common Article does not require that the State bring a prosecution, it does require that the State provide for such a possibility in its rules of criminal jurisdiction. Consider a situation in which an individual who is suspected of having committed war crimes in a NIAC transits through a country like the UK, which has not enacted such legislation. How can we conclude that the UK has discharged its obligation under Common Article 49(3) / 50(3) / 129(3) / 146(3) to suppress all acts contrary to the Conventions? Given the evolution of IHL, e.g., with respect to NIAC, a State must be seen as under such an obligation. This expert added that a number of civil law countries, including Sweden, Denmark, Germany, Belgium and Switzerland, have all prosecuted Yugoslavs and Rwandans.<sup>74</sup> Such practice demonstrates that States are no longer as unwilling as they might have been in 1949 to prosecute non-grave breaches. A couple of experts agreed, noting that the title of Common Article 49 / 50 / 129 / 146 is “penal sanctions.”

Other experts disagreed. Common Article 49(1) / 50(1) / 129(1) / 146(1) specifically requires States to enact legislation enabling the prosecution only with respect to grave breaches. With regard to other war crimes, universal jurisdiction is permissive and not obligatory. Had the drafters intended to require States to enact legislation to enable them to prosecute other breaches, they would have made this clear in paragraph 49(1) / 50(1) / 129(1) / 146(1). States are generally reluctant to prosecute foreigners for a number of reasons. While grave breaches are so serious that no State can complain of having to prosecute, States were clearly unwilling to extend this obligation where other violations are concerned. Moreover, in the view of one of these experts, it makes little sense to make mandatory the enactment of legislation providing for the possibility of prosecution where the State is always going to have the discretion to choose not to prosecute.

Given this disagreement, the experts consulted the Commentary with respect to the meaning of “suppression.” In the view of the Commentary, the term “covers everything a State can do to prevent the commission or the repetition, of acts contrary to the Convention.” While the corresponding term in the French text, “faire cesser,” the Commentary notes, is “open to various interpretations,” the English term “suppression” is closer in meaning to the French word “répression.” The Commentary gives a number of examples of past prosecutions for violations other than grave breaches and concludes that

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<sup>73</sup> By the term “foreigners,” the experts were referring neither 1) to foreigners who serve in the armed forces of another State and for which there would be an obligation on that State to prosecute nor 2) to foreigners within the jurisdiction of a State.

<sup>74</sup> See, for example, *The Four from Butare* case, Cour d’Assises de Bruxelles, Belgium, Judgment of 7-8 July 2001. The four Rwandans were found guilty of having committed grave breaches as well as violations of Common Article 3 and Articles 1, 2 and 4 of AP II. See also the *Grabež* case in which a Swiss Military Tribunal held that it could exercise jurisdiction over a Yugoslavian for alleged grave breaches as well as violations of the laws and customs of war and violations of AP II. Swiss Military Tribunal at Lausanne, Judgement of 18 April 1997.



It is thus clear that “all” breaches of the present Convention should be repressed by national legislation. At the very least, the Contracting Powers, having arranged for the repression of various grave breaches and fixed an appropriate penalty for each, must include a general clause in their national legislative enactments, providing for the penalty for other breaches of the Convention. Furthermore, under the present paragraph the authorities of the Contracting Parties should issue instructions in accordance with the Convention to all their subordinates, and arrange for judicial or disciplinary proceedings to be taken in all cases of failure with such instructions.<sup>75</sup>

One expert felt that the Commentary therefore made clear that Common Article 49(3) / 50(3) / 129(3) / 146(3) imposes no obligation on States to provide jurisdiction for violations of the Conventions which are non-grave breaches: States “should” repress by prosecution such violations, indicating that this is not a legal obligation but merely an advisable means of suppressing such violations.

**c) Other measures to suppress violations of the Geneva Conventions**

Several experts observed that there are means other than criminal prosecution by which States can fulfil their obligation under Common Article 49 / 50 / 129 / 146 to suppress violations. States can exercise military discipline, issue new instructions, and re-train their forces. In the context of PMCs, one expert added, States can exert their influence over PMCs incorporated in their jurisdiction. In this respect, another expert suggested that such States apply a sort of death penalty in some circumstances, i.e., withdraw the PMC’s charter or licence or otherwise force its dissolution.

**d) Erga omnes effect of Common Article 1**

The experts went on to consider the obligations binding on States which do not necessarily have any connection to the PMC. One expert observed again that Common Article 1 is not considered as imposing an obligation of result. States have at most accepted that the duty to “ensure respect” imposes an obligation to exert what influence they can. States can therefore bring complaints against the offending State, work in the General Assembly toward passing condemnations and petition the Security Council to take up the matter. The underlying question is whether, having attempted to exert influence through one avenue without success, the State is then obliged to take additional measures. In the view of this expert, States do not regard Article 1 as imposing such an obligation.<sup>76</sup>

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<sup>75</sup> J. Pictet (ed.), *Commentary to Geneva Convention I*, ICRC, Geneva, 1958, p. 367.

<sup>76</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *supra* note 69, Rule 144, Vol. I, Rules, pp. 509-513 and Vol. II, Practice, pp. 3288-3302.

## **F. Reparations for the unlawful conduct of PMCs under IHL and HRL**

One expert made a presentation on this issue, considering the issue of reparations where the conduct of the PMC is or is not attributable to the State as well as with respect to the direct liability of the PMC itself.

### **1. Reparations where the conduct of the PMC is attributable to the State**

#### **a) Where violations of IHL are committed**

The presenting expert began by observing that, where violations of IHL are committed in an IAC, and the violations are attributable to the State, Articles 3 of Hague Convention IV of 1907 as well as Articles 131 of GC III, 148 of GC IV and 91 of AP I<sup>77</sup> all provide that the State must make reparation. On the basis of these provisions, the presenting expert noted, the ICRC has concluded that the State's duty to make reparation is an obligation of customary law.<sup>78</sup> Article 91 of AP I, which employs the same wording as Article 3 of the Hague Convention, refers only to "acts committed by persons forming part of its armed forces." In the view of this expert, however, Article 91 was not intended to limit the liability for any act that can be attributable to the State.

Also, with respect to violations of IHL, the question arises as to whether the obligation to make reparation is limited to providing financial compensation. Article 91 provides that a "Party to the conflict...shall, if the case demands, be liable to pay compensation." In the view of this expert, State practice makes it clear that the obligation to make reparation is not limited to compensation. Under Principle IX of 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 this obligation encompasses a duty to provide satisfaction, restitution, rehabilitation as well as compensation.<sup>79</sup>

#### ***i. Whether individuals have a right to reparation under IHL***

One expert observed that the key question is who can bring a claim for reparation. While individuals may claim reparation for violations of HRL, it is less clear whether individuals have a right to reparation for violations of IHL.

One expert felt that the question must therefore be considered in two parts: first, whether individuals have a right to reparation for violations of IHL and, second, if so, whether individuals have a right to bring a claim for this reparation and have it enforced in domestic courts.

The traditional view, the presenting expert noted, was that only States could claim reparation, even assuming that this is an individual right. In the opinion of this expert, State practice,

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<sup>77</sup> Hague Convention Respecting the Laws and Customs of War on Land (IV), 18 October 1907, Art. 3, in D. Schindler and J. Toman, *supra* note 8, pp. 69-93; Geneva Convention III, *supra* note 3, Art. 131; Geneva Convention IV, *supra* note 67, Art. 148; Additional Protocol I, *supra* note 1, Art. 91.

<sup>78</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *supra* note 69, Rule 150, Vol. I, Rules, pp. 537-550, and Vol. II, Practice, pp. 3530-3610.

<sup>79</sup> 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, U.N. Doc. E/CN.4/2005/L.10/Add.11 (2005).

however, has evolved. Courts in Greece and Italy have recognized an individual's right to bring a claim,<sup>80</sup> as have a number of international agreements.<sup>81</sup> The Eritrea-Ethiopia Claims Commission permits either of these two States to bring claims against the other on behalf of its own citizens.<sup>82</sup> Likewise, the United Nations Compensation Commission empowered States to act as agents for the claims of their citizens. The Commission also reserved the power to designate an agent for individuals whose claims were not being submitted by any State, e.g., those submitted by Palestinians.<sup>83</sup> The ICJ in the recent *Palestinian Wall* case held that land confiscated by Israel to construct the separation barrier must be restored to the individual from whom the land was taken, recognizing that reparation must be made to the victims of IHL violations themselves.<sup>84</sup>

Another expert noted that the State practice on this point is not clear: while some national courts have permitted such claims, others have not. Some courts, another expert added, have held that individuals do possess the right to reparation for IHL violations suffered but would not enforce a claim because the relevant provisions of domestic law incorporating IHL were not self-executing. What is clear is that States must make reparation where they have committed violations of IHL, reparation frequently comes in the form of satisfaction or measures for rehabilitation provided for in a peace treaty.<sup>85</sup>

## **ii. *Widespread violations, peace settlements and the individual right to reparation***

One expert observed that serious violations of IHL will quite often constitute violations of non-derogable rights under HRL for which individuals enjoy a right to a remedy. For IHL violations greater difficulties arise with respect to the right to a remedy than with respect to the right to reparation. While individuals have a clear right to a remedy under HRL, it is not clear whether they do under IHL. One problem arises often in the case of mass violations of IHL where States argue that it is impossible to provide justice to all victims. While true, this conclusion leads to perverse legal consequences, this expert observed: States are held

<sup>80</sup> The *Prefecture of Voiotia case*, Court of First Instance of Leivadia, Greece, Case No. 137/1997 Judgement of 30 October 1997, affirmed by the Greek Supreme Court, Judgement of 4 May 2000; and the *Ferini case*, Italian Court of Cassation, Judgment of 11 March 2004, in *Revista di diritto internazionale* vol. 87, pp. 540-551 (2004).

<sup>81</sup> See, for example, the Class Action Settlement Agreement of 26 January 1999 (agreement between various Swiss banks and Holocaust survivors reached in US District Court for the Eastern District of New York), available at <http://www.swissbankclaims.com/index.asp>; Agreement between the United States of America and the Federal Republic of Germany concerning the Foundation "Remembrance, Responsibility and the Future," (creating a German fund for victims of slave labour), 17 July 2000, available at US State Department website, [http://www.state.gov/www/regions/eur/holocaust/000717\\_agreement.html](http://www.state.gov/www/regions/eur/holocaust/000717_agreement.html); and the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Agreement) 14 December 1995, Annex 6: Agreement on Human Rights, establishing the Commission on Human Rights, Art. II, including the Human Rights Chamber, Art. VII, empowered to decide on individual petitions and award remedies, including compensation, Art. XVI(1)(b), in *International Legal Materials*, vol. 35, pp. 75-80, 130-135 (1996).

<sup>82</sup> See the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (Peace Agreement) 12 December 2000. Article 5 establishes the Claims Commission; Article 5(8) specifies that claims may be submitted by either party on its own behalf or on behalf of its own nationals. *International Legal Materials*, vol. 40, pp. 259-264 (2001).

<sup>83</sup> The United Nations Claims Commission (UNCC) was established to address claims arising out of Iraq's invasion and occupation of Kuwait. See *Letter Dated 21 September 1992 from the President of the Governing Council of the United Nations Compensation Commission Addressed to the President of the Security Council*, U.N. Doc. S/24589 (1992), para. 33, in *International Legal Materials*, vol. 31, pp. 1018-1026 (1992).

<sup>84</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, paras. 153, 163.

<sup>85</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *supra* note 69, Rule 150, Vol. I, Rules, pp. 537-550, and Vol. II, Practice, pp. 3530-3610.

accountable only where violations are limited to a small number of victims. In the view of this expert, while individuals may not have a right to bring a claim in such cases, and while the amount of compensation may be affected, the State must still make reparation to memorials, foundations and similar institutions benefiting the victims.

Also, this expert observed, the conclusion of peace agreements at the end of conflicts presents a real problem with respect to reparations for violations of IHL. The concern here is that allowing claims will threaten to undermine such a peace settlement. Indeed, one expert wondered whether it was wise to allow individuals to make claims for violations of IHL where States have reached an agreement which puts together some sort of package for compensation. The presenting expert observed that the Commentary to both Articles 131 of GC III and 148 of GC IV makes clear that individuals cannot bring claims directly against a State and envisions all claims being addressed by a settlement concluded between the States themselves.<sup>86</sup> To the best of this expert's knowledge, no State has ever provided for individual claims in such a peace agreement. Accordingly, if States are able to waive the rights of their nationals to make claims, a real problem arises where States have committed IHL violations on a massive scale, as the amount of reparations agreed upon may very well fail to adequately compensate victims. This expert cautioned the other experts to keep an eye on the ongoing Ethiopia-Eritrea Claims Commission. After quantifying the claims, the two States may well determine that the claims against each side cancel out the claims against the other such that victims are unlikely to be fully compensated.

The other expert agreed and observed that, even in the context of violations of HRL, where the individual enjoys a clear right to make a claim, the decisions of the ECHR have had the effect of creating for States veritable economies of scale. Where States commit violations on a massive scale, the compensation awarded will not really cover the value of the various claims considered individually. A State is better off destroying an entire village than two or three houses.

### ***iii. Where a third State seeks reparation on behalf of victims of IHL violations***

One expert brought up the possibility of third States bringing a claim against the offending State on behalf of the victims of IHL violations. A third State, which has nothing to do with the conflict, could bring such a claim in the ICJ. Where individuals have a right to reparation but do not have a right to bring the claim, this possibility dispenses with the need for victims

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<sup>86</sup> J. Pictet (ed.), *Commentary to Geneva Convention III*, ICRC, Geneva, 1958, p. 630, and *GC IV*, p. 603. The Commentaries to Geneva Conventions III and IV read the same: "In our opinion, Article 131 is intended to prevent the vanquished from being compelled in an armistice agreement or a peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor. As regards material compensation for breaches of the Convention, it is inconceivable, at least as the law stands today, that claimants should be able to bring a direct action for damages against the State in whose service the person committing the breaches was working. Only a State can make such claims on another State, and they form part, in general, of what is called "war reparations". It would seem unjust for individuals to be punished while the State in whose name or on whose instructions they acted was released from all liability." The Commentary to Article 91 of AP I, however, does seem to envision individual claims in some cases: "Those entitled to compensation will normally be Parties to the conflict or their nationals, though in exceptional cases they may also be neutral countries, in the case of violation of the rules on neutrality or of unlawful conduct with respect to neutral nationals in the territory of a Party to the conflict. Apart from exceptional cases, persons with a foreign nationality who have been wronged by the unlawful conduct of a Party to the conflict should address themselves to their own government, which will submit their complaints to the Party or Parties which committed the violation. However, since 1945 a tendency has emerged to recognize the exercise of rights by individuals." *Commentary to the Additional Protocols*, supra note 21, paras 3656-3657.

to find a national jurisdiction in which they can have their rights enforced. The International Law Commission's DASR make clear that, where this third State is successful in obtaining compensation, this State holds the compensation on behalf of the victims and must turn it over to them.<sup>87</sup> Interestingly, this expert noted, if a State were to bring a claim against another State for violations of IHL committed against its own nationals, it would not be required to turn the compensation over to the victims, as the violation here must be seen as having been against the aggrieved State. Another expert felt that that this is no longer the accepted rule under international law.<sup>88</sup>

## **b) Where violations of HRL are committed**

Where violations of HRL are committed, the conduct having been attributed to the State under Articles 4, 5 or 8 of the DASR, it is clear that the State owes an obligation to make reparation, which includes compensation, satisfaction, restitution and rehabilitation. Under HRL, there are also obligations to investigate, prosecute and punish offenders in the case of gross violations. Furthermore, States are obliged to provide a remedy for all violations of HRL.

The right to a remedy, this expert further noted, is non-derogable. The Human Rights Committee has stated that the right to a remedy as embodied in Article 2 of the ICCPR is non-derogable in its General Comment 29.<sup>89</sup> Similarly, the Inter-American Court of Human Rights has held that the right to *amparo* as embodied in Articles 7(6) and 25(1) of the American Convention on Human Rights is non-derogable.<sup>90</sup>

A second expert felt, however, that we cannot conclude that the right to a remedy, including the right to *amparo* in the American system, is non-derogable in all cases. Such a conclusion is too broad. Rather, the right to a remedy is, at most, non-derogable with respect to non-derogable rights. In a number of cases involving unlawful killings taking place during states of emergency, the ECHR has found a violation of the right to an effective remedy under Article 13 of the European Convention.<sup>91</sup> Such cases, however, involved, the right to life. Where the State were to derogate specifically from Article 13 in a state of emergency, however, and were to commit acts which would be violations, especially of derogable rights,

<sup>87</sup> Commentaries to the draft Articles on State Responsibility, supra note 5. See the Commentary to Article 48, "Invocation of responsibility by a State other than an injured State," p. 323.

<sup>88</sup> Commentaries to the draft Articles on State Responsibility, supra note 5. See the Commentary to Article 33, "Scope of international obligations set out in this part" (Part Two: Content of the International Responsibility of a State), p. 234.

<sup>89</sup> General Comment 29 on Art. 4, States of Emergency (2001), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001). Paragraph 14 provides that "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective."

<sup>90</sup> *Habeas corpus in Emergency Situations (Articles 27(2), 25(1) and 7(6) American Convention on Human Rights*, Inter-American Court of Human Rights, Advisory Opinion of 30 January 1987, Series A, No. 8, paras. 31-44.

<sup>91</sup> *Kiliç*, supra note 48, para. 93; *Mahmut Kaya v. Turkey*, supra note 47, para. 126. The Court in this second case observed that, given "the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and including effective access for the complainant to investigation procedure," para. 124.

this expert suggested that the Court would not hold that such a derogation was impermissible. Given that no State has yet attempted to derogate from Article 13, this expert was of the view that it could not be concluded that the right to an effective remedy is itself non-derogable.

Another expert observed, however, that, even if States could derogate from Article 13 during a conflict or state of emergency, the claims themselves may well be brought after the conflict or state of emergency has ceased.

## **2. Reparations where the conduct of the PMC is not attributable to the State: the direct liability of the PMC and the State's obligations arising under its duty to exercise due diligence**

The presenting expert also discussed the issue of reparation where the violations of HRL or IHL cannot be attributed to the State. In this instance, of course, the State is not responsible for the violations and is thus not obliged to make reparation. Nevertheless, the duty to exercise due diligence will impose certain obligations on the State with respect to the issue of reparation where the conduct occurs within its jurisdiction. As discussed earlier, States must investigate and prosecute offenders. Likewise, in the view of this expert, States must provide access to their courts and enforce judgments against offenders and cannot seek to provide PMCs with any sort of exemptions under the law.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly sets out a number of obligations binding on States with respect to criminal justice and reparation.<sup>92</sup> The State must provide victims of crimes with a prompt and effective remedy, including access to justice, information about their rights, participation in criminal proceedings, protection against retaliation and intimidation, protection of their privacy, and States must ensure that the offender provides restitution. The Principles also suggest that States should establish a fund for compensation in the event that offenders cannot provide compensation. While a non-binding instrument, this expert was of the view that States are bound by the obligations set out in the Principles under current HRL.

### **a) Direct liability of the PMC and whether individuals can claim reparation against the PMC under IHL**

The presenting expert also discussed the issue of the liability of the PMC itself, which presents a possible avenue for reparation whether the conduct of the PMC can be attributed to the State or not. This possibility is especially important, this expert observed, given the obstacles individuals face in bringing claims against States. Furthermore, the idea that offenders should compensate victims, as set out in the Basic Principles of Justice referred to above, has been reinforced in the Rules of Procedure for the International Tribunals for the Former Yugoslavia and Rwanda.<sup>93</sup>

The US Alien Tort Claims Act, this expert observed, is a unique example of national legislation providing victims of internationally wrongful acts with a means of obtaining reparation from offenders. Two suits have already been brought under this law against a PMC operating in Iraq for employing interrogation methods in violation of international

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<sup>92</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly, U.N. Doc. A/40/43 (1985).

<sup>93</sup> Rule 106, "Compensation to Victims," of the Rules of Procedure and Evidence of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

law.<sup>94</sup> The claimants in one of these cases requested the court to issue an injunction which would have required the PMC to ensure that its interrogators were properly trained in conducting interrogations without committing torture. The request was rendered moot, however, when the defendant PMC announced that it would be ceasing its operations in Iraq.<sup>95</sup>

Even where individuals can avail themselves of national legislation like the Alien Tort Claims Act, there remain, however, the problems of mass violations and peace agreements which purport to settle all claims for reparation. One case brought under the Alien Tort Claims Act against a German company for employing slave labour was dismissed on the grounds that the peace treaty ending the Second War put in place such a complicated system for reparations that no judgment could be entered which would impede on it.<sup>96</sup>

Another obstacle claimants face where they seek to enforce this right in domestic courts arises where States raise sovereign immunity. The problem arose in the *Prefecture of Voiotia case* involving reparation for war crimes committed during the Second World War. Although the Supreme Court of Greece held that Germany could not raise sovereign immunity because the crimes had violated peremptory norms of international law, the Greek Government has nevertheless refused to permit the Court's judgment to be executed.<sup>97</sup>

In the view of this expert, legislation such as the Alien Tort Claims Act nevertheless provides the best means of holding PMCs accountable. Similarly, the OECD Anti-Bribery Convention requires States to criminalize or provide other civil or administrative sanctions with respect to bribery committed abroad.<sup>98</sup> This expert suggested there was no reason a similar obligation could not be imposed on States to provide jurisdiction over PMCs with respect to tort claims.

The experts next considered whether individuals could claim reparation against the PMC directly where the PMC has committed violations of IHL. Several experts observed that it is clear under the customary IHL of NIAC that armed opposition groups are not under an obligation to make reparation.<sup>99</sup> A couple of experts noted that it is always difficult to determine rules of the customary IHL of NIAC, since it can always be argued that what a

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<sup>94</sup> *Salah et.al. v. Titan Corp.*, United States District Court for the Southern District of California, 353 F. Supp.2d. 1087 (2004). The court granted the defendant's motion to transfer the case to the district court for the Eastern District of Virginia, 361 F. Supp.2d. 1152 (2005). See also, *Ibrahim et. al. v. Titan Corp.*, United States District Court for the District of Columbia, 391 F. Supp.2d. 10 (2005). The court here dismissed the plaintiffs' claim based on the Alien Tort Claims Act that their husbands had been tortured by contractors in Iraq, holding that private persons cannot commit torture in violation of the law of nations. The court did not, however, dismiss those claims based on the common law torts of assault, battery, wrongful death, intentional infliction of emotional distress and negligence.

<sup>95</sup> This injunction was requested in *Salah et al. v. Titan Corp*; a copy of it can be found on the website of the Center for Constitutional Rights, <http://www.ccr-ny.org/v2/home.asp>, under "Legal docket" / "September 11<sup>th</sup>" and under "Reports," p. 5, or [http://www.ccr-ny.org/v2/legal/september\\_11th/september\\_11th.asp](http://www.ccr-ny.org/v2/legal/september_11th/september_11th.asp).

<sup>96</sup> *Burger-Fischer v. Degussa AG.*, District Court for the District of New Jersey, 65. F.Supp.2d 248 (September 1999), p. 278.

<sup>97</sup> The *Prefecture of Voiotia case*, Court of First Instance of Leivadia, Greece, Case No. 137/1997 Judgement of 30 October 1997, affirmed by the Greek Supreme Court, Judgement of 4 May 2000; *Kalogeropoulou and Others v. Greece and Germany*, ECtHR, Decision on Admissibility of 12 December 2002. Cases described in Jean-Marie Henckaerts and Louise Doswald-Beck, supra note 69, Vol. II, Practice, p. 3562.

<sup>98</sup> Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 12 December 1997, entered into force 15 February 1999, Arts. 3 and 4, in International Legal Materials, Vol. 37, p. 1 (1998).

<sup>99</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, supra note 69, Rule 149, Vol. I, Rules, p. 536.

State does with respect to NIAC is a matter of its domestic law and does not represent State practice and *opinio juris* evidencing a rule of customary international law.

Several experts added that it was doubtful that States are obliged under the customary IHL of IAC or NIAC to permit claims against PMCs for IHL violations. One expert noted that it would be an odd result if States were under such an obligation, given that States are not under an obligation under IHL to provide a domestic remedy for violations of IHL which they themselves commit.

Moreover, if armed opposition groups are not under an obligation to make reparation under IHL, how could PMCs owe such an obligation? While it is clear that members of a PMC, as individuals, can commit violations of IHL, some experts felt it is not clear that a PMC itself can commit such violations.

The presenting expert felt it was not so clear that a PMC itself could not violate IHL and not be obliged to make reparation. While States may not be under an obligation to provide individuals with a judicial remedy for obtaining reparation, this does not mean that PMCs themselves are not under an obligation to provide reparation, irrespective of whether there exists a judicial remedy within the given State's legal system. This expert cited cases brought against German companies and Swiss banks arising out of violations of international law committed during the Second World War.<sup>100</sup> These cases have either been settled or dismissed for lack of jurisdiction or on the grounds that the peace treaty ending the war subsumed all claims for reparation; no judgments have been rendered as to responsibility of the defendants to make reparation. In the view of this expert, however, it is clear that these companies and banks did violate international law by employing or benefiting from slave labour. The claims against these banks were brought in the US under the Alien Tort Claims Act for violations of international law, "the law of nations." If one can bring a claim based on the conduct of a PMC in violation of international law, this must mean that PMCs are capable of violating international law. That the courts in these cases never had the opportunity to find as much does not mean that companies are not bound by international law, including an obligation to make reparation. Moreover, the large sum of money for which one case was settled is telling, even if the defendant banks maintained that they owed no duty to make reparation.

Other experts cautioned against finding an obligation to make reparation binding on PMCs on the basis of these cases. First, there was no finding by any court that they owed such an obligation or that they owed obligations under IHL generally. Also, the Alien Tort Claims Act under US law is unique; no other State has enacted similar legislation. One expert noted that, even in the context of IAC, just because States permit such claims under legislation such as the Alien Tort Claims Act does not necessarily evidence an *opinio juris* that they are

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<sup>100</sup> See, for example, *In re Holocaust Victim Assets Litigation.*, 105 F. Supp. 2d. 139, 142-143, United States District Court for the Eastern District of New York (2000) (This suit was brought against Swiss banks; a settlement was approved by the court); *Burger-Fischer v. Degussa AG.*, United States District Court for the District of New Jersey, 65 F.Supp.2d 248, 278 (September 1999) (The court dismissed this case on the basis that the treaty ending the war subsumed all reparations claims); and *In re Nazi Era Cases Against German Defendants Litigation*, 129 F.Supp. 2d 370, 378-380, United States District Court for New Jersey (2001) (The court dismissed this case partly in light of the US-German negotiations which lead to Germany's creation of a Foundation to compensate the plaintiff-victims of slave labour and a US-German agreement, under which the US undertook to "advise US courts of its foreign policy interests...in the Foundation being treated as the exclusive remedy for World War II and Nazi era claims against German companies, and concomitantly, in current and future litigation being dismissed.")



obliged under customary IHL to provide for such claims or that companies are obliged to make reparation for IHL violations.

In the view of one expert, where a State's domestic law does provide for a claim, whether for a tort or an IHL violation, the State would be obliged under HRL to allow its nationals, as well as foreign plaintiffs, to bring the claim against a PMC, assuming there exists some sort of connection between the State and the defendant PMC. The experts discussed this issue further, as related below.

**b) Whether the State is obliged under HRL to provide individuals with the means to obtain reparation from the PMC directly where the PMC has committed crimes and torts**

Where the conduct of a PMC is not attributable to the State, the State will not have committed a violation of HRL unless it fails to exercise due diligence. Accordingly, the experts next discussed the State's obligations under HRL to provide the means for individuals to be able to bring claims directly against or otherwise obtain reparation from the PMC where the PMC has committed crimes and torts.

Where a PMC commits abuses, and the State is found to have failed in its due diligence obligations under HRL to prevent the abuses, one expert wondered what the right to a remedy would oblige the State to do. Would the State discharge its obligation to provide an effective remedy if it accorded satisfaction to the aggrieved individuals, i.e., apologized for its failure?

A second expert felt that the ECHR would not regard this as sufficient. In the view of this expert, the duty to exercise due diligence and the obligations to provide an effective remedy and access to the courts are distinct bases for State responsibility with respect to conduct of a PMC which is not attributable to the State. As discussed earlier, with respect to the duty to exercise due diligence, the State is under a number of obligations to prevent, investigate, prosecute and punish offenders. Aside from the issue of due diligence, this expert felt that the State must still provide a means by which individuals can claim reparation for crimes and torts committed by a PMC. In this expert's opinion, the State may have discharged its obligation to provide a remedy where it provides such means to aggrieved individuals. Likewise, where the State fails to provide access to its courts, this expert was of the view that the State could be held in breach of its duty to provide an effective remedy.

In the view of this expert, States are obliged under HRL to ensure that individuals, including foreign plaintiffs, can bring claims against PMCs with which the State has some connection, e.g., PMCs which are incorporated in their jurisdictions. This obligation flows from the State's duty to provide access to its courts, as provided, e.g., under Article 6(1) of the European Convention on Human Rights.<sup>101</sup> Again, the right of access to the court system, this expert pointed out, cannot be used, however, to create claims which do not already exist under the domestic law of the State. With respect to the conduct of PMCs, however, the law of most States will provide jurisdiction for the kinds of crimes and torts PMCs could commit. The key is that there be some sort of connection between the defendant and the State. This expert was not sure, therefore, whether a State would be obliged to provide jurisdiction for civil claims against foreigners, e.g., whether the UK must provide jurisdiction for claims against foreign employees of a British PMC. Practically speaking, however, it is nearly always going

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<sup>101</sup> European Convention, *supra* note 52, Art. 6(1).

to be more worthwhile for claimants to sue the PMC itself rather than one of its employees. While the UK might be in position to allow a claim by a foreigner against a British PMC for conduct in Iraq, it is not certain whether States with civil law legal systems are currently in a position to allow claims against PMCs incorporated in their jurisdictions.

Sovereign immunity, this expert noted, should only present an obstacle for claimants where the alleged acts are committed by State agents or are otherwise attributable to the State. In the case of *Al-Adsani v. UK*, a bare majority of the ECHR (9 to 8) held that the UK was in not in breach of its obligation under Article 6(1) of the European Convention to provide access to its courts. In this case, a British court had dismissed a tort claim on the basis of the UK's sovereign immunity law. The claim was brought by a dual Kuwaiti-British national against the State of Kuwait for conduct committed in Kuwait which amounted to torture under Article 3 of the European Convention.<sup>102</sup> Were an individual to bring a similar tort claim in a British court for acts committed by a PMC rather than by a State, and the court did not allow the claim, this expert felt that the ECHR would find the UK in violation of Article 6, assuming there was some connection between the defendant PMC and the UK.

## **G. Unclear areas in the law and suggestions as to how PMCs could be better regulated**

During the final session of the meeting the experts sought to clarify where there are gaps in the law and made a number of observations with respect to what needs to be taken into consideration as States seek to regulate PMCs.

### **1. Gaps in civil and criminal jurisdiction and the problem of trials outside the theatre of operations**

One expert made a presentation outlining a number of legal and practical problems relating to the exercise of civil and criminal jurisdiction over members of PMCs.

The main problem is that there is no way to conduct criminal or civil trials in the theatre of operations. Cases must be brought back to the State for trial. While less difficult in civil cases given the lower burden of proof, trying any sort of case in one State where the conduct occurred in another is extremely difficult, as all the evidence and witnesses are in the State where the conduct occurred. The costs become enormous. This expert noted that States have prosecuted persons in their home territories for offences committed in theatre; it can, therefore, be done. But given the difficulties, the question becomes whether States will actually exercise their jurisdiction on a regular basis in such situations. Moreover, this expert noted, it is better for a number of reasons to have criminal cases prosecuted where the crimes are committed.

Aside from this overarching practical problem, States cannot always exercise jurisdiction over all offences. Although States must exercise jurisdiction for alleged grave breaches, they may not be able to do so for lesser crimes. Both the UK and the US, this expert noted, could not exercise jurisdiction over members of PMCs for robberies and thefts.

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<sup>102</sup> *Al-Adsani v. United Kingdom*, ECtHR, App. No. 35763/97, Judgment of 21 November 2001, paras. 14-19, 52-67.

Also, the local courts in theatre may not be able to exercise jurisdiction. Immunity may have been granted under a memorandum of understanding, or the local courts in a State involved in an armed conflict may not be functioning. Consequently, for some offences, there is a veritable black hole in the law.

There have been instances of trafficking by PMCs in the Balkans, this expert noted, and civil cases have been brought in the UK and the US. In the view of this expert, while the issue of regulation is crucial, States must be able to exercise criminal jurisdiction over members of PMCs if this sort of conduct is to be dealt with seriously. Otherwise, the result is a situation of horrific impunity.

In the view of this expert, the solution for providing effective criminal jurisdiction lies in the use of transportable courts capable of exercising civil and criminal jurisdiction in theatre. For the UK, there is the Standing Civilian Court, which is deployed with its armed forces abroad.<sup>103</sup> This court was initially developed by the UK so as to protect its nationals from local jurisdictions which might not provide fair trials or acceptable punishments. The proceedings are identical to those of any civilian court situated in the UK. The problem with the present Standing Civilian Court, this expert observed, is that it can only try those who are employed by Her Majesty's Government. The Court would therefore not have jurisdiction over members of a British PMC deployed in theatre, even where working with the armed forces, since these persons would not be employed directly by the British Government. In the view of this expert, this limitation could be remedied fairly easily, enabling the UK to effectively exercise jurisdiction over PMCs and their members.

One expert wondered whether the States in which the PMC operate will be willing to relinquish their jurisdiction to such transportable courts. The presenting expert noted that often this transportable court will function in a State where that State's courts will not be functioning. Where this State can exercise effective jurisdiction, however, it will often be willing to relinquish its jurisdiction to the transportable court. This expert noted that the UK has employed such courts in Germany and readily consults with the German Government on how they are functioning.

Another expert observed that States often complain that it is difficult enough for them to implement the review boards for internees required under Article 78 of GC IV.<sup>104</sup> Would States really be able import their national jurisdiction into an armed conflict situation? The Standing Civilian Court, like the courts martial system, the presenting expert observed, does just this. The Court operates like any civilian court in the UK, and its operation is facilitated by the armed forces.

One expert agreed that such transportable courts would provide an answer with respect to PMCs which "accompany the armed forces" within the meaning of Article 4A(4) of GC III but noted that not all PMCs fall into this category; for example, in the majority of situations where British PMCs operate they are not accompanying armed forces and there is no armed conflict. The presenting expert replied that the absence of an armed conflict would have no bearing on the jurisdiction of a transportable court. Also, there is no reason why the UK could not exercise jurisdiction over all its nationals for conduct committed anywhere in the

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<sup>103</sup> The current legislation providing for the Standing Civilian Court is The Standing Civilian Courts Order, 1997, UK Statutory Instruments, No. 172 ; and The Standing Civilian Courts Order (Amendment), 1997, UK Statutory Instruments, No. 1534, available at <http://www.uk-legislation.hmso.gov.uk/stat.htm>.

<sup>104</sup> Geneva Convention IV, *supra* note 67, Art. 78.

world. This is a matter of domestic law. What would be ideal, therefore, would be if the transportable court could exercise jurisdiction over all British nationals abroad not only where they are employed by the armed forces but whenever they are performing a military function.

Another expert agreed that there are tremendous difficulties for a State in bringing cases back to its territory for trial. Nevertheless, in the case of the US, this expert observed, the constitutional requirement of a jury trial presents a real obstacle for the use of transportable courts. How could such a court put together a jury of 12 persons representing the civilian community, which in turn requires a jury pool of hundreds, to decide on a case brought against a PMC or its member? The answer surely does not lie in putting together a jury composed of other members of PMCs or diplomats who happen to be in theatre. While standing civilian courts may be the answer for the UK and other States, they are not a feasible alternative for the US.

This expert wondered whether, for the US, the answer may lie in the use of military courts for trying civilians. Article 2(a)(11) of the Uniform Code of Military Justice provides for trials by court-martial for persons “serving with, employed by, or accompanying the armed forces outside the United States...”<sup>105</sup> The US Supreme Court, however, has limited the reach of Article 2(a)(11) with respect to courts-martial of civilians as a matter of US constitutional law. In a case arising in the 1950s, the Court overturned the convictions of two women who had murdered their husbands, who were soldiers, in England and Japan. While three justices were of the view that civilian dependents of members of the armed forces could never be tried by courts-martial for criminal offences,<sup>106</sup> another justice agreed only with respect to capital cases,<sup>107</sup> while yet another justice agreed only with respect to capital cases where the court-martial takes place, as here, during peacetime.<sup>108</sup>

Another expert felt, however, that any use of military courts to try civilians today would probably constitute a violation of HRL.

One expert stressed the importance of establishing the criminal liability of corporations under national law, something which is not provided for under the Statute of the ICC. Where corporations can be made criminally liable, the penalty would include the payment of steep fines and compensation, thereby providing an effective means of obtaining reparation.

## **2. Obtaining reparation from the PMC**

In the view of one expert, another area of the law in which there are gaps concerns the capacity of individuals to obtain reparation from the PMC. As discussed, the State may be obliged under HRL to provide access to its courts for criminal and tort claims against PMCs, creating one avenue for compensation. In the view of this expert, the possibility of civil claims in States which have a connection to the PMC does not, however, sufficiently fill the gap in the law here. One means of ensuring the possibility of reparation would be the establishment of some sort of national courts of arbitration. Were the UN to employ a PMC,

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<sup>105</sup> Uniform Code of Military Justice, Title 10, Chapter 47, § 802 of the United States Federal Code.

<sup>106</sup> *Reid v. Covert*, 354 U.S. 1, 15-19, United States Supreme Court (1957).

<sup>107</sup> *Id.*, pp. 41-64.

<sup>108</sup> *Id.*, pp. 65-78. This rationale for the decision is probably the most legally significant, given that there was no majority of five justices agreeing on one rationale. Where this occurs (a plurality decision), the “narrowest grounds” doctrine provides that the most limited rationale in support of the decision represents the holding of the case.

the PMC would be required to submit itself to the procedure. One expert pointed out, however, that the UN in practice often compensates for torts committed by contractors it hires. As the UN has so far sought to avoid having to create a mechanism for claims, it simply pays out claims as they are made, without employing any sort of procedure. Nevertheless, the other expert asserted, PMCs might act much more responsibly if they knew that they, rather than the UN, would be paying out the claims.

One expert recalled the observation that the Rules of Procedure for the International Criminal Tribunals for the former Yugoslavia and Rwanda provide for the possibility of victims obtaining reparation from offenders.<sup>109</sup> This expert pointed out that the Statute of the ICC provides for the establishment of a trust fund and empowers the Court to order that fines be transferred into the fund.<sup>110</sup> In the view of this expert, PMCs could be encouraged or required to make payments into the fund so as to ensure that victims can receive reparation where the individual employee convicted in the ICC is insolvent. Where the PMC is interested in saving its reputation, it may be very willing to make contributions to the trust fund.

The experts repeated a suggestion made earlier that a treaty could be concluded which requires States to enact jurisdiction allowing for civil claims against PMCs. As an analogy, one expert observed that the OECD Anti-Bribery Convention requires States to provide either criminal or civil sanctions for bribery committed abroad and also to establish its jurisdiction in cases involving bribery.<sup>111</sup> No State Party to the convention can therefore complain of not being able to exercise jurisdiction over persons, including legal persons, alleged to have bribed foreign officials while abroad. There is no reason States could not conclude a similar treaty with respect to PMCs, requiring that States provide for civil jurisdiction over torts committed by PMCs or their members while abroad.

### **3. *A jus ad bellum* issue: whether the PMC is entitled to be present in theatre**

One expert felt that there was a gap in the law with respect to the question of whether and under what circumstances PMCs are entitled to be present in the theatre of operations. The UN Mercenary Convention addresses this problem to some extent, e.g., where a PMC is employed by an opposition leader to help stage a coup. The gap lies in the State's domestic regulation of PMCs, i.e., the system the State introduces to exercise control over PMCs. Will States of incorporation, for example, require that PMCs obtain approval for every contract they wish to conclude or merely require PMCs to operate under a licensing system?

There is a political dimension to this problem as well, this expert observed. Where a PMC is incorporated in a State, other States will often tend to perceive, rightly or wrongly, that this PMC is acting with the endorsement of the State of incorporation. A rigorous regulatory system, therefore, may serve to allow States to distance themselves from PMCs which engage in operations which other States find troubling.

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<sup>109</sup> Rule 106, "Compensation to Victims," of the Rules of Procedure and Evidence of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, available on the Tribunals' websites: <http://www.un.org/icty/legal/doc-e/index.htm> and <http://65.18.216.88/default.htm>.

<sup>110</sup> Article 79, "Trust Fund," of the Rome Statute of the International Criminal Court, adopted 17 July 1998, in International Legal Materials, vol. 37, pp. 1002, 1047 (1998).

<sup>111</sup> Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 12 December 1997, entered into force 15 February 1999, Art. 3 and 4, in International Legal Materials, vol. 37, p. 1 (1998).

#### **4. The problems of the PMC hired by a company and the rogue PMC**

One expert observed that another area of the law in which there are grey areas concerns the use of PMCs by other companies. This is the more common situation by far, and this use of PMCs often occurs in a non-armed conflict context where IHL is inapplicable.

Another consideration which the law must take into account is that of the rogue PMC, i.e., the PMC which does not incorporate in any State and otherwise seeks to escape all regulation.

One expert recalled the earlier discussion regarding the UN Mercenary Convention and noted that States Parties need to take their obligations under this treaty into account with respect to future regulation.

#### **5. Regulatory requirements regarding training and the issuance of ROE**

One expert observed that in the view of most experts, Article 1 of the GCs imposes a clear duty to ensure that members of a PMC which the State hires are trained in IHL and operate under clear ROE and standard operating procedures, given that the Conventions impose obligations of result. The due diligence rule under HRL may also impose a duty to regulate in certain circumstances, entailing such requirements. Where the State will incur international responsibility, several experts observed, there is an implied obligation to regulate. Only where there is no state responsibility, therefore, is there really a gap. Nevertheless, in the view of the first expert, further regulation should address the obligation to ensure training and the use of ROE.

#### **6. Members of PMCs should be aware of their status under IHL**

##### **a) The activity and not the name of the company is relevant**

One expert observed that many PMCs are hired to provide security and thus prefer to be referred to as private “security” contractors rather than private military contractors. All the experts observed, however, that what matters under the law is what such companies do. Many “PSCs” are hired by States or other companies to guard things such as oilfields or pipelines in situations of armed conflict or where conflict is likely. Such PMCs therefore, one expert pointed out, may well wind up engaging in combat.

In the view of this expert, it is crucial that members of PMCs are aware of their status under IHL where they accept employment guarding a military objective in a situation of armed conflict. Likewise, even where members of PMCs are hired to provide security in a NIAC, where there are no issues of POW status, it is still important for members of a PMC to be aware that they could become parties to the NIAC, as the IHL of NIAC would become applicable, including consequently the possibility that they could commit war crimes.

##### **b) Where involved in fighting, would the PMC always become a party to the armed conflict?**

One expert felt there were other situations in which a PMC might come under attack and respond with force and yet not become a party to an armed conflict. The use of force by peace support personnel provides an analogy. Such forces may be deployed to perform peacekeeping or policing functions, requiring the use of lethal force and potentially involving

them in considerable fighting in some circumstances, e.g., where a party to the conflict is trying to attack a group of civilians and the peacekeepers engage this party in battle in defence of these civilians. In the view of this expert, such a situation merely amounts to a robust form of policing. While it is certainly possible that peace support personnel could be drawn into an armed conflict, whether or not they are is not merely a matter of the intensity and duration of their engagements with a party to the conflict. Rather, it is a matter of the mindset taken by these forces. Such forces become a party to the conflict where they endeavour to defeat or weaken one party to the conflict or the other. This expert nevertheless related another view on this question, which holds that peace support forces become a party to the conflict where one party to the conflict chooses to regard these forces as a party to the conflict, regardless of what action these forces take. The question is relevant with respect to those PMCs which are hired to defend civilians or other things which, under IHL, have not become military objectives, e.g., civilians and objects relating to humanitarian relief operations.

## **7. Should PMCs be prohibited from engaging in certain activities, i.e., combat?**

One issue addressed by the Swiss Initiative (discussed below) is whether PMCs should be prohibited from engaging in certain activities, mainly combat. Similar to the *jus ad bellum* issue one expert brought up earlier with respect to whether PMCs should even be permitted to be deployed in theatre in a given situation, the rationale behind this proposed prohibition is that it simply is not a good idea to have governments hire PMCs to engage in combat. Where States hire PMCs to guard objects, surely there is the possibility that these PMCs will have to engage in fighting in order to defend themselves and the object from criminal activity. Aside from these circumstances, would it be advisable, one expert suggested, to have a rule prohibiting the hiring of PMCs to engage in combat operations?

As the situation stands now, one expert pointed out, where PMCs are hired to defend objects which are military objectives during situations of armed conflict, it is a something of legal fiction to regard these PMCs as not being hired to engage in combat. It is clear that members of PMCs are civilians under IHL, at least if the PMC is not regarded as constituting the State's armed forces. Consequently, as civilians, it is already the case that members of PMCs may not take a direct part in hostilities, including combat operations against enemy forces.

One expert observed that a prohibition against the use of PMCs for combat might essentially amount to a requirement that States incorporate PMCs into their armed forces if they are to be used for combat operations. Such a prohibition may overlap, another expert pointed out, with the prohibition against using mercenaries.

Also, one expert noted, such a prohibition would have to take into account the different situations of IAC and NIAC. Another expert felt that, were States to embrace this prohibition, there ought to be an exception allowing the UN Security Council to make use of PMCs for combat. What if, unable to find States willing to deploy their armed forces, the Council wanted to deploy a PMC in order to protect humanitarian relief operations in a conflict situation or to put an end to a genocide? Such operations would likely involve the PMC engaging in combat. While some experts felt such a scenario was hardly conceivable in the near future, other experts thought it was quite possible. Accordingly, the international community should not put in place regulation which would prevent the Security Council from using PMCs in such situations.

One expert observed that the very notion of what constitutes combat is subject to debate. Another expert felt that the any regulation should focus rather on the use of force itself and on the rules under which the members of the PMC are permitted to engage (ROE), including what must be done when they are targeted.

#### **8. Other issues which should be kept in mind as States seek to regulate PMCs**

One expert felt strongly that, as States move toward regulating PMCs, they should maintain a dialogue with the PMC industry itself in order to best understand what PMCs do and how they operate. Accordingly, this expert noted that trade associations have been established in the US and the UK.<sup>112</sup>

Another expert felt that any regulation must be well coordinated among States so that it takes into account the reality that many PMCs operate in a number of different States at the same time. One difficulty, for example, is that different members of the same PMC would be subject to different kinds of criminal liability depending on where they are deployed.

#### **9. Any discussion of regulation should not ignore existing international law.**

One expert explained the initiative undertaken by the Swiss Government in cooperation with the ICRC. The initiative has sought to restate the international and national law applicable to PMCs and stimulate discussion among States regarding what sort of regulation is required. The initiative has not, however, taken a view as to what is needed, i.e., a treaty, a restatement of basic principles or something else.

One expert felt that the discussion throughout the meeting had demonstrated very well that, while there may be certain gaps, there is no major vacuum in the international law applicable to PMCs. Accordingly, the Swiss Initiative, this expert observed, has been careful not to give the impression that activities of PMCs are not governed under current international law, as this is surely not the case. A second expert agreed and shared the same concern that some discussions of regulation, especially with respect to codes of conduct and model regulations, may serve to undermine the law as it stands now. As States discuss future regulation, therefore, they must not forget that the use of PMCs is already governed in most respects by existing international law.

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<sup>112</sup> The International Peace Operations Association in the US., <http://www.ipoaonline.org/home/>; and the British Security Industry Association, <http://www.bsia.co.uk/about.html>.



# **Annex**

## **List of Participants**

1. Professor Deborah Avant, Director, Institute for Global and International Studies, The Elliott School of International Affairs, George Washington University.
2. Ms. Lindsay Cameron, Assistant to Professor Marco Sassòli, University Centre for International Humanitarian Law.
3. Ms. Antoinette Chibi, PhD Student with Professor Marco Sassòli, University Centre for International Humanitarian Law.
4. Professor Andrew Clapham, Graduate Institute of International Studies.
5. Mr. Michael Cottier, Federal Department of Foreign Affairs, Directorate of International Law, Section for Human Rights and Humanitarian Law, Deputy Head of Section.
6. Professor Louise Doswald-Beck, Director, University Centre for International Humanitarian Law; Graduate Institute of International Studies.
7. Ms. Cordula Droege, International Commission of Jurists.
8. Mr. Pierre Gassman, Program Advisor, Program on Humanitarian Policy and Conflict Research, Harvard University.
9. Ms. Emanuela-Chiara Gillard, Legal Advisor, ICRC.
10. Professor Françoise J. Hampson, University of Essex; Member of the UN Sub-Commission on Human Rights; Governor of the British Institute of Human Rights.
11. Mr. John Holmes, Director of International Affairs, Erinys International.
12. Major-General David Howell, Director, Army Legal Services, Department of Defence, United Kingdom.
13. Mr. Daniel Klingele, Head of Section, Directorate for International Law, Swiss Federal Department of Foreign Affairs.
14. Mr. Nils Melzer, Legal Advisor, ICRC.
15. Ms. Katja Nieminen, Research Fellow, Erik Castrén Institute of International Law and Human Rights.
16. Professor Yves Sandoz, University Centre for International Humanitarian Law.
17. Professor Michael Schmitt, George C. Marshall European Center for Security Studies.

*Rapporteur:* Mr. Harry Fogler, Student, University Centre for International Humanitarian Law.  
*Administrator:* Ms. Laure Bally Cergneux, Administrator, University Centre for International Humanitarian Law.

## **Program**

### **Expert meeting on private military contractors: status and State responsibility for their actions 29-30 August 2005**

A great deal of discussion on private military contractors (PMCs) turns on how to better regulate them by, for example, codes of conduct or special licences. However, any such further regulation needs to build on a solid understanding of what the existing law is. The purpose of this meeting is not to consider ideas for further regulation but to elucidate, to the degree possible and depending on various contexts, existing law relating to the status of such companies and their members and, in the light of this, State responsibility for their actions.

#### **First day**

##### **9.30-11.00**

Could PMCs be “combatants” i.e. members of the armed forces within the meaning of Article 43 of Additional Protocol I or “militias” or “members of volunteer corps” within the meaning of Article 4(A)(2) of the Third Geneva Convention? In the latter case, would the State be responsible for their activities within the meaning of Articles 4 or 5 of the Draft Articles on State responsibility?

##### **11.30-13.00**

Could PMC’s or their individual members be “civilians accompanying the armed forces without being members thereof” within the meaning of Article 4(4) of the Third Geneva Convention and therefore entitled to POW status? Are States responsible for them within the meaning of Article 5 of the Draft Articles on State responsibility?

##### **14.30-16.00**

Are members of PMCs mercenaries within the meaning of Article 47 of Additional Protocol I – was the definition in Article 47 aimed at individuals or companies? If Article 47 was aimed at individuals, could the companies claim that their members have not forfeited POW status? If such companies are mercenaries and not entitled to POW status, could they nevertheless fall within the meaning of Article 4 or 5 of the Draft Articles on State responsibility?

##### **16.30-18.00**

In the context of a non-international armed conflict, in relation to which activities would PMCs, hired by a government, be considered State organs within the meaning of Article 4 of the Draft Articles on State responsibility or fall within the meaning of Article 5 of these Draft Articles?

Is the situation any different if they are hired by governments to undertake peace-keeping or peace-support operations in what is or was an international or non-international conflict?

## Second day

### 9.30-11.00

If members of PMCs are not members of the armed forces, what is the obligation of “due diligence” by a State in relation to their activities and possible violations of human rights?

This will include the following questions:

- What does the duty of due diligence actually cover i.e. human rights law, to what degree must the government be aware of potential or existing human rights abuses by individuals and what is it required to do?
- Does it make any difference if the human rights violations are committed by a PMC that is not directly hired by the government?
- Which State would be responsible to exercise due diligence and therefore be itself in violation of human rights law if it does not? Which State is considered to have jurisdiction (effective control) for this purpose – the PMC’s State of incorporation, where it has its *de facto* headquarters or where it is actually carrying out its activities?

### 11.30-13.00

Is there a concept of “due diligence” for violations of international humanitarian law within the requirement to “ensure respect for IHL” by persons other than its own armed forces?

This question is aimed at establishing State responsibility for violations of IHL and will not address issues of individual criminal responsibility. It will include the following issues:

- If a government hires a PMC to undertake a specific function, is the PMC acting “on its instructions or under its direction or control”?
- What are States’ duties of instruction in IHL to such companies under, e.g., Article 128 of the Third Geneva Convention, Article 144 (2) of the Fourth Geneva Convention and Article 19 of Additional Protocol II? Does a failure to do this, together with violations by a PMC, incur State responsibility? If so, which State is responsible?
- Can the more general duty to “ensure respect” *erga omnes* be of any relevance i.e. the general duty of States to exert their influence to the degree possible to stop violations by others?
- Is there any difference if the violations are committed by a company which is in turn hired by the company initially hired by the government?

### 14.30-16.00

Is there an obligation by the State to provide reparations for violations of IHL or human rights law committed by PMCs or their individual members? Who could claim? Does it make any difference what type of conflict was involved?

### 16.30-17.30

Evaluation of areas that are unclear or insufficiently regulated by existing law and therefore merit thought on further development. Consideration of what the next steps should consist of.