Åbo Akademi University
Social Sciences, Business and Economics, and Law

Pia Rantakangas

THE INDIVIDUAL CRIMINAL RESPONSIBILITY OF MEMBERS OF PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICTS

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Supervisor: Catarina Krause
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Writer: Pia Rantakangas
Title: The Individual Criminal Responsibility of Members of Private Military and Security Companies in Armed Conflicts
Supervisor: Catarina Krause
Abstract: The use of private military and security companies ("PMSCs") has continued to increase globally. However, it can be argued that the international efforts to regulate the use of these companies and to effectively deal with the issues related to the actions of the companies and their employees have not been widely successful so far. There have been claims that the PMSCs and their personnel operate in a "legal vacuum" or "grey zone", especially when they are acting in armed conflicts. The main focus of this thesis is on the individual criminal responsibility of the personnel of private military and security companies for international crimes committed during armed conflicts. Since international courts have no jurisdiction over the private military and security companies as corporations, it is instead highly relevant to look at the individual criminal responsibility of the employees of PMSCs, as it seems to be the most likely avenue to hold the actors of the private companies responsible for international crimes. There have been notable allegations of misconduct by PMSCs in armed conflicts, including war crimes and other international crimes. The employees of PMSCs can more easily than most other groups of individuals become perpetrators of such crimes, considering the nature of the business, which often leads the companies to operate in conflict settings. While the private companies and their employees are often quite straightforwardly likened to mercenaries in public debate, it can be concluded that in most cases they do not meet the strict definition of a mercenary under international law. Instead, they do constitute a new phenomenon and have a distinct legal status. However, the ambiguous status of PMSC employees under IHL raises questions about both the privileges and responsibilities of the personnel of private companies and is closely linked to the question of their individual criminal liability for international crimes as well. As a principle, individuals should always bear responsibility for participation in international crimes, and especially for the gravest breaches of IHL. Thus, the fact that the personnel of PMSCs are working for a private company, does or at least should not exclude them from any individual criminal liability for international crimes. Nevertheless, in many ways it has remained unclear whether the employees of PMSCs can be held responsible for international crimes in a similar way than the military personnel of a state. The relevant questions, which will be examined in this thesis, relate to their unclear status under IHL, the narrow legal definition of a mercenary and the scope of individual criminal liability of PMSC personnel with regard to e.g. the doctrine of command and the superior-subordinate relationship. Another relevant question, which will also be discussed in this thesis, is about what the appropriate forum for their prosecution for international crimes would be.
Keywords: private military and security companies, international humanitarian law, international criminal law, individual criminal responsibility
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Abbreviations

AU	African Union
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), International Committee of the Red Cross (ICRC), 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
BAPSC	British Association of Private Security Companies
CoESS	The Confederation of European Security Services
EU	European Union
HRC	United Nations Human Rights Council
ICC	International Criminal Court
ICJ	International Court of Justice
ICoC	International Code of Conduct for Private Security Service Providers
ICoCA	International Code of Conduct for Private Security Service Providers Association
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
NATO	North Atlantic Treaty Organization
OAU	Organization of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PSC	private security company
PMC	private military company
PMSC	private military and security company
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

1. Introduction

1.1. Private Military and Security Companies and International Law

The increased visibility of private military and security companies (PMSCs) in armed conflicts has caught the attention of the public during at least the last decade.[1] The wars in Iraq, Afghanistan and most recently the Russian war of aggression in Ukraine have brought the phenomenon to the attention of media outlets and consequently to citizens.[2] The activities of PMSCs on the African continent have also certainly caught the public eye.[3] The private companies often seem to operate in weak and failed states that have questionable legal systems and where there is a lack of stable rule of law.[4] Consequently, the question as to whether the international norms to regulate said industry are adequate and correspond to the current situation and needs, has also become more topical.[5]

While the private military and security companies and their personnel have often been likened quite straightforwardly to mercenaries, legal scholars today agree that they actually constitute a completely new phenomenon, considering that they provide a wide range of both military and security services, are often organized as legitimate corporate entities, and thus have a distinct legal status.[6] This change in how the PMSCs and the those working for them are perceived is not only caused by a more sophisticated legal analysis, but also the actual evolution of the PMSC industry. The *modus operandi* of the companies can now include a range of actions beyond combat services: transport, logistics, maintenance, military and police training, demining, intelligence, risk analysis, protective services, anti-piracy actions, detention and interrogation of prisoners, construction, medical care and border protection.[7]

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[1] Montreux Document Forum website, *Contemporary use of PMSCs in armed conflict and complex environments*, available at: https://www.montreuxdocument.org/news/pmscs_armedconflict.html (last accessed 22.11.2023).
[2] *See e.g.* Debusmann/BBC 9.3.2022, Heinemann-Grüder 2023.
[3] *See e.g.* Cascais – Koubakin/DW 15.4.2022.
[4] Brooks, Koch & Schaub 2016 p. 201. *See also* Schaub & Kelty 2016 p. 19-20.
[5] *See e.g.* the Geneva Centre for Security Sector Governance (DCAF) webinar 21.10.2021, *A New Wave? Addressing the Contemporary Use of Private Military and Security Companies in Armed Conflict and Complex Environments*, video available at https://www.dcaf.ch/new-wave-addressing-contemporary-use-private-military-and-security-companies-armed-conflict-and (last visited 22.11.2023).
[6] Schaub & Kelty 2016 p. 8.
[7] Prem & Krahmann 2019 p.1, Brooks, Koch & Staub p. 201, Cameron 2014 p. 16.

Private military and security companies may have different functions in the environment that they are operating in and/or the states that they are in cooperation with. They might also work with other partners than just states or parties to an armed conflict, e.g. transnational corporations, international organizations (including the UN) or even NGO's.[8] Accordingly, it is possible for the companies to operate in different contexts and environments, including situations that do not qualify as armed conflicts according to IHL, such as internal disturbances and tensions.[9]

With regard to the legal status, rights and obligations of the PMSCs and their employees, it can be stated that the international efforts to regulate the use of these companies and to effectively deal with the issues related to their use have not been very successful so far.[10] However, most seem to agree that the question related to PMSCs is not "whether they should be regulated, but how".[11] National and international laws, informal industry self-regulations and hybrid approaches, such as multi-stakeholder initiatives and standard setting schemes, have been offered as solutions.[12] Especially the presence of PMSC employees in war scenarios or conflict environments does, however, pose many complex problems in ascertaining the individual criminal responsibility for the crimes that they have committed, especially international crimes that are committed outside of the host countries of the private military and security companies. The issues range from lacking jurisdiction to the procedural and substantive rules to be applied in the cases.[13]

1.2. Research Question(s) and Limitations

When examining the accountability, or possible criminal liability, of the actions related to the PMSCs, the question can be approached from at least three different angles. The first question, and also seemingly the most examined by scholars, is about the responsibility of the contracting state of the PMSCs.[14] Secondly, one can proceed to ask, whether the PMSCs, i.e. the companies

[8] Prem & Krahmann 2019, p.1,
[9] IPU/ICRC, IHL Handbook for Parliamentarians, p. 17.
[10] Global Policy Forum 2013.
[11] *See e.g.* Prem 2021, p. 357.
[12] Prem 2021 p. 357, Prem & Krahmann 2019 p.1.
[13] Manacorda & Mariniello 2012 p. 559.
[14] On state responsibility, *see e.g*. Hoppe 2008 EJIL (2008), Vol. 19 No. 5, 989–1014.

themselves, can be held accountable for violations of international law as a corporate body.[15] However, the third point of view, and the question on which this thesis will focus on, is about the criminal responsibility of the PMSC personnel, i.e., the individuals in different positions working under the PMSCs, and their criminal responsibility for international crimes.

In this thesis, the terms "employee" or "personnel" are used to describe a person or persons that work(s) for the private companies under some type of a contract of employment. The terms "employee", "member" and "personnel" of the private military and security companies are all used in this thesis interchangeably. However, it must be noted that since some PMSC's lack the status of a legal entity altogether and may not be registered companies at all, the term "employee", "member" or "personnel" must be interpreted more broadly as meaning the individuals operating as a part of a private military and/or security company, in different roles and by different types of agreements, not only a certain type of formal contract. In this thesis, all of the above-mentioned terminology also includes the directors of the companies. This definition used in this thesis is also compatible with the one of the Montreux Document[16], which states that the "personnel of PMSC are persons employed by, through direct hire or under a contract with a PMSC, including its employees and managers".[17]

Related to the last-mentioned question about the criminal responsibility of individuals working under the PMSCs in different positions, it is also relevant to recognize that while there are various categories that can define the status of a person under IHL, the legal status of PMSC employees during armed conflicts remains unclear in most cases. According to scholars, not enough attention has been given to ascertaining the status of certain PMSC roles during armed conflicts, especially outside just direct participation in hostilities; for example, functions such as guarding military bases or other security-related tasks. This status becomes extremely

[15] Regarding the criminal responsibility of both PMSC companies and individual employees and directors, *see e.g.* Ageli 2016, Amsterdam Law Forum, 8(1) pp.28–47. On the possibility of corporate responsibility, *see* Bantekas & Nash 2007 pp. 47–49.

[16] ICRC, The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, Ref. 0996, September 2008 (later in this thesis referred to as "the Montreux Document of 2008 on Private Military and Security Companies").

[17] The Montreux Document of 2008 on Private Military and Security Companies preface article 9 b). Since the term "private military and security company" or other terms related to it, such as the personnel or employees of such company, have not been defined in any binding legal treaty, the Montreux Document can be considered as the most widely accepted source for these definitions. *See* Schaub & Kelty 2016 p. 7.

relevant, when examining the criminal liability of the actions of the PMSC employees in the context of armed conflict, a situation in which IHL is applicable.[18]

Thus, the primary research question of this thesis is:

- *When the personnel of private military and security companies are acting in the context of an armed conflict, what are the prerequisites, conditions and limits for their individual criminal liability for crimes under international law, especially serious violations of international humanitarian law?*

Serious violations of IHL are considered war crimes that are punishable under international criminal law, including violations that are "grave breaches" of the 1949 Geneva Conventions and Additional Protocol I, as well as other serious IHL violations, that are recognized by the Rome Statute of the International Criminal Court.[19] The Geneva Conventions of 1949 recognize two types of serious violations: "grave breaches" and other prohibited acts that are not included to the definition of grave breaches.[20] Both are prohibited under international law, but the difference is that grave breaches can only be committed in international armed conflicts against protected persons or property and are subject to universal jurisdiction.[21] It must also be noted that in addition to war crimes, "international crimes" include crimes against humanity, genocide and the crime of aggression.[22]

In order to answer the research question of the thesis, one must examine the international legal framework under which the PMSC personnel are operating. However, an equally important question is their legal status under IHL, as mentioned above. When considering the legal status of PMSC personnel operating in armed conflicts, there have been claims that they are operating in a "legal vacuum" or "grey zone", in relation to both international humanitarian law and international criminal law.[23] The responsibility of PMSC personnel for breaches of international law can also be specified as a question about whether they enjoy exemptions from criminal liability because of their possibly unclear formal status under IHL, or because of other factors, such as the strict definition of mercenaries under international law that does not in most cases

[18] Chatham House 2008 p. 2.
[19] Melzer 2022 p. 289. Geneva Convention I (1949) Art. 50, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Art. 8(2)(a) and (b).
[20] Bantekas & Nash 2007 p. 113.
[21] Bantekas & Nash 2007 p. 113–114.
[22] Melzer 2022 p. 290.
[23] El Mquirmi 2022 p. 1, Quirico 2011 p. 423.

seem to correspond to the role of PMSC employees today.[24] One of the key questions is also about how and where the PMSC personnel can be prosecuted for these crimes based on their individual criminal responsibility.[25]

As stated above, the purpose of this thesis is not to focus on the accountability of the companies nor the states or other actors such as NGO's that they are in cooperation with or that are using their services, but rather the focus is on the individuals working for the PMSCs. Moreover, the aim is to only look at the criminal responsibility of the employees of private military and security companies in the context of armed conflict: in other words, in situations where international humanitarian law is applicable, even though as stated above, in reality, the companies do also operate in peacetime or under circumstances that do not amount to armed conflict under IHL, including in situations that would rather qualify as internal disturbances and tensions.[26] Thus, both IHL and international criminal law are relevant branches of international law with regard to the research question of the thesis.

1.3. International Law and Individual Criminal Responsibility

The international legal provisions on individual criminal responsibility for international crimes have been developed and formed within the framework of international humanitarian law.[27] Both IHL and international criminal law are relevant branches of law in terms of the research question of this thesis, as has been presented above. However, it is also relevant to make a distinction between international humanitarian law and other branches of international law, namely international criminal law, since they may be applicable at the same time, but do have a different purpose behind them.[28]

International humanitarian law (IHL) is the branch of international law that defines limits on the methods and means of warfare (*jus in bello*)[29]. IHL is specifically created to protect the possible victims of armed conflicts,[30] so ultimately the purpose of IHL rules is to limit the humanitarian consequences of armed conflicts; or in the words of *Melzer*, to establish the

[24] Quirico 2011 p. 423.
[25] Heinemann-Grüder 2023 p. 3.
[26] Melzer 2022 pp. 57–58.
[27] Greppi 1999 p. 531.
[28] Melzer 2022, pp. 26–27.
[29] Melzer 2022 p. 17, Gutierrez Posse 2006 p. 65.
[30] Gutierrez Posse 2006 p. 65.

"minimum standards of humanity" that should be respected in any armed conflict.[31] The humanitarian obligations under IHL must be thus respected in any and all circumstances of war and by all parties to the conflict.[32]

The famous Tokyo and Nuremberg Trials after the Second World War started the most remarkable contemporary movement of shaping and defining the doctrines of individual criminal liability under international law.[33] In both the Tokyo and Nuremberg Trials, the prosecution of war criminals was based on the premise that the principle of individual criminal responsibility for war crimes is a part of customary international law, whereas today the principle on individual criminal responsibility is recognized by several IHL treaties.[34] Article 6 of the Nuremberg Charter[35] states that war crimes are violations of existing provisions of *jus in bello*, i.e. international humanitarian law.[36]

IHL obliges states to prevent and prosecute serious violations of humanitarian law, including grave breaches of the 1949 Geneva Conventions and Additional Protocol I and other prohibited acts that count as serious violations of IHL.[37] Such serious violations of IHL constitute war crimes, for which individuals can be held directly accountable, and these crimes by individuals can today be prosecuted either by national (sovereign) states or international criminal tribunals.[38] The jurisdiction of the International Criminal Court (ICC) currently covers the "most serious crimes of concern to the international community": the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[39]

However, it is not international humanitarian law, but international criminal law that links the sanctions to the violations of IHL, defines them "in sufficient detail to make them prosecutable in court", and establishes the procedures for the exercise of jurisdiction over individuals suspected of committing the crimes.[40] Criminal liability in both national and international law

[31] Melzer 2022 p. 17.
[32] Melzer 2022 p. 17.
[33] Greppi 1999 p. 536, 548. It must though be noted that the categories of war crimes, crimes against humanity and genocide have developed significantly since the Second World War. *See* Greppi 1999 p. 548.
[34] Melzer 2022 p. 285.
[35] Charter of the International Military Tribunal ("the Nuremberg Tribunal"), 8 August 1945.
[36] Greppi 1999 p. 548.
[37] Melzer 2022 p. 31, Bantekas & Nash 2007 p. 113.
[38] Gutierrez Posse 2006 p. 65.
[39] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Art. 5.
[40] Melzer 2022 pp. 31–32.

is generally attributed to natural persons, with few and limited exceptions.[41] Individual criminal responsibility can therefore become relevant for any natural persons who commit an act that has been specifically defined as a crime by international law. While IHL and international criminal law have different objectives, content and purpose by default, they are both distinctive branches of international law, since they also address individuals, not only states.[42] The establishment of international criminal courts that are authorized to prosecute individuals for international crimes in cases where states are unable or unwilling to do so, is "related to and directly influenced by the content of" IHL.[43]

1.4. Methodology and Sources

To answer to the above-mentioned research question regarding the individual liability of PMSC employees for crimes under international law, rules of international law must be systemized and interpreted, using the legal dogmatic method. The focus and aim of this thesis will therefore be to determine and clarify the contents of relevant legal norms, and their systematization.[44] The aim of this thesis is not to provide an extensive overview of the actions of PMSCs that are acting in different contexts, nor to take part in the political debate about what the response of the international community should be in these different situations. Instead, the aim of the thesis is to clarify the legal context, i.e. identify the applicable rules of international law and their interpretation in relation to the specific research question.

The sources of international law have been referred to in Article 38(1) of the ICJ Statute.[45] According to Article 38, the sources constitute of international conventions, international custom as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations, as well as the judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law. Since the use of PMSCs and the legality of their use in armed conflicts is linked to IHL and the international regulation on mercenarism, both the Geneva Conventions of 1949 and the Additional Protocols I and II are relevant instruments, as is the International Convention

[41] Bantekas & Nash 2007 p. 15.
[42] Gutierrez Posse 2006 p. 69.
[43] Gutierrez Posse 2006 p. 68.
[44] Aarnio 1987 p. 16.
[45] Statute of the International Court of Justice, 18 April 1946.

Against the Recruitment, Use, Financing and Training of Mercenaries (1989)[46], customary law on IHL[47], judicial decisions[48] and writings. With regard to international criminal law, relevant sources used in this thesis include the Rome Statute of the International Criminal Court[49], customary law and case law by the international tribunals, including the ICC, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY).[50]

In addition, certain soft law sources are relevant in this context. The term "soft law" refers to agreements, principles and declarations that are not legally binding and cannot be legally enforced by a court but may still be relevant in certain contexts in an interpretative manner.[51] While treaties, custom and general principles are the only actual sources of international law, these rules or principles often need more detailed interpretation before they may be applied in practice.[52] Since the international legal framework related to the use of PMSCs and the actions and status of their personnel is still underdeveloped, soft law is especially in this context relevant in the interpretation of the existing norms and as examples of efforts to "fill the gap" of the lacking regulation. Examples of relevant soft law sources in this field are the Montreux Document of 2008 on Private Military and Security Companies[53], the International Code of Conduct for Private Security Providers[54], as well as the reports of the OHCHR Special Rapporteur/Working Group on the use of mercenaries.[55]

1.5. Outline of the Thesis

In this thesis, chapter 2 will discuss the background of the use of private military and security companies and examine their *modus operandi* from a legal perspective, in order to set the scene

[46] UNGA, International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, UNTS vol. 2163.
[47] *See e.g.* ICRC Database of Customary IHL: https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.
[48] For example: Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986.
[49] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.
[50] Regarding sources of international criminal law, *see* Bantekas & Nash 2007 pp. 2-5.
[51] *See e.g.* ECCHR website, *Glossary on International Law - Soft law*, available at: https://www.ecchr.eu/en/glossary/hard-law-soft-law/ (last accessed 22.11.2023).
[52] Melzer 2022 p. 25.
[53] Other relevant sources of soft law include for example the reports of the OHCHR Special Rapporteur/Working Group on the use of mercenaries, *see e.g.* OHCHR, Mercenarism and Private Military and Security Companies, HRC/NONE/2018/40.
[54] ICoCA, International Code of Conduct for Private Security Providers, as amended 10 December 2021.
[55] *See e.g.* OHCHR, Mercenarism and Private Military and Security Companies, HRC/NONE/2018/40.

to later discuss the role of individuals and their legal responsibilities in this context. In addition, the regulation of (or the efforts and initiatives to regulate) the activities of the PMSCs will be examined in chapter 2. This background is also needed to analyse the legal status of PMSC employees under IHL at a later stage of the thesis.

Chapter 3 will introduce the concept of mercenarism and its definition under international law. The relationship between PMSCs and mercenarism will be examined in chapter 3 in order to address the question of whether the employees of PMSCs are "modern day mercenaries" from a strictly legal point of view, which is also relevant when discussing their status in cases of breaches of international law and IHL. Chapter 4 will examine the legal status of PMSC employees that are acting in different functions in the context of an armed conflict, as well as the consequences to both their rights, obligations, and protection under IHL.

The scope of individual criminal liability of PMSC employees for international crimes will be examined in more depth in chapter 5, considering the different circumstances in establishing responsibility for certain breaches of law in the context of armed conflict. This question will be examined from the perspective of the distinct characteristics of PMSCs operating in conflicts. Chapter 6 will discuss the certain specific questions related to the individual criminal responsibility of PMSC employees, such as the chain of command and possible responsibility of PMSC superiors for international crimes or aiding or abetting in international crimes. The questions of how and where the PMSC personnel can be prosecuted for the crimes committed in armed conflicts will be examined in chapter 7. Lastly, the conclusions related to the research question of the thesis will be presented.

2. Privatization of War and International Law

2.1. The Definitions of Private Military and Security Providers

Private military and security companies are private businesses that provide either military or security services, or both.[56] According to some scholars it would be important to make a clear distinction between private military companies (PMCs) and private security contractors (PSCs), also from a legal point of view, because only the first mentioned can also operate as a part of an army in offensive military actions.[57] However, since both PMCs and PSCs can *de facto* operate in armed conflicts via different functions relevant to international law, especially IHL, both branches of private military operators are also relevant to consider in the context of this thesis. Private military and security services may include many different types of functions: armed guarding and protection of persons and objects, maintenance and operation of weapons systems, prisoner detention, and advice to or training of local forces and security personnel.[58] One growing branch that is also worth mentioning is maritime security, where the companies mainly operate to prevent pirate attacks in certain areas, notably in Eastern Africa.[59] The companies often have a role that is meant to complement the national military forces of a state.[60]

The UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination ("the UN Working Group on mercenaries") has been established as a mechanism that is part of the Special Procedures of the United Nations Human Rights Council.[61] The experts of the UN Working Group on mercenaries have used the following definition for private military and security companies: "a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities." Furthermore, military services in this context are defined as "specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities" and security services

[56] The Montreux Document of 2008 on Private Military and Security Companies preface article 9 a).
[57] The Insight/Threat Intelligence Podcasts 2020.
[58] The Montreux Document of 2008 on Private Military and Security Companies preface article 9 a). *See also* ICRC Casebook. https://casebook.icrc.org/glossary/private-military-and-security-companies-pmscs.
[59] Cameron 2014 p. 16.
[60] Schaub & Kelty 2016 p. 18.
[61] OHCHR 2018 (HRC/NONE/2018/40) p. 6.

as “armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities”.[62]

Alongside the definition by the UN Working Group and the Draft Convention, the definition of private military and security companies in the Montreux Document of 2008 is particularly relevant, since the term has not been defined by any binding treaty, and therefore the Montreux Document is the most widely accepted source for the definition.[63] According to the Montreux Document:

> “[the PMSCs] are private business entities that provide military and/or security services, irrespective of how they describe themselves - - [m]ilitary and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.”[64]

While it has been concluded above that for the purposes of this thesis it is not relevant to make a strict distinction between PMCs and PSCs, since both can operate in the context of armed conflicts and thus be relevant to the research question of the thesis, in some other contexts this distinction indeed is important to be made. For example, the UN has referred to this distinction by stating that they do not resort to private military companies in UN peacekeeping operations, but only to private security providers without armed services, and only as a last resort.[65] Also, some states may more easily be drawn to use private security companies (PSCs) rather than private military companies (PMCs) because of their flexibility in conducting security services, without having to be troubled with the need for discreteness that comes with using companies specialized in military services.[66] However, as stated above, this distinction is not relevant in most situations, e.g. when discussing the operations of PMSCs and their personnel in armed conflicts under IHL, since an “all-encompassing” description of the private companies does not exist under the law of armed conflict and there should not be any “vacuum” in IHL in this sense.[67]

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[62] A/HRC/24/45, para 5. The definition is based on the Draft of a possible Convention on Private Military and Security Companies for consideration and action by the Human Rights Council, A/HRC/15/25, annex I. *See also* OHCHR 2018 (HRC/NONE/2018/40) p. 18.
[63] Schaub & Kelty 2016 p. 7.
[64] The Montreux Document of 2008 on Private Military and Security Companies preface article 9 a).
[65] OHCHR 2018 (HRC/NONE/2018/40) p. 22.
[66] Markusen 2022 p. 1.
[67] Sossai 2009 p. 1, Schaub & Kelty 2016 p. 7.

2.2. The Background and Current State of Play of Private Companies as Actors in Conflicts

The use of private military and security companies has been a common practice for states since at least the 1980's. *Ageli* gives some pre-2000's examples: a company called DynCorp participated in the counter-narcotics strategy in Colombia in 1992, multiple private armies operated in Libya after the "Arab Spring" in early 2010s or as mentioned above, the UN used private security companies in peace missions since 1990's.[68] Today, their use both in armed conflicts and outside of them has not decreased, but vice versa[69]: for example, in Iraq and Afghanistan alone, according to estimates there have been about 155 000 PMSC employees working for the US Department of Defence, and they have outnumbered the uniformed military personnel in both of these contexts.[70] China is also known to use private security companies without military functions to protect the interests and functions of Chinese companies abroad, including in countries with conflict zones in their territory.[71] The United States, Russia, and China have all broadly used PMSCs "to understate or obscure their involvement in countries and conflict zones worldwide".[72]

The UN practice has sometimes been mentioned as "a positive side" of the industry.[73] However, a lack of transparency has been noted in the practices of the UN as well, as there were "little to no information" on the number or name of the companies contracted or details regarding their services. At the same time, certain staff representatives have reported growing concern about the increasing use of private military and security companies and their capacity to effectively protect United Nations staff. [74] According to *Ageli*, the majority of the criticism towards the use of these companies has been triggered by events in "weak states, which are usually in civil war", and which need "military reinforcement so as to confront the opposing groups".[75] The other element is the secrecy surrounding these companies: despite their extensive use, their

[68] Ageli 2016, Amsterdam Law Forum, 8(1) pp. 28–29, 47.
[69] *Sossai* states that the use of PMSCs "in present-war scenarios is unprecedented both in size and scope". Sossai 2009 p. 1.
[70] Cameron & Chetail 2013 p. 1.
[71] Markussen 2022 pp. 1-2.
[72] Markussen 2022 p. 2.
[73] Ageli 2016, Amsterdam Law Forum, 8(1) pp. 28–29.
[74] OHCHR 2018 (HRC/NONE/2018/40) p. 22.
[75] Ageli 2016, Amsterdam Law Forum, 8(1) pp. 28–29.

actions have remained mainly "secret", because the companies and the contracting parties have often been successful in hiding most of their actions from the public eye.[76]

Referring to what has been described above about the secrecy of the actions of the private companies, even in the UN context, it may be concluded that the lack of transparency seems to be a common practice of the industry. However, it seems that certain recent developments have begun to slowly erase the element of secrecy around the industry, as the public has grown increasingly aware of the existence of PMSCs in armed conflicts, most recently due to Russian war of aggression in Ukraine since February 2022 and the notable participation of Wagner Group in the military offensive as well as committing atrocities during the war.[77] In addition, the actions by the United States in Iraq and Afghanistan have been noticed by the public and the media, as well as the actions of many private companies in Africa.[78]

2.3. The Regulation of Private Companies and Their Personnel

2.3.1. International Legal Framework

International law at present does not define the terminology or make any explicit mention of private military and security providers in any of the existing international treaties, which can be explained by the relatively recent appearance of these organisations globally.[79] However, international law provides a number of rules that are relevant to the use and actions of PMSCs. Some of the current existing rules apply to the states that are contracting the private companies, some apply to the work force of the companies, some to the state of nationality of the PMSC and some to the state of nationality of the PMSC employees. In addition, several rules of international human rights law, international humanitarian law, international criminal law and general international law principles are applicable.[80]

However, PMSCs not being explicitly defined or otherwise addressed under any international regulation raises questions, because several other similar functions, such as mercenarism, have

[76] *Ibid*.
[77] *See e.g.* BBC 3.10.2022 on the actions of "a Russian mercenary group", the Wagner Group, in Ukraine and Heinemann-Grüder 2023 on "Russia's corporate warriors in armed conflicts".
[78] Brooks, Koch & Schaub 2016 p. 202, Debusmann/BBC 9.3.2022, Cascais – Koubakin/DW 15.4.2022, Heinemann-Grüder 2023 p. 4.
[79] Kinsey 2003 p. 14.
[80] The Montreux Document Forum, written contribution by the co-chairs Switzerland and ICRC, 2021 p. 1.

been addressed. In addition, according to many scholars, the current regulation on PMSCs is not sufficient, but instead leaves several "grey zones" related to the operations of the companies and their employees.[81] The UN working group on the use of mercenaries conducted a four-year study in 60 states in all regions of the world, after which it strongly urged the international community to establish new international standards on PMSCs.[82] According to the head of the UN Working Group, "there are more regulatory gaps than good practices in national laws concerning the industry" and the industry "in which the use of force is common" is a growing one, so the need for regulation is only increasing.[83]

Currently, the approach of different states to the private military and security industry is, according to the views of the UN Working Group, inconsistent and uncoherent, even though it is known that grave human rights violations have been committed by private actors that often do not answer to any military chain of command. Thus, the lack of "robust regulation" may lead to impunity for war crimes and other international crimes committed by the employees of private companies. The main concern of the UN Working Group was, according to its chairperson, not whether the PMSC operations are legal *per se* but that because of the lack of any strong legal framework, there are not any safeguards against grave violations of human rights or IHL. Similarly, there are not any mechanisms in place to bring perpetrators of crimes to justice or provide remedies for the victims.[84]

This lack of specific international regulation dedicated to PMSCs presents a notable challenge also because there are certain functions, which are seen by many scholars as "inherently governmental or state functions that should not be delegated or outsourced".[85] According to *White*, this also seems to be the underlying purpose behind the UN Working Group's Draft Convention on Private Military and Security Companies (PMSCs)[86] for consideration and action by the Human Rights Council[87], since in the preamble of the draft convention the Working Group expresses concern about the "increasing delegation or outsourcing of

[81] Global Policy Forum 2013, Prem 2021 p. 357.
[82] A/HRC/36/47, 20.7.2017.
[83] OHCHR Press Release 15.9.2017. *See also* A/HRC/36/47, 20.7.2017.
[84] *Ibid*.
[85] Draft of a possible Convention on Private Military and Security Companies for consideration and action by the Human Rights Council, A/HRC/15/25, preamble. White 2011, p. 137.
[86] Draft of a possible Convention on Private Military and Security Companies for consideration and action by the Human Rights Council, A/HRC/15/25.
[87] A/HRC/15/25, Annex I, 2 July 2010.

inherently State functions which undermine any State's capacity to retain its monopoly on the legitimate use of force."[88]

However, the International Committee of the Red Cross (ICRC) claims that it has not joined the debate about the overall legitimacy of using PMSCs but is instead mainly concerned about whether and how international humanitarian law (IHL) applies to them when the companies are operating in armed conflicts, and whether their existence and actions are in compliance with IHL. However, the ICRC also clearly shares the view that there should be a clear legal framework in terms of applicable international rules, and not only that, but also "appropriate domestic legislation and regulations" that cover the actions of the PMSCs.[89]

Since both of the most relevant instruments currently in place that will be examined in more detail in the following sub-chapters, namely the Montreux Document and the self-regulation by the industry (ICoC), are soft law instruments, the question of the possibility of an international treaty, which would lay down the rules of international law regarding PMSCs, is indeed a topical one. Such a treaty could, according to ICRC, also identify certain activities which the States could under no circumstances outsource to private companies.[90]

2.3.2. Self-Regulation by the Industry

Self-regulation by the PMSC industry can be considered the "second" avenue of the international legal framework, since the potential of an international treaty would be the so-called "first avenue".[91] Similar to the Montreux Document, the International Code of Conduct for Private Security Service Providers (ICoC) is another voluntary regulatory initiative launched by the government of Switzerland in cooperation with private stakeholders and relevant experts in the field. A fairly large range of representatives of the PMSC industry have signed the International Code of Conduct for Private Security Providers ("ICoC") in 2010[92], in which they express their commitment to the strict standards on e.g. the use of force and treatment of persons detained or those that are exposed to the activities of PMSCs. For example,

[88] White 2011 p. 137. Draft of a possible Convention on Private Military and Security Companies for consideration and action by the Human Rights Council, A/HRC/15/25, preamble.
[89] ICRC 2012 p. 1.
[90] ICRC 2012 p. 2
[91] ICRC 2012 p. 2.
[92] ICoCA, International Code of Conduct for Private Security Providers, as amended 10 December 2021.

the ICoC states that the companies shall not, and should require their personnel to not engage in torture or other cruel, inhuman, or degrading treatment or punishment, or any type of sexual violence.[93] The International Code of Conduct for Private Security Service Providers' Association (ICoCA) also has the possibility to serve as an oversight mechanism.[94]

Even though it seems clear that self-regulation is not a realistic alternative to international or domestic legislation in this context, it can nevertheless contribute to setting standards of conduct for PMSCs and their employees. In that way it can then contribute to improving the compliance with IHL and human rights law of the practices of the industry.[95] However, there remains a clear lack of convergence between government regulation and industry self-regulation, which makes it more difficult for the industry self-regulation to effectively contribute to the international legal framework, as it stands today.[96]

According to *Narvàez González* and *Valencia*, the ICoCA nevertheless has added value in some contexts.[97] For example, it is a welcome addition to the legal framework relating to the actions of PMSCs and their employees in Latin America, a region that is "in need of better controls for private security services and robust mechanisms to hold PSCs responsible for violations". According to *Narvàez González* and *Valencia*, these violations include lack of impunity for crimes against local populations, and "the blurring the lines between police, illegal armed groups and PSCs". Also according to the article, the ICoCA (and its Association) could offer a human rights framework that could help prevent and remediate possible violations – in case it is effectively implemented.[98]

However, the article by *Narvàez González* and *Valencia* also notes, that being a voluntary association, the real impact of ICoCA relies heavily on the market pressure of PMSCs for its enforcement. Thus, the clients are in a key role in steering the direction, if they choose primarily companies that have committed in operating in accordance with the ICoCA due diligence standards. The government can also play a role in this by incentivizing the ICoCA membership

[93] ICoCA, International Code of Conduct for Private Security Providers, as amended 10 December 2021 paras 35, 38.
[94] ICoCA website, *What we do*, available at: https://icoca.ch/what-we-do/ (last accessed 22.11.2023).
[95] ICRC 2012 p.2.
[96] El Mquirmi 2022 p. 11.
[97] Narvàez González & Valencia 2019 pp. 1-29.
[98] Narvàez González & Valencia 2019 p. 11.

in e.g. public procurement. According to *Narvàez González* and *Valencia*, similar efforts have already been seen for example in the UK, the US and Switzerland.[99]

In order to the ICoC to be effectively enforced, there would still need to be common efforts by more actors worldwide to make the commitment to it worthwhile for most of the companies operating in this field.[100] In addition, one of the flaws of the ICoC is that it only includes companies that provide private security services, not ones that provide solely military services.[101] According to many sources, including the preamble of the UN draft convention, any national or international systems of self-regulation are not sufficient in ensuring that the obligations of IHL and international human rights law are obliged by the PMSC personnel.[102]

Lastly, in addition to the ICoC, regarding attempts for self-regulatory frameworks in the field, certain other actors deserve a mention as well, even though many of them have also already contributed to the ICoC initiative. For example, the British Association of Private Security Companies (BAPSC) was launched in 2006.[103] It aims to "promote, enhance and regulate the interests and activities of UK-based firms and companies that provide armed security services in countries outside the UK and to represent the interests and activities of Members in matters of proposed or actual legislation".[104] In addition, the objective of BAPSC is to "raise the standards of operation of its members and this emergent industry" as well as to "ensure compliance with the rules and principles of international humanitarian law and human rights standards".[105] However, the BAPSC does not seem to be particularly active at the moment[106], and since there is no central database of PMSCs that are operating from the UK, it also remains questionable, to what extent it actually covers the national range of operators in the industry in the UK.[107]

[99] Narvàez González & Valencia 2019 p. 26.
[100] Narvàez González & Valencia 2019 pp. 26-29.
[101] El Mquirmi 2022 p. 11.
[102] White 2011 p. 143-144. Draft of a possible Convention on Private Military and Security Companies for consideration and action by the Human Rights Council, A/HRC/15/25, preamble.
[103] BAPSC website, *Home/About us*, available at: https://bapsc.org.uk/default.asp, (last accessed 22.11.2023).
[104] BAPSC website, *Key Documents > Charter*, available at https://bapsc.org.uk/key_documents-charter.asp (last accessed 22.11.2023).
[105] BAPSC website, *Home/About us*, available at: https://bapsc.org.uk/default.asp (last accessed 22.11.2023).
[106] The latest events at the website date back to 2011: *see* BAPSC Website, *Home/About us*, available at: https://bapsc.org.uk/default.asp, (last accessed 22.11.2023).
[107] Overton, Benevilli & Bruun/OpenDemocracy 20.12.2018.

Another actor in the field is the Confederation of European Security Services (CoESS), which was established already in 1989 and serves as the umbrella organisation for 22 national private security employers' associations. It has been recognised by the European Commission as the only European employers' organisation to represent companies that provide private security services.[108] The CoESS claims to actively participate in developing European standards for the private security industry, based on its values of quality, trust, compliance and safety. The CoESS seems currently more active than certain other actors such as the BAPSC, and is more focused on influencing the policy-making and legislative work of the EU, giving joint statements or position papers to the EU Council presidencies or regarding certain specific questions such as the use of artificial intelligence (AI) in security-related matters.[109] However, the CoESS also claims to have contributed to the development of multiple European and international standard setting exercises in the area of private security.[110]

A couple of other efforts to create mechanisms of internal code of conduct for the industry could be named as well: the Sarajevo CoC and the IPOA CoC.[111] The Sarajevo CoC was created in 2005-2006 on the basis of the observation that the rapidly growing private industry is taking on roles that have traditionally only been conducted by the state security providers. Thus, the code of conduct was created in response to the lacking national or international legislative framework, to support the application of a transparent and fair licensing system.[112] The IPOA CoC also aims to support the idea of a transparent licensing regime.[113] Now IPOA, the non-profit trade association founded in 2001 that has been re-named as The International Stability Operations Association (ISOA), claims to "promote high operational and ethical standards of firms active in the peace and stability operations industry", "to engage in a constructive dialogue" with policy-makers in the field and "to inform the concerned public about the activities and role of the industry".[114]

[108] CoESS website, *History*, available at: https://www.coess.org/about.php?page=history (last accessed 22.11.2023).
[109] CoESS website, *Newsroom* > *Position papers*, available at: https://www.coess.org/newsroom.php?page=position-papers (last accessed 22.11.2023).
[110] CoESS website, *Projects and standards*, available at: https://www.coess.org/projects-and-standards.php?page=european-standards--cen (last accessed 22.11.2023).
[111] Hoppe & Quirico 2009 p. 5.
[112] Sarajevo PSC Code of Conduct 30.7.2006 preamble p. IV.
[113] Hoppe & Quirico 2009 p. 5.
[114] ISOA website, *About us*, available at: https://ipoaworld.org/eng/aboutipoa.html (last accessed 22.11.2023).

For the purpose of this thesis it is not necessary to elaborate in a more lengthy or detailed manner on all of the efforts of establishing either international, regional, or national code of conducts for the industry to fill in the gaps left by lacking legislative frameworks. However, what is notable is that most of these efforts have been described by scholars as containing only "vague" language resulting to problems of interpretation, and it has also been pointed out that it seems to not be clear whether or to which extent a specific code would apply to the PMSCs themselves, or to their personnel.[115] In addition, even though the multi-stakeholder initiatives, especially the ICoC, can be described as relevant efforts to contribute to the establishment of international norms in terms of the activities of PMSCs and their personnel, they cannot completely fill the gap, which is the need to create an independent, supranational and impartial regulatory framework and monitoring body in relation to said industry.[116]

2.3.3. The Montreux Document

The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict ("the Montreux Document") of 2008[117] represents another relevant soft law instrument in the field, in addition to the self-regulation (namely ICoC) that was briefly examined above. The Montreux Document is an instrument that aims to guide states in their "use and tolerance" of PMSCs.[118] The Montreux Document is supported by 58 States and three international organisations: the EU, NATO and the OSCE.[119]

While the Montreux Document in itself is not a legally binding instrument, in terms of its content, the first part (Part I) of the Montreux Document refers to "hard laws", as it focuses especially on the obligations of states and emphasizes their role in bearing the primary responsibility for ensuring compliance with IHL and human rights law.[120] The second part of the Montreux Document focuses on the good practices, which do not have a legally binding nature and that are not meant to be exhaustive.[121] When PMSCs are operating in the context of

[115] Hoppe & Quirico 2009 p. 22
[116] Krieg 2014 p. 50.
[117] ICRC, The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, 2009.
[118] Cameron & Chetail 2013 p. 4.
[119] The Montreux Document Forum website, *Participants*, available at: https://www.montreuxdocument.org/about/participants.html (last accessed 22.11.2023).
[120] White 2012 p. 12.
[121] The Montreux Document, Part Two, p. 16.

armed conflict, the companies, as well as their employees are bound by IHL, which imposes "both explicit and implicit limitations on the tasks for which states may use private military and security companies", although not prohibiting the presence or use of PMSCs in situations of armed conflict.[122] The Montreux Document recognizes some of the limitations explicitly that IHL does not, such as the prohibition to give PMSCs the command of a prisoner of war (POW) camp.[123]

In addition to the references to already binding law (treaties and custom), the Montreux Document also sets forth good practices and provides guidance on how the States can incorporate their obligations into domestic legislation.[124] These good practices could also serve as a basis or foundation for other regulatory efforts with regard to PMSCs and states' responsibilities regarding their use.[125] It again has to be noted that private military and security companies (PMSCs) are not explicitly defined by any binding international treaty.[126] The Montreux Document provides a definition, although not totally complete, of PMSCs and reflects on the PMSCs and their services which are of greatest concern from the perspective of IHL.[127]

Even though the Montreux Document mainly focuses on the obligations of states, it has certain elements also relevant to the individual criminal responsibility of PMSC employees. For example, paragraph 23 of its Part I ("Pertinent international legal obligations relating to private military and security companies") states that "the personnel of PMSCs are obliged to respect the relevant national law, in particular the national criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality". The Montreux Document also addresses the question of the unclear status of PMSC employees under IHL in the context of armed conflict, as well as the obligation of the PMSC personnel to comply with the rules of IHL nevertheless.[128] However, *White* argues that the obligations identified and the good practices proposed by the Montreux Document are heavily aimed at states and much less towards the industry or the personnel of the companies. According to *White*, the Montreux

[122] Cameron & Chetail 2013 p. 113.
[123] *Ibid*.
[124] ICRC 2012, White 2012 p. 12.
[125] White 2012 p. 12.
[126] El Mquirmi 2022 p. 2.
[127] Cameron & Chetail 2013 p. 4.
[128] The Montreux Document, paras 24, 26.

Document does not even try to regulate the industry, but instead serves as a reminder to the States of their obligations.[129]

2.3.4. The National and International Regulation Related to PMSC Personnel

The employees of PMSCs are bound by international humanitarian law when they are operating in armed conflicts. However, the exact determination of the applicability of IHL rules to PMSC personnel must be examined through the roles of the employees in armed conflict. International humanitarian law always requires that the status of individuals is divided to either combatants or civilians.[130] States have an obligation to ensure their compliance of IHL, including the use of PMSCs and their personnel. According to the Montreux Document, the employees of private companies are obliged to respect the relevant national law of the state in which they operate and in addition, "as far as applicable", the law the states of their nationality.[131]

However, according to the UN Working Group on the use of mercenaries[132], a study of the national legislations of 60 states from around the world showed an "overall lack of rules with regard to the direct participation of private military and security personnel in hostilities, a scenario that in some cases could fall within the mercenary definition - - (t)his gap also increases the risk of human rights abuses".[133] While the Working Group has acknowledged the positive aspects of both instruments studied above, the Montreux Document and the ICoC, it has also noted that the scope of application of the Montreux Document is limited and the ICoC is after all only a voluntary initiative that does not feature any accountability or enforceable remedies for victims of crimes.[134]

Regarding national legislations, the Working Group expressed its concern on that weak national legislation and lack of any enforcement mechanisms cannot address human rights concerns

[129] White 2012 p. 13.
[130] Cameron & Chetail 2013 pp. 383–385.
[131] ICRC, The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, 2009, E 23.
[132] The UN Human Rights Council (HRC) has a Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, that was established in July 2005. Since 2005, the HRC has renewed the mandate of the Working Group multiple times, as well as adopted resolutions on the matter. *See* OHCHR: About WG Mercenaries (https://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/about.aspx).
[133] UNGA A/75/259, pp. 7-8, A/HRC/36/47, 20.7.2017.
[134] A/HRC/36/47 (20.7.2017) para 66.

effectively. Serious gaps can be found in areas such as licensing or vetting the PMSC personnel, the use of force, the use of weapons, accountability and remedies for violations. While the Working Group states that it would welcome the strengthening of national legislation in areas it has identified as particularly weak and problematic, in addition, taking into account the transnational character of the PMSC industry, emphasis should especially be put on the need of international regulation of the companies, including the individual liability of their employees.[135]

White argues that effective regulation of the activities of PMSCs cannot only be established by operating at the international level, even with the UN in lead, if the domestic regulation remains inadequate. Thus, effective control and accountability of PMSCs should be, as argued by *White*, dependent on a system of national regulation and enforcement.[136] On the other hand, *White* has claimed that the supervision and regulation of PMSCs should preferably occur at both the international and national levels in order to be as effective as possible.[137] For example, numerous European states regulate the activities of PMSCs on their own territory but not their extraterritorial activities. This is notable, since the PMSCs are nearly without exception multinational companies by nature and their personnel mostly operate outside of the home state of the company.[138]

2.3.5. The UN Draft Convention on Private Military and Security Companies

The UN Draft Convention on Private Military and Security Companies is a product by the UN Working Group on Mercenarism, presented as an Annex of the report of the Working Group to the Human Rights Council in 2010.[139] Firstly, in the conclusions of their report, the UN Working Group emphasized its "utmost concern" about the impact of PMSCs on the human rights situation globally, "in particular when operating in conflict, post-conflict or low-intensity armed situations". They also noted with grave concern that PMSCs and their personnel are rarely held accountable for violations of human rights, even in the gravest cases. Thus, they decided to propose to the HRC a draft of a new binding legal instrument, i.e. a new international

[135] A/HRC/36/47 (20.7.2017) paras 62–64.
[136] White 2011 p. 143–144.
[137] White 2012 p. 22.
[138] Cameron 2014 p. 16–17. The possibility of a European Treaty has also been suggested, *see* Cameron 2014 pp. 19-28.
[139] Draft of a possible Convention on Private Military and Security Companies for consideration and action by the Human Rights Council, A/HRC/15/25, Annex I, 2.7.2010.

convention. This convention would not ban the use of PMSCs but rather establish minimum international standards for states in order for them to regulate the activities of both the companies and their personnel. The Working Group invited the Human Rights Council to take the work forward based on the draft of a convention they presented.[140]

The UN Draft Convention recognizes the need to enhance both international and national regulations in order to achieve an effective overall regulatory framework in the context of PMSCs. The proposals of the UN Working Group would require states to establish a comprehensive domestic regime of regulation, as well as "oversight over the activities in its territory of PMSCs and their personnel including all foreign personnel, in order to prohibit and investigate illegal activities as defined by this Convention as well as by relevant national laws".[141] The draft convention also envisages e.g. national licensing regimes.[142]

According to *White*, the UN Draft Convention does constitute a "reasonable" basis to address the use of PMSCs in conflict and post-conflict settings. However, as a draft of an international convention, it does not address the PMSCs themselves, but rather attaches obligations to states that are contracting them or hosting them in their territories, either as home states or host states. Thus, at least in the opinion of *White,* the UN Draft Convention fails to fully reflect the growing recognition of the need to have a credible access to justice for the individual victims of the crimes and bringing the perpetrators of such crimes to justice.[143]

White also claims that the states that are more closely connected to the PMSC industry are also more drawn to the Montreux process than to the UN Draft Convention. On the contrary, those states that are more reserved against the PMSC industry and consider it as "a modern form of mercenarism", are more likely to support the process of the Draft Convention. In the debates of the Human Rights Council, many notable actors, including the US, UK and the EU, have heavily questioned the need for a new convention. Their criticism has been based on the claim that there already is another parallel process, i.e. the Montreux process, and on that the issue of

[140] Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, A/HRC/15/25, 2.7.2010, paras 90–92.
[141] Draft of a possible Convention on Private Military and Security Companies for consideration and action by the Human Rights Council, A/HRC/15/25, 2.7.2010, Articles 12-14.
[142] White 2011 p. 143–144. Draft of a possible Convention on Private Military and Security Companies for consideration and action by the Human Rights Council, A/HRC/15/25, 2.7.2010, Articles 12-14.
[143] White 2011 p. 149–150, White 2012 p. 29.

PMSCs and mercenarism is not limited to human rights, which means that the HRC lacks the overall mandate on the subject.[144]

[144] White 2011 p. 150–151.

3. Private Companies – Modern Day Mercenaries?

3.1. Mercenaries and International Law

Using private actors in armed conflicts is not at all a new phenomenon: on the contrary, it is most likely "as old as war itself".[145] Mercenaries have been used in the most notable armies in history, but their profile and the role that they have played in conflicts have varied between different eras and conflicts. The "mercenaries of today" can be said to often look quite different than they did in the times of for example Alexander the Great or Roman Legions.[146] The business of selling military services in a larger scale became more popular especially after the end of the Cold War, when in many parts of Europe, large armies were not seen as necessary as before by states.[147] Despite the new "trends" in the field, namely the relatively recent emerging of corporate actors, the definition of mercenaries that can be found in Additional Protocol I to the Geneva Conventions of 1949[148] (AP I), and the UN Mercenary Convention of 1989[149] is still based on a "traditional" view of mercenaries.

As already stated in the first chapter of this thesis, private military and security companies (PMSCs) are especially in public debate very often straightforwardly likened to mercenaries. However, nowadays legal scholars mostly agree that they and their personnel actually do form a new category rather than simply falling into the already existing one, despite being called "corporate mercenaries" by many.[150] Whether an individual employee of a PMSC meets the definition of a mercenary is, however, still a relevant question when examining the rights, obligations and protection of individuals under international law, including their individual criminal responsibility.

[145] Dodenhoff, 1969 p. 91.
[146] Dodenhoff, 1969 p. 91. About the history of mercenarism, *see* Dodenhoff 1969 pp. 91-108.
[147] Cameron 2014 p. 15.
[148] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.
[149] UNGA, International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, A/RES/44/34, Article 3.
[150] Prem & Krahmann 2019 p. 1, Mathieu & Dearden 2006.

Mercenarism is prohibited in the International convention of 1989 against the recruitment, use, financing and training of mercenaries (hereinafter: the UN Mercenary Convention of 1989).[151] However, the convention has only been ratified by 37 states, and most of the states that have been accused of using "modern-day mercenarism" (using private military contractors), such as the U.S. and Russia, are not parties to it.[152] According to Article 3 of the 1989 Convention, a mercenary, who meets the definition set out in Article 1 of the Convention and who participates directly in "hostilities or in concerted act of violence", commits an offence "for the purposes of the Convention".

The Convention for the Elimination of Mercenarism in Africa (the OAU Convention on Mercenarism)[153] also prohibits mercenarism. The OAU Convention on Mercenarism states in its Articles 3 and 4 that "(m)ercenaries shall not enjoy the status of combatants and shall not be entitled to the prisoners of war status", and that they are "responsible both for the crime of mercenarism and all related offences, without prejudice to any other offences for which he may be prosecuted". Article 7 of the OAU Convention states that "(e)ach contracting State shall undertake to make the offence defined in Article 1 of this Convention punishable by the severest penalties under its laws, including capital punishment". To date, the OAU Convention has been ratified by 32 African states.[154]

The trials of mercenaries are examples of the attempts to cope with the rules of international law regarding this phenomenon. Several trials, where individuals have been accused of mercenarism, have taken place in African settings.[155] One example of these trials is "the Angolan trial on Mercenaries" in 1976. In this case, questions of both the definition of a mercenary as well as the question of applicable legislation had to be addressed. Regarding the question of applicable law, the Court referred to multiple relevant sources of law in its verdict: OAU resolutions, UN resolutions, the Charter of Nürnberg Military Tribunal, as well as the national penal code of Angola.[156] The People's Revolutionary Court of Angola ended up

[151] UNGA, International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, A/RES/44/34, Article 3.
[152] The International Convention Against the Recruitment, Use, Financing and Training of mercenaries (1989) currently has 37 parties and 17 signatories, *see* UNTC > Depositary > Status of Treaties. Regarding the claims that some states have used "modern day mercenaries", *see e.g.* McFate 2019.
[153] OAU, Convention for the Elimination of Mercenarism in Africa, 3 July 1977, CM/817 (XXIX) Annex II Rev.1. The Organisation of African Unity (OAU) is the predecessor of current African Union (AU).
[154] AU, List of Countries which have signed, ratified/acceded to the OAU Convention for the Elimination of mercenarism in Africa, 15.6.2017.
[155] Major 1992 p. 134–135.
[156] Hoover 1977 p. 340.

convicting 13 European soldiers in total on the charge of being mercenaries, sentencing nine to prison and four of them to death.[157]

Also, in 1986, the International Court of Justice (ICJ) dealt with a case in which Nicaragua accused the United States of using mercenaries in its territory and going as far as creating and organizing a mercenary army.[158] The case did not address directly the question of mercenarism *per se*, but still in the conclusions of the court the ICJ demonstrated clearly that the use of mercenaries by a state is illegal in customary international law, if the principles of non-intervention, territorial sovereignty and political independence are also violated.[159]

3.2. The Definition of a Mercenary and Prohibition of Mercenary Activities

The first step in discussing whether and to which extent mercenary activities are prohibited, is to have a "clear and workable" definition of a mercenary, i.e. an answer to the question of who qualifies as a mercenary.[160] The term "mercenary" is often used in a generic and politically loaded sense, but the precise meaning from a legal viewpoint most often does actually not correspond to the rhetoric used in public discussions.[161] The definition of mercenaries can be found in several instruments, the most notable being Additional Protocol I to the Geneva Conventions of 1949 (AP I), which, in its Article 47(2), defines a mercenary as:

> "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."[162]

[157] Hoover 1977 p. 323.
[158] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986.
[159] Gaultier et al. 2001 p. 26. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986, paras 83, 93, 191 and 195.
[160] Major 1992 p. 107.
[161] Faite 2004 p. 4.
[162] UNGA, International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, A/RES/44/34.

A similar definition can also be found in the UN Mercenary Convention of 1989 and the OAU Convention.[163]

However, the definition of a mercenary has been said to "create as many problems as it solves", in being both too specific and restrictive, and containing elements such as "motivation" which are in general very complicated concepts to take into account in legal assessment.[164] The definition requires that all six conditions mentioned above should be fulfilled. AP I also only applies to international armed conflicts, and no similar provision is included in the AP II[165], which would also apply to non-international armed conflicts.[166] Thus, it can be concluded that the current international law on mercenarism remains very limited in terms of effectiveness.[167] Due to the narrow scope of the definitions of a mercenary in the conventions, very few individuals end up fulfilling the criteria. Nevertheless, it is also noteworthy that mercenaries have actually been singled out in multiple instruments as a specific category of actors in armed conflicts, including in AP I, marking that their role is distinguished from other categories and should be treated as such.[168]

In addition to the shortcomings of the definition of mercenaries, an even more complex question arises when examining the consequences of being a mercenary, i.e. what follows, if the definition of a mercenary is being met.[169] Even though mercenarism has been prohibited in some instruments of international law, the law applicable in armed conflicts, i.e. international humanitarian law, does not *per se* address the legality of mercenary activities, because of the "special nature" of IHL. In other words, IHL does for example not comment on the possibility of any (criminal) responsibility of those that participate in mercenary activities. What IHL does define, at least to some extent, is the status of a mercenary and the implications of said status in the event of capture.[170] The international conventions, on the other hand, aim to eliminate mercenarism by criminalizing such activities. Although they share the same definition of a

[163] OAU, Convention for the Elimination of Mercenarism in Africa, 3 July 1977, CM/817 (XXIX) Annex II Rev.1.
[164] Major 1992 p. 110.
[165] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
[166] Faite 2004 p. 5.
[167] Kinsey 2003 p. 13.
[168] Fallah 2006 p. 610.
[169] Fallah 2006 p. 606.
[170] OHCHR Website, *International standards -Working Group on the use of mercenaries*, available at: https://www.ohchr.org/en/node/3383/international-standards (last accessed 22.11.2023).

mercenary with IHL, it is not a violation of the Geneva Conventions to practice mercenarism, but it is only prohibited in the international conventions on mercenarism.[171]

To conclude, at the moment there is not a total prohibition on the use of mercenaries under international customary law, even though in the Nicaragua case in 1986 the ICJ stated that the use of mercenaries by a state is illegal in customary international law if simultaneously the principles of non-intervention, territorial sovereignty and political independence are also violated.[172] Nevertheless, as described above, there are certain instruments of international law that do prohibit mercenarism, including the UN Mercenary Convention of 1989 and the OAU (now AU) Convention.

3.3. Prohibition of Mercenarism in Relation to the Role and Activities of PMSC Employees

As seems quite evident, the definition of mercenaries mentioned in Additional Protocol I and the UN Mercenary Convention of 1989 is mostly based on a very "traditional" view of mercenaries. Nevertheless, today, private military and security companies (PMSCs) are often likened to mercenaries, despite the fact that they rarely fulfil the definition, which can indeed be considered very restrictive.[173] In addition, it is again important to note, not only from a practical but also from a legal point of view, that like private military and security companies themselves, their employees do not form an internally homogenous group of individuals either. They can engage in different types of activities, of which many do not involve direct participation in hostilities, but some may.[174]

According to *Cameron & Chetail*, it is "imperative" to define whether PMSCs or more specifically their employees are mercenaries under the definitions of the relevant conventions, in order to determine e.g. whether they can even be utilized legally in different contexts. However, in any case it is not possible to draw any simple conclusions that all PMSC employees in certain broader contexts would or would not fulfil the definition of mercenaries under the conventions. The definitions always require a highly individual determination, on a strict case-

[171] Cameron & Chetail 2013 p. 426.
[172] Kinsey 2003 p. 9. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986, paras 83, 93, 191 and 195.
[173] *See e.g.* Mathieu & Dearden 2006.
[174] Bilkova 2009 p. 13.

by-case basis. *Cameron & Chetail* also note that because of the narrowness of the definition of a mercenary, in most cases it is very unlikely that many PMSC employees would actually be "caught by it". However, they also state that drawing on examples from how PMSCs were operating in Iraq in 2003-2004, it can be concluded that certain individuals working for PMSCs can indeed very well be considered to fulfil the definition of a mercenary under the conventions, so despite the difficulties, the question definitely is not irrelevant.[175] *Elsea & Serafino* also find it possible that some of the PMSC personnel could be considered mercenaries, also using the example of contractor personnel in Iraq in early 2000's, who are U.S. (or its allies) or Iraqi nationals.[176]

However, *Faite* does not share the same view as *Cameron & Chetail* and *Elsea & Serafino*, stating that the definition of a mercenary "will very seldom be applicable to personnel of private companies" and that British or American PMSC employees that carried out duties in Iraq from 2003 onwards "would not have qualified as mercenaries since they were nationals of a party to the conflict", hence they "do not fulfil the conditions of Article 47". Also, many of them (as often is the case in the *modus operandi* of PMSCs) were not "specially recruited to fight in an armed conflict" but were permanent employees of the private companies, which would also, according to *Faite*, cause them falling outside one of the six criteria.[177]

Thus, it seems highly unlikely, although not impossible, that PMSC employees could face criminal liability in certain contexts only by the fact that they would be considered to have acted as mercenaries in an armed conflict, provided that the relevant state in the case has ratified one of the international conventions that explicitly prohibit mercenarism. The definition of a mercenary status cannot, on the other hand, either be said to be irrelevant in examining the criminal liability of the PMSC employees acting in armed conflict. Thus, the possibly of PMSC employees fulfilling the definition of a mercenary must anyway always be examined on a case-by-case basis, even though the definition might be extremely narrow and rarely leading to the PMSC personnel fulfilling the criteria.[178]

[175] Cameron & Chetail 2013 pp. 70–71.
[176] Elsea & Serafino 2009 pp.45–46.
[177] Faite 2004 p. 4.
[178] Cameron & Chetail 2013 pp. 70–71.

4. The Personnel of Private Security and Military Companies and Their Status under International Humanitarian Law

4.1. Combatants and Civilians

When discussing the actions of PMSC employees in armed conflict, it becomes relevant to determine whether they are considered civilians or combatants under IHL. The rights and obligations of combatants and civilians in armed conflict vary also when discussing individual liability for breaches of international law during the conflict.[179] Regarding this, it is important to recognize the nature of IHL. In general, IHL does not question the lawfulness of an armed conflict *per se*, but rather aims to recognise the limits of conflicts and to protect civilians and alleviate the suffering of persons not taking part in hostilities, for example by establishing the principle of distinction.[180] International humanitarian law is "deeply concerned" of the status of individuals, and their classification to civilians and combatants.[181] The principle of distinction is indeed in a sense the "cornerstone of IHL".[182] For the purpose of this thesis it is thus also relevant to recognize that all persons are basically either considered to be either combatants or civilians under IHL.[183]

In armed conflict, combatants are those who are members of the armed forces, i.e. members of the belligerent parties, except for example medical and religious personnel that only have humanitarian functions.[184] Also irregular militia and volunteer corps are considered combatants if they fulfil certain conditions, such as being commanded by a person responsible for their subordinates, carrying a fixed distinctive emblem and carrying arms openly.[185] The combatants have the right to take direct part in the hostilities and in case they fall into the hands of enemy, they become prisoners of war, and they cannot be punished for that they have directly participated in hostilities.[186] However, they do have obligations under international law, and can be punished for violating IHL. The main difference between civilians and combatants, regarding possible individual criminal liability for violations of IHL, is that those that have not

[179] For example the "combatants' privilege", *see e.g.* Melzer 2022 pp. 84–85, 171–173, 288.
[180] Melzer 2022 p. 18, Cameron & Chetail 2013 p. 384.
[181] Cameron & Chetail 2013 p. 384.
[182] Melzer 2022 p. 18, 80.
[183] Williamson 2008. On the principle of distinction: ICRC Casebook > Glossary > Distinction.
[184] Melzer 2022 p. 81.
[185] *Ibid*.
[186] Melzer 2022 p. 83.

been granted the status of combatants, cannot according to IHL take direct part in hostilities.[187]

In IHL, the term "civilian population" is negatively defined: all persons, who are neither members of the armed forces of a party to the conflict, nor participants in a *levée en masse*[188], are civilians. Protecting civilians is in the centre of IHL, which makes it integral to recognize the role of civilians, its scope and consequences under IHL.[189] Also, in general, if there is any doubt about the status of a person, said individual should be considered a civilian.[190] However, this does raise a difficult question when it relates to those that seem to anyway fall out of these two categories, for example, mercenaries, spies and terrorists.[191]

4.2. Unlawful or Unprivileged Combatants

In legal writings, persons whose legal status under IHL is unclear and who do not seem to qualify neither as a civilian nor as a combatant, have been described as "persons fighting outside these categories"[192] (meaning the categories of civilians and combatants), or more precisely "unlawful combatants".[193] The term "unlawful combatant", or "unprivileged belligerent", can be used about a person who belongs to an armed group but neither the individual or the group (or both) fulfils the conditions for combatant status. For example, the United States has used this term after the 9/11 attacks, when launching the "global war on terror", meaning "a third category of persons" under IHL, in addition to combatants and civilians.[194] Even though initially the terminology used by the U.S. was not actually aimed at mercenaries or PMSC employees but rather terrorist groups and their fighters, it raises interesting questions regarding mercenaries and other persons who seem to fall outside of the two categories under IHL as well.[195]

[187] Melzer 2022 pp. 81, 83, 85.
[188] *Levée en masse* means "inhabitants of a territory which has not been occupied, who on the approach of the enemy spontaneously take up arms to resist the invading troops without having had time to organize themselves into regular armed forces." The participants of *levée en masse* are considered combatants. ICRC Casebook Glossary (https://casebook.icrc.org/glossary/levee-en-masse).
[189] Melzer 2022 p. 80.
[190] Melzer 2022 p. 85.
[191] Melzer 2022 p. 83–84.
[192] Melzer 2022 p. 81.
[193] ICRC Casebook > Unlawful combatants, Värk 2005 p. 193.
[194] ICRC Casebook > Unlawful combatants.
[195] *Ibid*.

It must be noted that using the term "unlawful combatant" or similar is still seen as quite controversial by many, since IHL formally and/or explicitly does not recognize such a category. For example, *Cameron & Chetail* state that the employees of PMSCs could not be considered unlawful combatants even when they do directly participate in hostilities without the status of a combatant, "because such a category does not exist under IHL." [196] However, notions made in Articles 46 and 47 of the Additional Protocol I about mercenaries and spies not having the right to the prisoner of war status clearly represents a distinction from the initially set basis that there are only two categories under IHL, combatants and civilians.[197] The category of unlawful combatants refers to those who take a direct part in the hostilities, but cannot be granted the status of the combatant. Even though the "core" of IHL is to protect civilians, it would also be highly controversial also in terms of IHL, if certain persons would be considered to exist in a "legal vacuum" during armed conflicts. As *Värk* puts it: "there is no intermediate status: nobody in enemy hands can be outside the law" (referring to the prisoner of war status).[198]

Thus, it seems reasonable to explore the possibility of a third category, even though IHL explicitly only mentions the two: civilians and combatants. For example, mercenaries would belong to neither of these two but to that "third category", that can be described as the category of "unlawful combatants".[199] Some may prefer to just call this "falling outside of the two categories" rather than a third individual category, but it does not change the main conclusion that some actors do not completely seem to fall in neither of the two categories that have been explicitly set under IHL.[200] While the legal status of the whole concept of "unprivileged" or "unlawful" combatant does without a doubt still hold certain unclarities and the doctrine may at its current stage not be widely accepted by all, it is still referred to in this thesis (while also taking into account the criticism towards it), because of its relevancy for the status of PMSC employees, which also seems to "fall in the gaps" of the IHL categories of combatants and civilians.[201]

[196] *See e.g.* Cameron & Chetail 2013 p. 425-426.
[197] It must be noted that the combatant's prisoner of war status in the AP I only applies to international conflicts. In non-international armed conflicts domestic law is applicable. *See* Elsea & Serafino 2009 p. 45 and Bantekas & Nash 2007 p. 123.
[198] Värk 2005 p. 191.
[199] Värk 2005 p. 192.
[200] Värk 2005 p. 191, Cameron & Chetail 2013 p. 425–426.
[201] Värk 2005 p. 191.

Regarding the general question of individual liability related to international crimes committed in armed conflict, the combatant's privilege that would be afforded under IHL to the members of armed forces (i.e. combatants) of a party to an international armed conflict, cannot anyway be used as a defence plea in a war crimes trial. However, as already briefly mentioned above, the difference that is the most relevant in the case of PMSC personnel, lies in the combatants right to participate directly in hostilities, which also then entails immunity from prosecution for any lawful acts of war, that would otherwise constitute offences (also under the national law of the capturing state). It has to be noted, however, that even combatants do not in any case enjoy any such immunity for violations of IHL that would be punishable under international criminal law (e.g. war crimes).[202]

4.3. Are the PMSC Employees Combatants, Civilians or Unlawful Combatants?

It has been quite clearly stated by relevant sources that mercenaries belong to the "third category" of unlawful combatants, or in any case they seem to "fall in the gaps" of the two categories of combatants and civilians. In Article 27 of the Additional Protocol I to the Geneva Conventions there is an explicit mention on that mercenaries shall not have the right to be a prisoner of war. The discussion of mercenaries is currently very much focused around the question whether PMSC personnel qualifies as mercenaries in different contexts, since similarly to mercenaries, they are acting based on a commercial or private interest in an armed conflict. However, as many of them actually do not fall under the narrow definition of mercenaries, as has already been concluded also in chapter 3 of this thesis, the question of their legal status under IHL cannot be solved by simply stating that they too do operate in all situations as unlawful combatants.[203]

The PMSC employees can receive the combatant status by direct membership to the armed forces of the state, or by the private military company being connected to the state.[204] There is also the possibility that a private company could recruit and train a person who is later incorporated into the armed forces of a state, and who would then have the combatant status.[205] However, as the private companies provide their services through a corporate legal framework,

[202] Melzer 2022 p. 289.
[203] Cameron & Chetail 2013 p. 386.
[204] Cameron & Chetail 2013 pp. 385–386.
[205] Cameron & Chetail 2013 p. 386.

such a connection with the state is in most situations quite unlikely, also considering that the whole reasoning of using PMSCs in the first place is often to outsource some of the military functions and distinguish them from the actions of the state. And as has already been stated, IHL does not explicitly take any specific standing to the status of the PMSCs or their personnel. It seems thereby unlikely that many PMSCs would satisfy the criteria to be recognized by IHL resulting in the status of combatant to its employees when operating in armed conflict.[206]

Thus, it can be concluded that it is quite rare that PMSC personnel would have the combatant status, which then means that a large part of the personnel of private companies can actually be seen as civilians under IHL, and a part may even qualify as civilians accompanying the armed forces.[207] However, if they do take direct part in the hostilities on behalf of the contracting State and if the State does not incorporate them in their armed forces, they will not have the status of combatants, but the one of "unlawful combatants", [208] although this view of a specific third category still remains controversial among scholars and experts.[209] It must also be noted, that if the PMSC members do fulfil the criteria of a mercenary, they can be criminally punished for this status, if the relevant provisions on the prohibition of mercenaries are implemented in the domestic legislation of said country.[210] Also, because mercenaries are not qualified as combatants who are entitled to combat immunity, they can be tried and punished for their actions in armed conflict, even if the same actions would be lawful when committed by a soldier of the state army.[211]

4.4. Direct Participation in Hostilities by Private Military Company Employees

PMSC personnel may often not be formally included in the armed forces of the contracting state, or in other words, categorized as members of the armed forces of a party to the conflict. This would often mean categorizing them first and foremost as civilians according to Article 50 of AP I. In this role, as civilians, they should be protected against direct attacks unless they actually take direct part in the hostilities. This would apply even when the PMSC employees are armed, provided that they have not (yet) taken part in the hostilities. If they do take direct

[206] Cameron & Chetail 2013 p. 385–386.
[207] Cameron & Chetail 2013 p. 418–421.
[208] Värk 2005 p. 192.
[209] Cameron & Chetail 2013 p. 425.
[210] Cameron & Chetail 2013 pp. 70–71.
[211] Elsea & Serafino 2009 p. 45.

part in the hostilities, they lose the protection that IHL provides civilians, but gain it back after they no longer directly participate in the hostilities.[212]

According to *Melzer*, a trend of increased civilian participation in hostilities has occurred due to certain global developments, such as the changing type of conflicts from international to non-international armed conflicts.[213] It can perhaps be said that the emergence of certain non-state actors in conflicts, such as the private corporations and their personnel participating in hostilities, is another representation of this "trend" described by *Melzer*.[214] So far, IHL has addressed these new challenges by leaning on the basic rule of the Additional Protocols I and II to the Geneva Conventions, according to which "civilians benefit from protection against direct attack 'unless and for such time as they take a direct part in hostilities'".[215]

There is no precise definition of the concept of "direct participation in hostilities" in the Geneva Conventions of 1949 nor its Protocols.[216] However, the commentary on AP I states that "direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[217] Thus, it is the "individual conduct" as part of the hostilities that is considered as direct participation, not the fact whether said individual is defined as a civilian or a member of the armed forces of one of the belligerent parties.[218] IHL also does not *per se* prohibit any direct participation in hostilities by civilians, but rather sets the rules on how such actions will influence the status of said individual during armed conflict, either temporarily or more permanently.[219] The term "hostilities" can, according to *Melzer*, be described as "the sum total of all hostile acts carried out by individuals directly participating in hostilities".[220]

In the case of PMSCs, one firstly needs to determine "enemy forces". The identification of enemy forces is quite clear if the contractor is (one of) the state(s) that are part of the conflict, but perhaps less clear in other cases, where the contractor is e.g. another private entity. It must

[212] Faite 2004 p. 7.
[213] Melzer 2009 p. 5.
[214] *See* Melzer 2009 p. 37.
[215] Additional Protocol I (1977) Article 51 (3), Additional Protocol II (1977) Article 13(3). Melzer 2009 p. 5.
[216] Melzer 2009 p. 41.
[217] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 p. 618. Faite 2004 p. 7.
[218] Melzer 2009 p. 41.
[219] Melzer 2009 p. 85.
[220] Melzer 2009 p. 44.

be noted that the doctrine of direct participation in hostilities is applicable in both international and non-international armed conflicts.[221] Also, PMSCs can have multiple different functions in armed conflicts, such as transportation of weapons, intelligence, strategic planning, which are all functions that may result to losing the civilian status under IHL.[222] Guarding, i.e. providing security to a military facility, is also a very common service provided by PMSCs. According to *Faite*, guarding military infrastructures such as army bases, barracks of ammunition dumps also clearly constitutes a direct participation in the hostilities.[223] The same statement also seems to apply to another function often provided by the PMSCs: information gathering. According to *Sossai*, information gathering activities by the personnel of PMSCs during armed conflict may in most cases also be considered as direct participation in hostilities.[224] Other examples of similar scenarios with similar outcomes could be rescue operations or the maintenance and operation of a weapons system by the private contractors.[225]

Faite lastly raises the questions of what the consequences would be if the private contractors returned fire during an attack that was aimed directly at them. The scenario seems quite likely to happen occasionally, since the private company employees that operate in the context of armed conflicts and fragile settings most often carry weapons themselves. Faite states that "this is clearly a grey area and it must be assessed on a case by case basis", since normally the use of force solely for self-defence would not be considered as direct participation in hostilities, but the question about defensive and offensive use of force may not always be easy to define.[226]

According to *Melzer*, however, when the personnel of PMSCs directly participate in hostilities during an international armed conflict without "the express or tacit authorization" of the State party to the conflict, they would still remain civilians and just lose their protection against direct attack for the time that the direct participation lasts. However, when the private contractors have been incorporated into the armed forces of the State (or another party to the conflict, if non-international) either formally or by giving a continuous combat function, such personnel could under IHL become members or an "organized armed force", and thus would no longer qualify as civilians. Thus, he concludes that whether the personnel of private military and

[221] Melzer 2009 p. 27.
[222] Faite 2004 p. 7.
[223] Faite 2004 p. 8.
[224] Sossai 2009 p. 14.
[225] Sossai 2009 pp. 15–16.
[226] Faite 2004 p. 9.

security companies qualify as civilians for the purposes of defining the consequences of their direct participation in hostilities requires careful determination (done with "particular care"), including e.g. assessment of their activities and geographical location in relation to the armed forces of the contracting State.[227]

4.5. Combatant's Privilege and the Legal Status of PMSC employees

According to scholars, the most important difference between the status of combatants and civilians in armed conflict under IHL is the loss of protection by the combatants against direct attack.[228] However, for the purposes of this thesis, the concept of "combatant's privilege" is a more important concept, when the focus is on examining the scope of individual criminal responsibility of PMSC employees in the contexts of armed conflict. The combatant's privilege is attached to the person having the status of a combatant, and basically means the right to participate directly in hostilities. However, as examined above, not all categories of persons that take direct part in the hostilities in the context of (international) armed conflict are qualified to have the status of combatants, including mercenaries or private contractors. This is also why "unlawful combatants" are also often referred to as "unprivileged combatants". *Melzer* points out that even though IHL limits the right to directly participate in hostilities to privileged combatants, it does not necessarily imply that there is a prohibition on "unprivileged combatancy". All taking up arms and taking part to the hostilities must in any case oblige to certain specific prohibitions, such as the prohibition of direct attacks against civilians, acts of terror, indiscriminate attacks or using human shields.[229]

Both combatants, civilians that are directly participating in hostilities, and the members of armed forces not entitled to the combatant privilege can be lawfully attacked. Of these three categories, civilians or "unprivileged" combatants can be prosecuted for lawful acts of war, that constitute an offence under the applicable national law. According to *Melzer*, the difference between civilians and "unprivileged" (or "unlawful") combatants is that the participation of civilians in the hostilities should be mostly spontaneous, whereas the unprivileged combatants do this on "an organized and continuous" basis. Thus, according to Melzer, "civilians directly participating in hostilities lose their protection against direct attack only for the duration of each

[227] Melzer 2009 pp. 39–40.
[228] Melzer 2022 p. 86, Faite 2004 p. 5.
[229] Melzer 2022 p. 86.

specific hostile act, whereas, in principle, both privileged and unprivileged members of the armed forces may be directly attacked for the entire duration of their membership, with the sole exception of those who are *hors de combat*".[230]

Two important conclusions can be drawn from this: according to what *Melzer* states, PMSC employees after all seem to fall more often to the category of unlawful or unprivileged combatants than civilians, since their actions are rarely "spontaneous" but actually nearly always are conducted in an organized and continuous basis.[231] The assessment made by *Cameron & Chetail* point to similar direction, when they highlight the fact that the role of PMSC employees is more often "a continuous combat function" rather than an isolated act that is more restricted in terms of its duration.[232] This would also mean, that like combatants, the personnel of PMSCs more permanently lose the protection that is granted to civilians against being directly attacked. However, they still don't gain the "combatant's privilege", and can be prosecuted for lawful acts of war, under the applicable national legislation.[233] The status of combatant only exists in this sense in international armed conflicts. Thus, in a civil war, members of organized armed groups cannot be granted a prisoner of war (POW) status when captured, and they can be prosecuted for taking up arms.[234]

[230] Melzer 2022 p. 88.
[231] *Ibid*.
[232] Cameron & Chetail 2013 pp. 385–386, 415–418.
[233] Elsea & Serafino 2009 p. 45, Sossai 2009 p. 24.
[234] Faite 2004 p. 6.

5. The Individual Criminal Responsibility Related to International Crimes of Private Company Employees

5.1. General Remarks on Individual Criminal Responsibility

Individual criminal responsibility for the violations of the rules of war is a very old characteristic of international law, as it can already be found e.g. in the Lieber Code[235]. The earliest trials on war crimes seem to date back at least to the 15th century.[236] Since then, individual criminal responsibility has been codified in many other treaties of IHL and has served as a basis for the prosecutions in the international military tribunals and later in the establishing of the International Criminal Court in the Hague and its Statute[237]. The jurisdiction of the International Criminal Court (ICC) currently covers the following "most serious crimes of concern to the international community": the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[238] The principle of individual criminal responsibility has also been implemented in the domestic legislation of many states and can be found in numerous resolutions of the UN Security Council and UN General Assembly. Customary international humanitarian law recognizes the individual criminal responsibility for war crimes committed both in international and non-international armed conflict, and it has also been explicitly mentioned in certain treaties of international law, such as the above-mentioned Statute of the International Criminal Court (the Rome Statute).[239]

Thus, there does not seem to be any question about whether any individual should bear criminal responsibility for their participation in international crimes.[240] However, since private military and security companies do not represent "classical" actors in armed conflicts, the subjection of their personnel to IHL and their liability for e.g. war crimes does constitute a complex issue.[241] The PMSC personnel clearly should not be excluded from individual criminal liability for this type of misconduct, including committing war crimes. However, in reality they have often

[235] Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863.
[236] Greppi 1999 p. 533.
[237] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.
[238] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Art. 5.
[239] IHL Database of Customary International Law, Rule 151 (Individual Responsibility). Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Art. 25: "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute".
[240] Cameron & Chetail 2013 p. 597.
[241] Quirico 2011 p. 423.

enjoyed immunity in such cases.[242] Even though the reported violations have ranged from murder of civilians to the use of warfare methods prohibited in IHL, no private contractor has been sentenced for committing war crimes, and bringing individual employees in front of a tribunal seems to be extremely rare as well.[243] One of the main questions is also, that to what extent the PMSC personnel could enjoy exemption from criminal liability because of their unformal or unclear status under IHL, which has been described previously in Chapter 4 of this thesis.[244]

5.2. Remarks on Accountability and Corporate Responsibility

Before discussing the problems and specific questions arising in the context of PMSC employees' individual criminal liability more specifically, certain clarifications of terminology should be made, as well as certain remarks on the corporate responsibility of PMSCs. Firstly, it should be noted that the term of "accountability" is often used in a broader sense also relating to the responsibilities of states, or to the responsibility of both PMSCs and their personnel at the same time. The term accountability can be useful also in the context of discussing the individual liability for crimes, when seen as a question of what happens as a response to wrongful actions. In other words, the question is not about what the response is for not addressing the prerequisites for the work of PMSC personnel, but the reaction to when there are actual breaches of (international) law.[245]

In the context of private military and security companies, the ICRC further clarifies this point of view by stating that while there have been various reports about the excessive use of force by PMSCs leading to notable civilian casualties, it appears that states actually have a quite poor understanding, not only on the contractual aspects of law, but of the possible actual legal consequences of PMSCs and more specifically their employees' activities in the field. Often the case is, that the PMSCs have been employed by the states to certain functions such as guarding military facilities or escorting military vehicles, without actually being incorporated into the armed forces of said state. If situations that have led to military actions and in certain occasions have also resulted in large-scale civilian casualties, referring to those activities as

[242] Quirico 2011 p. 424.
[243] Quirico 2011 p. 422, Lenhardt 2008 p. 1016.
[244] Lenhardt 2008 p. 1016, Faite 2004 p. 5.
[245] Hedahl 2017 (in Andreopoulos & Kleinig 2017) p. 6.

"purely defensive" cannot be seen as sufficient in terms of the legal assessment, since directly participating in the hostilities not only makes the PMSC personnel involved themselves as legitimate targets of attack under IHL, but at the same time, should not exempt them for being accountable for breaches of IHL, and human rights law.[246]

Even though the ICRC in the above-mentioned context also refers to the violation of human rights law, it must be noted that when it comes breaches of international human rights law, the concept of human rights has been first and foremost premised on the notion that the state is the violator against the individual or the people. While individuals do themselves also bear criminal liability for committing international offences, they cannot as such assume international responsibility for violating international human rights law, because the obligations are addressed exclusively to states. However, an interesting point of view is that some states have been supporting the idea that non-state entities could also be responsible for grave violations or "destruction" of human rights, especially when the acts are related to terrorism, or for example national liberation or other "guerrilla movements". [247]

One could also present the question if this reasoning is applicable to private military and security companies as well. However, it seems that it would assumably be a complicated task to aim for any collective responsibility of an entity (private company) that is not a state nor does not necessarily have any kind of a set structure, or in some cases, even a clear legal identity.[248] According to *Bantekas & Nash*, there is indeed no doubt about the fact that any general corporate criminal liability does not exist in international law, and whatever existence it has outside of international regulations, it is fragmentary, context-specific, and subject to qualification.[249] Thus, it could be concluded, that since corporate responsibility can in most cases be ruled out, the question of individual responsibility becomes the most relevant question in this regard.

5.3. Individual Criminal Responsibility of PMSC Employees for the Most Serious International Crimes

[246] ICRC 2012.
[247] Bantekas & Nash 2007 p. 18.
[248] *See e.g.* EU Council Decision 2021/2179 of 13 December 2021, where one PMSC is called "unincorporated private military entity".
[249] Bantekas & Nash 2007 pp. 47–49.

5.3.1. The Most Serious Crimes of Concern to the International Community

The Rome Statute of the International Criminal Court (ICC), states that the jurisdiction of the Court is limited to "the most serious crimes of concern to the international community", which are the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[250] There have been notable allegations of misconduct of PMSCs in armed conflicts, including especially war crimes and crimes against humanity.[251] It seems evident, that outside perhaps of a state army of similar entity, PMSC personnel can more easily than any other branch of individuals become perpetrators of such crimes, since because of the nature of the business, they very commonly operate in contexts of armed conflicts, and often in highly fragile settings.[252]

When any individual is prosecuted for any of the most serious international crimes, there can be certain complex questions that arise, e.g. on the objective characteristics and subjective intent of the crimes, the criteria (related to the attempted crimes), and other possible questions, such as the persons accused acting as an accessory to the crime, or the various possible defence pleas on justifications.[253] IHL in itself does not provide much guidance on this subject, but instead one must look at international criminal law, and the international courts and tribunals have historically played a significant role in clarifying the rules. According to especially the legal praxis created by the international criminal courts and tribunals, individuals can be criminally responsible not only for committing or issuing orders to commit war crimes, but also for "planning, preparing, or attempting to commit war crimes, and for instigating, assisting, facilitating, or otherwise aiding or abetting others in the commission of war crimes". However, there are questions related specifically to the status of PMSC employees that need to be examined more closely in this regard, such as the possibility of individual criminal liability in the case of committing war crimes or crimes against humanity, and certain specific questions regarding their role, such as the question of if the doctrine of chain of command may be relevant in the context of private military operators.[254]

[250] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Article 5.
[251] Montreux Document Forum 2021 p.3, Lenhardt 2008 p. 1016.
[252] Cameron & Chetail 2013 pp. 598–599.
[253] Melzer 2022 p. 286.
[254] *Ibid*.

In this chapter, especially the responsibility related to war crimes, crimes against humanity and genocide will be examined more carefully in the context of the individual criminal liability of the PMSC employees, since according to Article 8 the Rome Statute, the crime of aggression first and foremost involves "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State", which would quite straightforwardly rule out any central role of private corporate actors. It must also be noted that Article 6 of the Rome Statute describes genocide as an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group", which generally has related more to state or in-state actors than private actors acting alongside the state as the primary perpetrators of the crime – although a possible role of PMSCs in aiding in such an act cannot be completely ruled out.[255] However, given these remarks on the nature of the most serious international crimes, the focus in this regard in this chapter will be on the possibility of PMSC employees being held accountable for war crimes or crimes against humanity, and also the possibility for individual criminal liability for the act of genocide will also be briefly examined.

5.3.2. War crimes

International humanitarian law is first and foremost concerned with the protection of victims of armed conflict, especially civilians.[256] However, in regulating the conduct of hostilities, IHL does impose certain duties on all those that are involved in the conflict and prohibits them from engaging in certain acts. IHL obliges all parties to the conflict to take necessary measures to prevent and repress violations of IHL, which includes criminal prosecution and implications. In the Geneva Conventions of 1949 and Additional Protocol I there are also a series of particularly serious violations that are referred to as "grave breaches", and in AP I, as "war crimes", that can also give rise to universal jurisdiction.[257] To be specific, "serious violations" of IHL are considered war crimes under international criminal law, including those acts that have been called "grave breaches" of Geneva Conventions of 1949 and AP I, and other serious violations that are recognized as war crimes in the Rome Statute or by customary international law.[258]

[255] *See e.g.* Cameron & Chetail 2013 p. 621.
[256] Melzer 2022 p. 80.
[257] Melzer 2022 pp. 38–39.
[258] Melzer 2022 p. 289.

Historically, war crimes and grave breaches of IHL have though been distinct concepts of international law.[259] War crimes have been referred to as acts carried out in times of war that have been criminalized in international law.[260] The definition of war crimes is basically a "generic concept" of serious violations of the laws or customs of conflicts, committed in the course of an armed conflict in circumstances that require criminal punishment of the perpetrators.[261] On the other hand, grave breaches of IHL have meant a limited set of "particularly serious violations" of the Geneva Conventions of 1949 that also bring special obligations to the states that are parties to the conventions to integrate them in domestic legislations.[262] The Geneva Conventions of 1949 indeed recognise two types of violations: "grave breaches" of IHL, and other prohibited acts that do not fall into the definition of grave breaches.[263] While both are prohibited under international law, grave breaches can only be committed during international armed conflicts against protected persons and/or property, and are subject to universal jurisdiction.[264]

However, it has been stated that distinctions between the concepts of grave breaches and war crimes have been blurred over time, especially because both constitute violations of IHL and can lead to the individual criminal liability.[265] Both grave breaches and war crimes apply in international armed conflict, but in contemporary international law, while war crimes can be committed in both international and non-international armed conflict, grave breaches of IHL only continue to apply to international armed conflict.[266] On the other hand, war crimes have evolved through time and adapted to new realities, where "grave breaches" of the 1949 Geneva conventions has not evolved in a same way as a concept.[267]

Whether all the provisions of IHL are binding on individuals also when they are not acting in the role of "state agents", is to still somewhat a matter of uncertainty.[268] However, in the *Akayesu* case[269], the ICTR Appeals Chamber has also stated that IHL would actually be lessened and called into question, if certain persons could simply be exonerated from individual

[259] Divac Öberg 2009 p. 163, Bantekas & Nash 2007 p. 113.
[260] Divac Öberg 2009 p. 163.
[261] Eboe-Osuji 2011 p. 2.
[262] Divac Öberg 2009 pp. 163–164, Melzer 2022 p. 269.
[263] Bantekas & Nash 2007 p. 113.
[264] *Ibid*.
[265] Divac Öberg 2009 p. 167.
[266] Divac Öberg 2009 p. 170.
[267] Divac Öberg 2009 p. 182.
[268] Lenhardt 2008 p. 1018.
[269] ICTR Appeals Chamber, The Prosecutor v. Jean Paul Akayesu, IT 96-4, judgment, 1 June 2001.

criminal responsibility only on the basis of not belonging to a certain category.[270] Also in this regard, the question about whether, from the viewpoint of IHL, PMSC employees are civilians, combatants or neither in certain situations and contexts of their operations, again has value.[271]

Originally, war crimes have been conceived as a concept that relates to the armed forces of a state fighting a war.[272] *Bantekas & Nash* state that it is "obvious" that those taking direct part in the hostilities can be held liable for war crimes e.g. for intentionally attacking persons protected under IHL or using prohibited weapons or other means of combat.[273] With regard to the employees of PMSCs, the relevance lies in the fact that they may take direct part in hostilities in certain cases[274], but also in that they may as well have other functions that are very closely related to the military functions, even though they would not make them *de juro* nor *de facto* members of the armed forces of the contracting state. Also, neither of these remarks do necessarily pose an obstacle as such to the individual liability, since as stated above, the question is, whether any civilian is (also) bound by IHL norms.[275]

In the *Akayesu case*, the International Criminal Tribunal for Rwanda (ICTR) stated that

> "(t)he duties and responsibilities of the Geneva Conventions and the Additional Protocols - - will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts."[276]

In here, the mention about *de facto* representing the government (of a belligerent party) is a particularly interesting question, when examining the individual criminal liability of PMSC employees, since this mention has been considered to mean that civilians can be perpetrators of war crimes only in such cases, where their acts can be actually attributed to a party to the conflict.[277] However, in the *Musema* case the ICTR stated, relying on previous case law and resulting in a broader point of view than in the above mentioned *Akayesu* case, that "any civilian

[270] ICTR Appeals Chamber, The Prosecutor v. Jean Paul Akayesu, IT 96-4, judgment, 1 June 2001, at para. 444. Lenhardt 2008, p. 1018.
[271] The question of the legal status of the PMSC employees has been addressed in Chapter 2 of the thesis.
[272] Lenhardt 2008 p. 1017.
[273] Bantekas & Nash 2007 p. 115.
[274] See e.g. Perovic/Lawfare 23.3.2021.
[275] Lenhardt 2008 p. 1017.
[276] ICTR, The Prosecutor v. Jean Paul Akayesu, ICTR-96-4-T, judgement, 2 September 1998, para 631.
[277] Lenhardt 2008 pp. 1020–1021.

who is as accessory to a violation of the laws and customs of war is himself liable as a war criminal".[278]

According to *Lenhardt*, it could thus be concluded that private military personnel, who have been employed by entities that are not party to the conflict, could only constitute "ordinary offences" under domestic criminal law.[279] The Montreux Document also states that the employees of PMSCs are in general obliged to respect the relevant national law and "in particular the national criminal law" of the state in which they operate. In addition, "as far as applicable", they are also obliged to respect the law of the States of their nationality.[280] However, also according to *Lenhardt*, it can be argued that PMSC personnel who are for example guarding detainees and military objectives or providing security to diplomats, i.e., have been employed by parties to the conflict, can in principle commit war crimes.[281]

During an armed conflict, not every crime committed is considered a war crime.[282] When the personnel of private military and security companies have been operating in an armed conflict, the act that they are accused of should have been perpetrated against the victims concerned and have a clear link to the particular conflict, in order for the act to be considered to be a war crime rather than an ordinary crime.[283] In this assessment, the status of the victim also has to be examined, especially considering whether the victim is a non-combatant (civilian) or a member of one of the belligerent parties.[284] Also, the existence of a conflict should have played "a substantial part in the ability to commit it", the "decision to commit it" and "the manner in which it was committed or the purpose for which it was committed".[285]

This requirement could be met for example in cases where PMSC personnel are hired and are in fact fighting a war alongside the armed forces of the contracting state.[286] However, IHL applies to the whole territory that is under the control of one of the parties to the conflict and does not require strict time limits either, which in concrete terms means that also e.g. crimes

[278] ICTR, Prosecutor v. Musema, ICTR-96-13, judgment, 27 Jan. 2000, para. 270.
[279] Lenhardt 2008 p. 1019.
[280] The Montreux Document, Part I, para E 23.
[281] Lenhardt 2008 p. 1019. Lenhardt also points out, that the question that follows in this regard is the nexus between the act and the armed conflict, since not every crime committed during armed conflict is a war crime. On the nexus between armed conflict and the alleged war crime, *see e.g.* Lenhard 2008 pp. 1020-1021.
[282] Lenhardt 2008 p. 1020.
[283] Bantekas & Nash 2007 p. 115, Quirico 2011 p. 431, Lenhardt 2008 p. 1020.
[284] Lenhardt 2008 p. 1021.
[285] Lenhardt 2008 p. 1020.
[286] Quirico 2011 p. 431, Lenhardt 2008 p. 1020.

committed in the aftermath of the fighting can form the nexus between the crime and the conflict, whether or not they are taking place in the region or area of the actual combat.[287] In conclusion, the employees of private military and security companies should be held liable for war crimes whenever there is a link to be established between the crime and the armed conflict.[288]

5.3.3. Crimes Against Humanity

The definition of crimes against humanity has been outlined in Article 7 of the Rome Statute of the ICC, and it covers acts such as attacks directed against civilian populations, or for example, widespread acts of torture, sexual violence or enforced disappearance of persons. In comparison to war crimes, crimes against humanity can be committed both in peacetime and in armed conflict, and the perpetrator does not need to be a member of the state or organization involved in the crime, but instead, the definition can include all persons who are acting to implement or support the policy of the state or the organization.[289] Also, when the acts are committed in the context of an armed conflict, according to *Prosecutor v. Duško Tadić* ("the *Tadić* case"), crimes against humanity do not require a connection to the specific armed conflict, which also makes its application in that sense different than war crimes. The individual responsibility can arise for any person, who "planned, instigated, ordered, committed or otherwise aided and abetted in their planning, preparation or execution" of crimes against humanity.[290]

It has been stated that there is a significant lack of specialized research on the involvement of PMSCs in certain areas of human rights violations or crimes against humanity, for example, related to sexual abuses and sexual violence against women and girls.[291] Several PMSCs operating in prisons have been accused of torture and excessive use of force, and there have also been reports of arbitrary detention, torture, disappearances and summary executions.[292] Many relevant human rights organizations have also pointed out the lack of accountability of PMSCs and referred to a broad "culture of impunity" in this regard.[293] The lack of

[287] Lenhardt 2008 pp. 1020–1021.
[288] Quirico 2011 p. 431–432.
[289] Lenhardt 2008 p. 1021.
[290] OHCHR 2011 p. 78.
[291] Current Affairs/Trullols & Lázaro 2018.
[292] European Parliament Motion for Resolution 2021/2982 (RSP), paras E, G.
[293] Current Affairs/Trullols & Lázaro 2018.

accountability in certain previous situations has also be seen to have provoked new abuses by certain PMSC operators in different settings.[294] However, despite the lack of examples so far, it is possible that the PMSC personnel can be criminally prosecuted for crimes against humanity, not only by the state that they are operating in (or the state of their nationality with certain conditions), but also at least in theory by the ICC – although, only in the case that they are acting as a part of a "widespread or systematic attack directed against any civilian population", i.e. taking direct part in the hostilities or similar situation, which would often involve the state army as well.[295]

5.3.4. Genocide

The states are required to exercise criminal accountability for all international crimes and prosecute perpetrators of such crimes, including the crime of genocide. There should be no exception to the rule for PMSC personnel, and this has been recalled e.g. in the statements 6, 12, 17 and 21 of the Montreux Document.[296] The prohibition of genocide has been established in the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter "the Genocide Convention") of 1948[297], and is considered to be *jus cogens*.[298] States are both obliged to not commit genocide ("negative obligation") as well as prevent and punish for it ("positive obligation"). Both the positive and negative obligations of states are relevant also for the actions of PMSCs. The positive obligation, i.e. the obligation to prevent and punish for the act of genocide covers situations where the state has knowledge or learns that a PMSC is committing or about to commit the crime of genocide. The obligations of the state are even stronger, when there is a clear linkage or relationship between the state and the PSMC, e.g. in situations where the contracting state has actual control over the actions of the PMSC in question. The states also have the obligation to ensure that the persons charged with genocide are tried by a competent tribunal of a state in the territory of which the act has been committed, or by an international tribunal that has jurisdiction in the case.[299]

[294] *Ibid*.
[295] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Article 7.
[296] ICRC, The Montreux Document 2008 p. 35.
[297] UNGA, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UNTS vol. 78, p. 277.
[298] Renz 2020 p. 94.
[299] Article VI of the Genocide Convention.

According to Articles III and IV of the Genocide Convention, persons committing genocide, or other acts named in Article III, such as conspiracy or attempt to commit genocide, should be punished, "whether they are constitutionally responsible rulers, public officials or private individuals". In this regard, the term "private individuals" also covers the PMSC personnel, since it is not necessary in this context to make a difference between someone that has been hired by a company or someone who acts as "a simple individual".[300] With regard to the possible individual criminal liability of PMSC personnel for the act of committing genocide, one of the most relevant situations would be when a member of the PMSC personnel acts as a *de facto* director in the situation, the evaluation of which should be based on a case-by-case examination of the specific circumstances of the case.[301]

For example, in the *Musema* case[302] the ICTR set certain limit, to the extent to which a person considered to be an individual "business leader" or someone holding a similar function can actually affect a whole population of a certain region, and thus be considered as liable for the act of complicity of genocide. The accused, Alfred Musema, was the director of a factory (Gisovu Tea Factory) in the Kibuye region during the Rwandan genocide of 1994, so his position was more of a traditional "business leader" than for example a director of a PMSC. However, some comparisons can be drawn, since both roles would represent the category of "private individuals". During the conflict, Mr. Musema transported armed attackers who were also employees of his factory, personally took part in attacks and killings, and encouraged acts of sexual violence.[303]

The example of the *Musema* case does in a way highlight the fact that while the crime of genocide is often related more to state officials, the possibility of prosecuting private individuals such as PMSC employees on this count should not be completely excluded either, especially if it can be shown that the individual (e.g. a director of a PMSC) holds *de jure* and *de facto* control over a certain group of people.[304] *Cameron & Chetail* do, however, also point

[300] Cameron & Chetail 2013 p. 597.
[301] Cameron & Chetail 2013 p. 621.
[302] ICTR, The Prosecutor v. Alfred Musema (Judgement and Sentence), ICTR-96-13-T, 27 January 2000, paras 880-882. Cameron & Chetail p. 621.
[303] ICTR, The Prosecutor v. Alfred Musema (Judgement and Sentence), ICTR-96-13-T, 27 January 2000, International Crimes Database > Cases > The Prosecutor v. Alfred Musema (last accessed 2.11.2023), and Cameron & Chetail p. 621.
[304] ICTR, The Prosecutor v. Alfred Musema (Judgement and Sentence), ICTR-96-13-T, 27 January 2000, paras 880, 881. Cameron & Chetail 2013 p. 621. The questions related to the doctrine of command and superior-subordinate relationship in terms of the actions of PMSC personnel and directors will be examined in Chapter 6 of the thesis.

out that "in principle, the staff of a PMSC acting in a certain geographical area and contributing to the economic life of that region may not be held liable (by virtue of that fact alone) for international crimes committed by the population of that place".[305]

5.4. International and Non-International Armed Conflicts

International armed conflicts, which include at least two states, can be considered as the "classical" form of armed conflict. An international armed conflict exists when one of the states use armed force against another state, regardless of the fact whether one or both of the states have formally declared or recognized a war.[306] The Hague Regulations of 1907, the Geneva Conventions of 1949 and the Additional Protocol I are all applicable to international armed conflicts, as well as customary international humanitarian law. An international armed conflict also occurs if a State intervenes militarily in a non-international armed conflict on the side of one of the belligerent parties.[307]

However, a majority of the conflicts today do not exist between states, but between states and other parties such as organized armed groups, or between such groups.[308] A certain level of intensity of the conflict must, however, be established in order for the confrontation to be considered a (non-international) armed conflict instead of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature"[309].[310] The conflicts that are non-international by character are, in terms of treaty law, primarily bound by the Common Article 3 of the Geneva Conventions.[311] The Common Article 3 must be applied "as a minimum" by all parties to the conflict.[312] Also Additional Protocol II ("AP II") to the Geneva Conventions (1977) is applicable to non-international armed conflicts.[313] For a non-State armed group to be considered as a party to the conflict, they do not have to be formally recognized as belligerent parties by the state or opposing party to the conflict, but should have

[305] Cameron & Chetail 2013 p. 621.
[306] Melzer 2022 p. 54.
[307] Bantekas & Nash 2007 p. 116.
[308] Melzer 2022 p. 66.
[309] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art. 1.
[310] Melzer 2022 pp. 69–70.
[311] Melzer 2022 p. 66.
[312] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Article 3.
[313] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

"a minimum level" of organization "without which coordinated military operations and collective compliance with IHL would not be possible".[314]

Private military and security companies operate in both non-international and international armed conflicts.[315] While it is clear that war crimes can also be committed in the context of a non-international armed conflict as stated in Article 8 e) and f) of the Rome Statute, the treaty law is still less established than in the context of an international armed conflict.[316] *Quirico* points out that when the threshold of an armed conflict is met, the question whether PMSC personnel may be considered liable for war crimes regardless of their "unclear formal status under IHL" is also linked to the nature of the conflict in question.[317] It must be noted that there are certain differences in the status of the persons involved in the conflict under IHL, namely that in conflicts of a not international nature, the status of a (lawful) combatant under IHL does not correspond to that of international armed conflicts, and the (lawful) combatants do not benefit from a prisoner of war status in non-international armed conflicts.[318] Also, the "fighter status" in non-international armed conflicts has no implications of combatant privilege, which means that members of organized armed groups can always be at risk of prosecution even for lawful acts of war.[319]

[314] Melzer 2022 p. 68.
[315] Lenhardt 2008 p. 1020.
[316] Lenhardt 2008 p. 1020. "Grave breaches of IHL" only apply to international armed conflicts, *see* Bantekas & Nash 2007 p. 113.
[317] Quirico 2011 p. 447.
[318] Bantekas & Nash 2007 p. 123.
[319] Cameron & Chetail 2013 p. 417.

6. Principles of International Criminal Law in Relation to the Individual Criminal Responsibility of Private Company Personnel

6.1. Chain of Command and Responsibility of Superiors

6.1.1. The Doctrine of Command and Superior Responsibility in Relation to the Personnel of Private Companies

The individuals who are perpetrators of international crimes are most often persons integrated into "a hierarchically structured collective", for example, an army or police force of a state.[320] As stated above, the PMSC employees can act in various roles, including taking direct part in hostilities or performing functions that can be very closely related to the military functions of the army of the (belligerent) state in an armed conflict. Thus, it cannot be ruled out that the principles of command and superior responsibility, which are often instrumental questions when discussing responsibility for violations of IHL, could also be relevant in the case of examining the individual criminal liability of PMSC personnel, especially the supervisors but in certain cases also possible the senior management of the PMSC's.[321]

The doctrine of command and superior responsibility has been shaped by the international military tribunals that prosecuted military and political leaders for mass crimes that were committed during World War II.[322] The purpose is to concretize through criminal law the duty of superiors to supervise the activities of their subordinates, "to such a degree that the acts of subordinates are to be attributed in the same manner to the superior", and in this sense, the actions of the subordinate would "become those of the superior", although not vice versa.[323] According to Article 28 of the Rome Statute, in addition to other grounds of criminal responsibility, a military commander - or a person effectively acting as one - "shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces". The criminal liability may be triggered, when that military commander or person either knew of, or should

[320] Lenhardt 2008 p. 1033.
[321] Lenhardt 2008 p. 1024–1025.
[322] Melzer 2022 p. 287, Neilson 2011 pp. 122, 129–130.
[323] Bantekas & Nash 2007 p. 37.

have known, that the forces were to commit such crimes and they have failed to take all necessary and reasonable measures to prevent or repress such actions, or to refer the matter to the competent authorities for investigation and prosecution.[324]

In relation to the use of PMSCs in armed conflicts by the belligerent parties, the obvious question seems to be, whether the superior, i.e. the military commander of the state army, would be responsible for the actions of private military companies that would be *de facto* directly participating in hostilities, be it that they might not most often be actually incorporated into the armed forces of said state.[325] According to the Rome Statute, a person "effectively acting" as a military commander could also be criminally responsible for the crimes mentioned in the Rome Statute, when they are committed by forces under his or her effective command and control.[326] Even though this question has not yet been examined exhaustively either by tribunals or by the scholars of international law, some have already argued that the Rome Statute's formulation of command responsibility could be used to attribute liability to superiors of PMSCs.[327] Another important point of view is that the superiors mentioned in Article 28 can be, in addition to the state officials hiring the PMSCs and state military commanders that work alongside them, also the superiors within the PMSCs themselves.[328] The Montreux Document, be it that it is not a legally binding instrument but mostly refers to binding treaty law in its Part I, also states that the superiors of PMSC personnel, including directors or managers of PMSCs themselves, can be liable for crimes under international law committed by PMSC personnel under their effective authority and control.[329]

The criteria of the doctrine of command and superior responsibility rests on three cumulative elements: (1) the existence of a de facto superior-subordinate relationship providing the superior with effective control over the conduct of the perpetrators; (2) the superior's knowledge, or his or her culpable lack thereof, that a crime has been, or is about to be, committed; and (3) the superior's failure to prevent, put an end to, or punish the crime.[330] Thus, according to the Rome Statute, military commanders and other superiors are criminally

[324] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Article 28.
[325] Some PMSC have been reported to actually often engage in combat operations, *see e.g.* Perovic/Lawfare 23.3.2021.
[326] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Art. 28.
[327] Neilson 2011 p. 121.
[328] *Ibid*.
[329] The Montreux Document 2008, Part I, para F 27.
[330] Melzer 2022 p. 287.

responsible for war crimes committed by persons that were under their effective control, if they have failed to take all necessary measures in their power to prevent or repress such crimes, or to submit the matter to the competent authorities for investigation and prosecution. And in the case of military commanders, the criminal responsibility only arises if they "knew or, owing to the circumstances at the time, should have known" that their forces were committing or were about to commit war crimes. In the case of other superiors, the criminal responsibility is only triggered in case they "knew or consciously disregarded information clearly indicating" that their subordinates were committing or about to commit war crimes, and if these crimes concerned activities within their effective responsibility and control.[331]

With regard to the employees of PMSCs, in many cases they may be a part of the forces (even though they would not be granted the combatant status) possibly committing the war crimes, and not the superiors. However, in certain contexts also the PMSCs and a certain part of their employees can function in such a role that they would be considered superiors either to the other PMSC employees, or even to the forces of a belligerent (state) party.[332] Also, relatively often the PMSCs themselves have hierarchical structures alike the chain of command of the forces of a state.[333] Especially the actions of the PMSCs giving guidance to the armed forces of the contracting state could be relevant in this regard. In these kinds of cases, it would be rather unclear whether the doctrine of chain of command could also be applied if the acts of the PMSC personnel would be subject to prosecution, but at least it does not seem that this option could be completely ruled out.[334]

Alexandra argues, that even though the private contractors might not have been integrated into the command structure of the armed forces, they nevertheless fit in to the corporate structure, share a common goal with the armed forces and interact with the elements to achieve that goal. The "US doctrine" has tried to tackle the issue of the status of combatants and civilians by stating that the contractor employees could not lawfully perform military functions and thus should not be working in scenarios where they might be conceived as combatants. While this aim is certainly one that would solve many of the imminent problems, such as preventing persons considered as "civilians" from taking direct part in hostilities, many of the PMSC

[331] Melzer 2022 p. 287.
[332] Neilson 2011 pp. 150, 159, Cameron & Chetail p. 616.
[333] Neilson 2011 p. 154.
[334] Lenhardt 2008 pp. 1025–1026, Cameron & Chetail 2013 p. 613.

employees do *de facto* perform military functions. Also, even in situations where the contractors might not take direct part in the hostilities, they will most likely in many scenarios be conceived as combatants by the opposition forces, when most often than not working side by side with the national army of an individual state.[335]

6.1.2. The Superior-Subordinate Relationship

The command responsibility requires that commanders are liable only for acts committed by persons that are their direct subordinates, so in other words, in their direct and effective command and control. Regarding this, both *de jure* and *de facto* assessment are relevant, although in the case of PMSC personnel being either the superior or subordinates or both, the *de facto* aspect is the one that should be emphasized.[336]

In Article 28 of the Rome Statute, there are some significant differences between the provisions of Article 28(a) and 28(b), because Article 28(b) covers superior-subordinate relationships where the superiors are civilians (i.e. not persons "effectively acting as" military commander). The formulation of Article 28(b) serves thus also as an indication of the difference between military and civilian context, since a civilian superior would not be expected to have effective "authority and control" over all aspects of their subordinates in the field.[337]

Neilson argues, that due to their lack of formal training and education in IHL, it would be unrealistic to expect civilian superiors "to exercise the same level of supervision of military commanders".[338] Also, without formal appointment, it may remain unclear that a person is a superior until their status would be determined in court. *Neilson* thus concludes, that for these reasons, a different knowledge requirement for commanders and civilian superiors can be deemed appropriate. However, whether same arguments would be applicable to other actors, such as PMSC employees in armed conflict, that are not formally appointed but do *de facto* act as superiors to their own forces or even the state forces, remains to be addressed. It hardly seems that e.g. lack of IHL training and education would be a relevant argument in their context.

[335] Alexandra 2017 p. 7 (in Andreopoulos & Kleinig 2017).
[336] Bantekas & Nash 2007 p. 39.
[337] Neilson 2011 p. 138–140.
[338] Neilson 2011 p. 142.

Neilson also recognizes that the potential danger in having a difference in knowledge standards is highlighted in paramilitary units and superiors within PMSCs.[339]

6.1.3 The Individual Criminal Responsibility of PMSC Personnel under the Chain of Command Doctrine and Superior-Subordinate Relationship

To conclude from what has been stated above, there are actually several scenarios in which it could be argued that there could be criminal liability in the context of PMSCs operating in armed conflicts, on the grounds of the chain of command doctrine and the superior-subordinate relationship. The perhaps most obvious, and by far the most discussed by scholars, relate to the military commanders of civilian leaders responsible for contracting the PMSC by the state. However, in terms of the criminal liability faced by the personnel (individuals) of PMSCs themselves, which is both the focus of this thesis and which has also not been in the spotlight of scholars as much, it has been argued that a PMSC superior could be tried as a "person acting as" a military commander, under art 28(a), or as a civilian superior under art 28(b), and the classification would depend on the factual circumstances.[340]

The PMSCs work relatively often in close proximity with the armed forces of the state, and while they might not be fully integrated into their armed forces, there is often some cross-over in the supervision or command between the PMSC and the armed forces of the state that they work alongside.[341] In the case of PMSC personnel, the relevant question is most often not the *de jure* status of the superiors and subordinates but the *de facto* situation. Whereas the *de jure* command structures are often found in the military and political branches of states entities, the situation is different in the case of paramilitary units whose command structures may often be "ad hoc", flexible and/or rapidly changing. Although it must be noted that the changing of command structures is not exactly unknow to the regular armies either, since rapid changes may be called for in the battlefield especially in situations where casualties are high.[342]

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[339] Neilson 2011 p. 142–143.
[340] Neilson 2011 p. 147. In this regard, the questions related to the jurisdiction of the International Criminal Court in such cases will not be examined in this thesis, since the focus is on the applicability of the criminal responsibility according to the relevant treaties and conventions, which is not only limited to the Rome Statute of the ICC, even though relevant. On the discussion on the jurisdiction of the ICC and the possibility of international criminal tribunals to examine the criminal responsibility of corporate entities in this regard, *see e.g.* Neilson pp. 147–150 and Bantekas & Nash 2007 p. 47–49.
[341] Neilson 2011 p. 150.
[342] Bantekas & Nash 2007 p. 40.

Of course, the *de facto* effective control is often a much more complex task to prove than the *de jure*.[343] In the *Celebici* case[344], the International Criminal Tribunal for the Former Yugoslavia (ICTY) concluded, that even though one of the respondents, Zejnil Delalić, was a "well-placed individual" and clearly involved in the local effort to contribute to the defence of the Bosnian State, he did not acquire such a status that would place him into any hierarchy of authority that would create a relationship of a superior and subordinate. This stand taken by the ICTY does not, however, seem to exclude the applicability of the PMSC personnel from such a scenario, but rather clarifies the grounds on which the assessment should be made. Zejnil Delalić was in 1992 appointed "coordinator of the Konjic Municipality Defence Forces", which the ICTY noted was not a usual military term. The ICTY also noted that the function is unusual, and the whole office was created to deal with the special circumstances in the particular municipality. The prosecution argued that in a fluid situation, in which the well-developed structures were lacking, a strong and influential personality such as the respondent, could have acquired a significant degree of authority that would have made him a *de facto* leading commander of the municipality. Even though the ICTY did not agree with the factual assessment of the prosecution as in what comes to the actual powers and responsibilities held by Mr. Delalić, the argument in itself is interesting from the viewpoint of PMSC personnel, who also might operate e.g. under more unusual military terms than the actual forces of a state.[345]

Another test for command responsibility is the one that was outlined in the *Bemba* case[346], which mentions five specific elements, which should all be present in order for the liability under command responsibility to be found. According to the ICC, Prosecutor v. Bemba, for an accused to be found guilty and convicted as a military commander or person effectively acting as a military commander under Article 28(a), certain specific elements must be fulfilled:

> "a. crimes within the jurisdiction of the Court must have been committed by forces; b. the accused must have been either a military commander or a person effectively acting as a military commander; c. the accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes; d. the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; e. the accused must have failed to take all necessary and

[343] Bantekas & Nash 2007 p. 41.
[344] ICTY, Prosecutor v Delalić et al., Case No. IT-96-21-T, "Judgment", 16 November 1998.
[345] ICTY, Prosecutor v Delalić et al., Case No. IT-96-21-T, "Judgment", 16 November 1998, paras 658-660.
[346] International Criminal Court (ICC), Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba Gombo, 21 March 2016.

> reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; and f. the crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them."[347]

Of the five elements set out by the ICC in the *Bemba* case, especially the requirements b) and the c) seem to be the most relevant when discussing the applicability of the legal doctrine to the PMSC employees. The first mentioned requirement (b) here is that the suspect must be either a military commander or a person effectively acting as such, i.e. a "military-like commander". The term "military commander" of course most of all refers to a category of persons who are formally of legally appointed to carry out a military commanding function, i.e, *de jure* commanders.

However, the mention of a "military-like commander" can also refer to persons who have not been legally elected to carry out the role of a military commander, yet they do perform it *de facto* by "exercising effective control over a group of persons through a chain of command".[348] The latter is of course, in most cases, the relevant provision to be looked at in the case of PMSC members. It has also been stated in the *Celebici* case by the ICTY, that "(t)he mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility".[349]

The second element outlined in the *Bemba* case refers to the existence of "effective control" over the forces that have been found to have committed the offences. The Pre-Trial Chamber of the ICC stated in its initial verdict of the *Bemba* case that it concurs with the view adopted previously by ICTR and ICTY, that the existence of the effective control is "more a matter of evidence than of substantive law" and depends on the circumstances of each case.[350] Thus, also the second requirement seems to be possibly applicable in the case of PMSC superiors.

[347] ICC, Pre-Trial Chamber II, Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, 15 June 2009, para 170. Rome Statute Article 28 (a).
[348] ICC, Pre-Trial Chamber II, Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, 15 June 2009, para 409.
[349] ICTY, Prosecutor v Delalić et al., Case No. IT-96-21-T, "Judgment", 16 November 1998, para. 354.
[350] ICC, Pre-Trial Chamber II, Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, 15 June 2009, paras 411, 416.

6.2. Aiding or Abetting Others in the Commission of International Crimes

As concerns the form of engagement, it is also relevant to note that individuals can be found to be criminally responsible not only for committing, or issuing orders to commit war crimes, but also for planning, preparing, or attempting to commit war crimes, and for instigating, assisting, facilitating, or otherwise aiding or abetting others in the commission of war crimes.[351] According to Article 25 of the Rome Statute of the ICC, a person shall be criminally responsible and liable for punishment "for a crime within the jurisdiction of the Court", if said person commits a crime jointly with another or through another person, orders, solicits or induces the commission of such a crime, aids, abets or otherwise assist in its commission, including providing the means for its commission, or in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. There is, also according to Article 25 of the Rome Statute, a requirement that such a contribution should be intentional and made with the aim of furthering the criminal activity or made in the knowledge of the intention of the group to commit the crime.

Thus, it is possible for the PMSC personnel also to become criminally responsible for encouraging the commission of, or aiding and abetting an international crime, such as war crimes. According to *Neilson*, these forms of participation are especially relevant for the PMSCs whose main field of operations is "advising" or "training" a state army, in which case it is possible that an individual PMSC employee might induce, encourage or even order members of the armed forces of the state to commit an international crime. In such a case, individual criminal liability cannot be ruled out, even though the PMSC employee would not be an integrated member in the said armed forces.[352]

In this regard, it must also be noted that "aiding" and "abetting" are not actually synonyms in legal terminology, since the first mentioned means giving assistance to someone, while the latter "involves facilitating the commission of an act by being sympathetic thereto".[353] "Assistance" has been interpreted quite broadly, and in the *Tadić* case the ICTY Trial Chamber stated that "all acts of assistance by words or acts that lend encouragement or support" are

[351] Melzner 2019 p. 286.
[352] Neilson 2011 p. 1023.
[353] Cameron & Chetail 2013 p. 601.

relevant when considering criminal responsibility based on aiding and abetting.[354] The accused does not even have to be present at the place and time of the crime committed, but the assistance can happen before, during or after the crime. However, the assistance needs to be direct or to have a "substantial" impact on the commission of the crime.[355]

For PMSC employees to be considered to have aiding or abetting in international crimes, it also must be proven that they had knowledge of the unlawful character of the act that they have given their support to.[356] In other words, they don't have to share the intent, but they have to be aware of it, and of the elements of the crime.[357] The PMSC personnel could be providing a state army training or information on how to conduct a military operation, giving them technical assistance or weapons. These forms of participation are indeed particularly relevant for the companies whose main field of activity is training or otherwise advising state armies.[358] If such an operation, where the employees of PMSCs have provided such services involves commission of crimes, the PMSC employees could also be held liable for the acts committed under Article 25(3) of the Rome Statute.[359]

An employee of an PMSC may induce, or even order, members of the armed forces of a state to commit acts that are considered international crimes, despite the fact such an order typically would require a military relationship of subordination.[360] It seems that certain acts can be more easily proven to have direct and substantial effect to the unlawful acts that are committed, e.g. providing weapons is a more straightforward act in being linked to certain acts and thus requires less interpretative elements than e.g. providing training to armed forces. However, other types of actions by the PMSC personnel cannot be ruled out to possible fit the criteria of aiding and abetting in international crimes either, e.g. identifying civilian targets which are attacked by the armed forces or acting as prison guards in facilities where prisoners are tortured can be seen as aiding or abetting in the commission of international crimes, even if claims on these actions may be somewhat more difficult to establish in a judicial process.[361]

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[354] ICTY, Prosecutor v. Dusko Tadić (Opinion and Judgment), IT-94-1-T, ICTY, 7 May 1997, para 688.
[355] Cameron & Chetail 2013 p. 602.
[356] ICTY, Prosecutor v. Dusko Tadić (Opinion and Judgment), IT-94-1-T, ICTY, 7 May 1997, para 689. Cameron & Chetail 2013 p. 603.
[357] *Ibid*.
[358] Lenhardt 2008 p. 1023.
[359] Cameron & Chetail 2013 p. 604.
[360] Lenhardt 2008 p. 1023.
[361] Lenhardt 2008 p. 1024.

6.3. Joint Criminal Enterprise

A "joint criminal enterprise" ("JCE") is a doctrine under which "all participants in a common plan or design" can be held criminally liable for the crimes that have been committed "in furtherance of the common plan".[362] The three categories, or forms, of JCE are: 1) liability for a common purpose, 2) liability for participation in a common criminal plan within an institutional framework, and 3) criminal liability based on foresight and voluntary assumption of risk. The first one requires "shared intent of all the members of the JCE", and all of them would be held liable as a co-perpetrator of the crime. The second scenario means that the perpetrator has knowledge of the "system of ill-treatment implemented in an institution", such as a concentration camp. In this case, every person who has the knowledge of the system of ill-treatment, regardless of nature their tasks in the institutions (e.g. only administrative), shares implicitly the criminal intent with the others involved in the JCE that directly commit the crimes. Lastly, the third option holds that if a member has "the intention to participate in and further the criminal purpose of the group, he or she will be held liable as a co-perpetrator for the crimes which were not part of the common criminal design", although given that the commission of these additional crimes by other members was foreseeable and the person that is accused willingly and knowingly took that risk. Thus, all of these scenarios share certain similar characteristics: plurality of persons, the existence of a common plan, design or objective and the participation of the accused person in the JCE "by any form of assistance in, or contribution to, the execution of the common purpose".[363]

It seems that it is at least possible that the PMSC employees could be held accountable among other participants if they have a common purpose like mentioned in the first form of JCE. According to *Cameron & Chetail*, it also seems possible that the actions of PMSC employees could meet the criteria mentioned in the second category of JCE (liability for participation in a common criminal plan within an institutional framework). For example, in the case of ill-treatment of prisoners at the Abu Ghraib prison could in their view satisfy the test for the second form of JCE.[364] There have indeed been accusations by American soldiers and other parties claiming that not only were certain employees of the PMSCs completely aware of the ill-treatment and torture happening in the prison, some individuals were "either directly or

[362] Cameron & Chetail 2013 p. 608.
[363] Odriozola-Gurrutxaga 2013 p. 3.
[364] Cameron & Chetail, 2013 p. 609.

indirectly responsible for the abuse at Abu Ghraib" and knew that the instructions given "equated to physical abuse" [365].

The third form of the JCE is the broadest since it is based on taking a voluntary and "foreseeable" risk that crimes which are not part of the original plan may still occur in pursuing the common plan. It seems that this category can also be applied to the actions of PMSC personnel, although it actually might be in most cases more relevant to the contractors of the PMSCs rather than the PMSC employees themselves. This could be the case e.g. when a contractor hires the PMSC to participate in illegal projects related to e.g. exploiting natural resources as security guards. In such a case, the contractor as well as the PMSC employees could be held accountable for crimes committed by the PMSC employees and/or other security forces involved in the JCE.[366]

It must be noted that the JCE as a concept was established by the ad hoc tribunals and is not clearly addressed in the Rome Statute of the ICC, although the Pre-Trial Chamber of the ICC has since then referred to the principle (of a common plan that must include the commission of a crime) in its decision on the confirmation of charges in the *Lubanga* case.[367] The views of ICC and the ad hoc tribunals differ to a certain extent on how the JCE criteria should be approached, since the ICC Pre-Trial Chamber leans on a theory of control of the act to attribute liability of the accused as a co-perpetrator of the crime, whereas the ICTY and ICTR had a different (subjective criterion) approach.[368]

However, *Cameron & Chetail* note, that taking into account the existence of JCE as a possibility of triggering individual criminal liability, the PMSCs themselves should take it into account for example when making contracts that could imply the commission of (international) crimes. The risk seems particularly high for PMSCs when they would provide e.g. security services in conflict zones or countries that are controlled by "dictatorial" governments. The contract between the PMSC and the other party (often contracting state but could be another private

[365] Hersh/The New Yorker 30.4.2004. Later, over 70 prisoners of Abu Ghraib brought up a lawsuit against the contractor accused of crimes such as torture, but the case was settled by the contractor in 2013. However, 20 years later, there still is another case pending in the U.S. against a private contractor (which denies the allegations). *See* Swan/The Intercept 17.3.2023.
[366] Cameron & Chetail 2013 p. 610.
[367] ICC, Prosecutor v. Thomas Lubanga Dyilo, Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-01/04 – 01/06, 29.1.2007, paras 343-344. Cameron & Chetail 2013 p. 611.
[368] Odriozola-Gurrutxaga 2013, pp. 2, 5.

entity protecting e.g. their economic interests in certain areas) can be used to prove the agreement of the project, in the course of which crimes may have been then later committed. Thus it can be concluded, that the JCE is another form of individual criminal liability which may be applicable to PMSC personnel.[369]

[369] Cameron & Chetail 2013 p. 612.

7. Where Can the Personnel of Private Military and Security Companies Be Prosecuted?

7.1. International Tribunals

When prosecuting individuals for war crimes on the international level, the Rome Statute and the ICC are the most relevant instances today in this regard. The purpose behind establishing the ICC in the first place was to make sure that "the most serious crimes of concern to the international community as a whole" do not go unpunished and to "put an end to impunity for the perpetrators" of such crimes, and thus also contribute to preventing those crimes in the future.[370] Today, as many as 123 countries are states parties to the Rome Statute of the International Criminal Court. Of these, 33 are African states, 19 Asia-Pacific states, 18 from Eastern Europe, 28 from Latin American and Caribbean states, and 25 from Western European and other states - including all EU member states.[371] Unlike the ad hoc tribunals, namely ICTY and ICTR, the ICC is a permanent international criminal court which has an international legal personality.[372]

The Articles 11, 12 and 13 of the Rome Statute define conditions under which the ICC is competent to deal with international crimes. The jurisdiction of the ICC covers crimes that have been either committed in the territory of states parties to the Rome Statute, or crimes that have been committed by a national of one of the states parties. The UN Security Council (UNSC) can also refer to the ICC situations in which international crimes have been committed even if the state where they occurred is not a party to the treaty.[373]

There have been arguments that since international tribunals only focus on the most serious crimes, it would be highly unlikely that a member of PMSC personnel would be prosecuted at this level.[374] For example, *Lenhardt* claims that since the ICC is "premised on the principle of complementarity" and only cases that are of "sufficient gravity" are admissible, it would be

[370] DeGuzman 2013 p. 475. The Preamble of the Rome Statute p.1.
[371] ICC > Assembly of States Parties > The States Parties to the Rome Statute (last accessed 2.11.2023).
[372] Bantekas & Nash 2007 p. 536.
[373] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Article 13 (b). Cameron & Chetail 2013 pp. 597–598.
[374] Lenhardt 2008 p. 1030.

highly unlikely, although not impossible, that cases against PMSC personnel could be brought to the court.[375]

The principle of complementarity is indeed something that clearly distinguishes the ICC from other international criminal tribunals, such as the ad hoc tribunals ICTY and ICTR.[376] The Rome Statute recognizes that states ultimately have the first responsibility and right to prosecute international crimes.[377] The ICC can exercise jurisdiction when national legal systems fail, i.e. when the national legal system in question is unable or unwilling to do so.[378] However, it must be noted that the ICC can also use other incentives before launching an actual investigation, such as encouraging states to act in a certain situation. The Office of the Prosecutor of the ICC has the option to aid and act in partnership with the states in case needed, so it is not always just a matter of instance, but also of international partnership to tackle impunity for the most serious crimes globally.[379]

Lenhardt has pointed out, that any case to be deemed as admissible to the ICC would also need to cross the threshold of "sufficient gravity", according to Article 17 (2) (d) of the Rome Statute. As concerns the crimes committed by the employees of PMSCs, this threshold might not be met in most cases. However, the Rome Statute leaves the actual content and interpretation of the concept of "gravity" ambiguous and gives little to no indication about which cases meet the threshold. The judges of the ICC have thus had the opportunity to interpret and apply the threshold on several cases.[380]

In *the Lubanga/Ntaganda Arrest Warrant Decision*[381] in 2006, the Pre-Trial Chamber I (PTC I) proposed an interpretation of the gravity threshold, which then later was deemed too strict and restrictive by the Appeals Chamber. The Appeals Chamber did especially not subscribe to the PTC I's view that the gravity threshold would limit admissibility solely to cases that involve

[375] Lenhardt 2008 p. 1030.
[376] ICC/OTP 2013 p. 3.
[377] Rome Statute of the International Criminal Court (last amended 2010), Articles 1, 17.
[378] Rome Statute of the International Criminal Court (last amended 2010), Article 17. ICC/OTP 2003 p. 3.
[379] ICC/OTP 2003 p. 3–4.
[380] DeGuzman 2013 pp. 475–477.
[381] ICC Appeals Chamber, Prosecutor v. Mr. Bosco Ntaganda, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC-01/04, 13.6.2006.

systematic or large-scale criminality by the most responsible senior leaders.[382] In 2020, the Appeals Chamber stated in the *Al Hassan* case that the purpose of Article 17(1)(d) of the Rome Statute is to exclude the "unusual" cases in which the crimes listed in Article 5 (genocide, crimes against humanity, war crimes and crime of aggression) would not for some reason amount to a gravity required but in which "the specific facts are only of marginal gravity".[383] The Appeals Chamber noted that the jurisdiction of the Court is already limited to "what are, in principle, by their nature, very serious crimes".[384] In the *Al Hassan* case the Appeals Chamber also stated that both quantitative (especially the number of victims) and qualitative criteria (e.g. the nature, scale and manner of the alleged crimes or the impact of the crimes on the victims) are relevant when assessing the gravity threshold, and they must be examined as a whole and not only relying e.g. on the quantitative aspect.[385]

Thus, it seems that not all crimes committed by the personnel of private military and security companies could be excluded from the jurisdiction of the ICC either just based on the "sufficient gravity" threshold. However, it also seems clear that the assessment should always be made on a case-by-case basis. The ICC Appeals Court referred on a general note to this requirement of a "case-by-case" analysis also in their *Al Hassan* jugdement.[386]

Contrary to what *Lenhardt* has stated on the very slim probability of crimes by PMSC personnel being prosecuted in international tribunals and especially the ICC, according to *Cameron & Chetail*, while this assessment might be true at the moment, just the "sheer size of the industry" and its growing significance could in the future lead prosecutors to seek to address at least the worst cases, to show that shooting civilians indiscriminately or other grave and clear IHL violations will not be tolerated, regardless of the status of the actor.[387] It must also be noted,

[382] ICC Appeals Chamber, Prosecutor v. Mr. Bosco Ntaganda, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC-01/04, 13.6.2006, paras 56-80. DeGuzman 2013 pp. 479–480.
[383] ICC Appeals Chamber, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense, No. ICC-01/12-01/18 OA, 19 February 2020, para 56.
[384] *Ibid* para 57.
[385] *Ibid* para 92.
[386] ICC Appeals Chamber, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense, No. ICC-01/12-01/18 OA, 19 February 2020, paras 2, 53.
[387] Cameron & Chetail 2013 p. 621.

that especially the *Musema* case[388] represents a relatively recent example where an international tribunal considered whether a private individual could be prosecuted for the crime of genocide. Acting as a director of a tea factory, Alfred Musema was a "business leader" during the Rwandan genocide in the 1990's, but his role as a private individual did not exclude him from individual criminal liability, although his business (a tea factory) was by default far less linked with military operations or acts of violence than private military and security companies. However, the case serves as an example of a civilian superior being charged in an international setting for crimes such as genocide.[389] The *Bemba* case, in which the ICC referred to "effective control", also seems to support this conclusion, as presented previously in Chapter 6.1. of this thesis.[390] Lastly, the assessments of the Appeals Chamber of the ICC in the *Lubanga/Ntaganda Arrest Warrant Decision* and in the *Al Hassan* case seem to confirm that the assessment of if a case is admissible for the ICC should always be done on a case-by-case basis, and that any case should not be solely excluded based on a substantive fact such as that the crime was conducted by a private actor and not by e.g. a senior leader of a state army or government.

7.2. The Possibilities and Obligations of States to Prosecute Employees of Private Companies for Violations of International Law

Even though the possibility of prosecuting the employees of PMSCs for international crimes in an international tribunal cannot be excluded, the most likely avenue seems to be domestic prosecution via national legal systems.[391] *Cameron & Chetail* point out that states are obliged under the Geneva Conventions and Additional Protocols to prosecute any grave breaches of IHL and other war crimes.[392] To be more precise, international crimes that amount to grave breaches of the Geneva Conventions or AP I, are subject to mandatory universal jurisdiction, meaning that it is mandatory for the state to prosecute such international crimes.[393] Other crimes that can be subject to universal jurisdiction are genocide, crimes against humanity, the crime of torture and piracy.[394] In addition, the states that have ratified the Rome Statute of the ICC must

[388] ICTR, The Prosecutor v. Alfred Musema (Judgement and Sentence), ICTR-96-13-T, 27 January 2000, paras 880-882. Cameron & Chetail 2013 p. 621.
[389] Cameron & Chetail 2013 p. 597, 621.
[390] International Criminal Court (ICC), Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba Gombo, 21 March 2016.
[391] Cameron & Chatail 2013. p. 627.
[392] Cameron & Chetail 2013 p. 598.
[393] Lenhardt 2008 p. 1030.
[394] Kmak 2011 p. 26.

implement it, which could also mean prosecuting PMSC employees on the grounds of crimes included in the statute, pursuant to their national law.[395]

In some specific cases the barriers for holding PMSC personnel accountable for the violations are exceptionally tricky, e.g. because of the potential immunity of personnel that are directly contracted by the UN.[396] The UN has regularly utilised PMSCs in its peacekeeping and humanitarian operations.[397] Thus, the question of immunity due to the employees of private companies being contracted by the UN is indeed relevant too, even though more focus has been given to situations where a state is the contractor of the PMSCs.[398]

The states have an obligation to protect human rights and prevent their violations, including investigating those violations and prosecuting the ones responsible for them. According to *Bakker*, in most cases, where incidents that have amounted to serious human rights violations and where PMSC employees have been involved as perpetrators of the crimes, any adequate investigations or criminal prosecutions have not been conducted. However, this does not erase the responsibility of the states, but rather highlights the inadequate response both on international and national level to serious breaches of international law by PMSC personnel.[399]

In the case of PMSCs, one of the relevant questions is whether the responsibility of prosecuting for crimes committed during armed conflict is primarily for the contracting state, host state or home state of the PMSC. For example, a state can contract a PMSC to perform tasks abroad, which makes it more complicated to determine, which state is the one responsible for investigating and prosecuting possible crimes. It seems clear, that if a contracting state exercises "overall effective control on the territory of the host State", i.e. it has militarily occupied at least a part of that state, the contracting state is legally bound to ensure the respect of international human rights law and IHL in its own territory, including investigations and prosecutions for their breaches. However, if the contracting state does have a more minor scope of authority or control on the territory of the host state, it is more difficult to establish, to which extent they would be responsible. In such situations, one has to resort to the principle of proportionality and also take into account the effectiveness of the control of the contracting state to the PMSC

[395] Cameron & Chetail 2013 p. 598.
[396] Crowe & John 2017 pp. 24–26.
[397] Crowe & John 2017 p. 1.
[398] Crowe & John 2017 pp. 1–2.
[399] Bakker 2009 p. 1.

employees. It would also seem that in contrast to the host state, the contracting state does factually have the authority and/or control over the PMSC employees contracted, at least in situations where they are operating under the direct command or obeying the instructions of an agent (e.g. army commander) of the contracting state.[400]

An example of the possibility of such prosecutions by a contracting state for extraterritorial activities of PMSC employees could be conducted in the United States under the Military Extraterritorial Jurisdiction Act (MEJA) that was adopted in year 2000 (and later amended in 2004).[401] Under the MEJA, in addition to those that are actual members of the armed forces, also persons that are simply employed by or accompanying the armed forces can be prosecuted.[402] Thus, it seems that at least a part of PMSC personnel contracted by the U.S. could fall under this legislation, although not all, especially those that do not qualify as being "employed by" or "accompanying" the U.S. armed forces.[403] There have been some cases in which successful prosecutions of PMSC employees have been conducted under the MEJA, also for crimes committed in the context of armed conflict by U.S.-hired PMSC employees in Iraq and Afghanistan.[404]

One case example can be found from the United States, where members of Blackwater Worldwide Security, a famous U.S. based private military and security company, were tried in the U.S. for crimes committed in relation to the 2007 shooting at Nisur Square in Baghdad, Iraq.[405] The court found MEJA to be applicable in the case, despite opposite claims of the defendants.[406] In September 2007, a car bomb exploded near a U.S. diplomat who Blackwater was protecting based on being contracted for the task by the U.S. State Department. The protection team, called "Raven 23", then headed to the Nisur Square in Baghdad, where they opened fire, and their actions resulted in 31 Iraqi civilians being killed or wounded.[407] Because of the incident, three U.S. citizens and Blackwater employees were tried in the U.S. for the crimes, resulting in convictions of voluntary manslaughter, attempted manslaughter and using

[400] Bakker 2009 pp. 17–19.
[401] Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261-67 [2000] as amended on October 28, 2004.
[402] Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261-67 [2000] as amended on October 28, 2004, 9-20.115 (as updated in January 2020).
[403] Elsea 2009 p. 18.
[404] Elsea 2009 p. 23.
[405] U.S. vs. Slough, 641 F.3d 544, 547 (C.A.D.C., 2011), U.S. vs. Slough, No. 15-3078 (D.C. Cir. 2017).
[406] U.S. vs. Slatten, No. 15-3078 (D.C. Cir. 2017)., part II (MEJA Jurisdiction/MEJA Jury Charge).
[407] U.S. vs. Slatten, No. 15-3078 (D.C. Cir. 2017), pp. 4–6.

and discharging a firearm in relation to a crime of violence, or aiding-and-abetting the commission of those crimes. One of the defendants, Nicholas A. Slatten, was also convicted of first degree murder.[408] Despite agreeing in principle with the convictions of the first instance, the appeals court took note that "private security contractors work in places that are 'extremely dangerous' because of 'conflicts, wars, political unrest, and . . . terrorist activity'", and that "they live and work in a hostile environment in a war zone in which the enemy could strike at any moment".[409] The appeals court concluded that "because of this ever-present danger, they are often required to use lethal force", which then resulted in reduced sentences for three of the defendants.[410]

It has been considered that the United States did fulfil their obligation under international (humanitarian) law to investigate and convict for crimes committed by the persons during an armed conflict who were working for a private company but being contracted by the state (U.S.). However, it must be noted as well that the later pardons by president Trump to the same convicted individuals that were working for Blackwater were seen by some to have gravely violated the international obligations of the U.S.[411] For example, the Chair-Rapporteur of the UN Working Group on the use of mercenaries stated that "[p]ardoning the Blackwater contractors is an affront to justice", since "[t]he Geneva Conventions oblige states to hold war criminals accountable for their crimes, even when they act as private security contractors - - [t]hese pardons violate US obligations under international law and more broadly undermine humanitarian law and human rights at a global level".[412] The Working Group also expressed "extreme concern" that by permitting PMSCs to operate "with impunity in armed conflicts", states could evade their IHL obligations by outsourcing their core military functions to private companies.[413]

However, in contrast to the U.S., in European context the PMSCs and their employees would be prosecuted in ordinary criminal tribunals and cannot be tried by military jurisdictions.[414] Thus, compared to the U.S., in some other states there is an opposite perception that the PMSCs

[408] U.S. vs. Slatten, No. 15-3078 (D.C. Cir. 2017), pp. 3.
[409] U.S. vs. Slatten, No. 15-3078 (D.C. Cir. 2017), pp. 81.
[410] U.S. vs. Slatten, No. 15-3078 (D.C. Cir. 2017), pp. 81-82.
[411] AJIL 19.4.2021 pp. 332–333.
[412] OHCHR Press Release, 30 December 2020.
[413] *Ibid.*
[414] Council of Europe/Venice Commission 2009, para 56.

and their personnel should actually be separated in this sense from military personnel.[415] *Schaub & Kelty* claim that the "regulatory commitment" of many states, for example the UK, is low simply because the governments of certain states, especially those that PMSCs are not particularly active in, do not accept the argument that more specific regulation would be required.[416] With regard to the prosecution of PMSC employees in domestic tribunals, *Quirico* points out that the "regulatory regime of PMSCs proves particularly unsatisfactory when the legislation of the 'home' state does not regulate the activity of PMSCs abroad and the 'host' -- state does not provide sufficient regulation for PMSCs."[417]

Apart from the above-mentioned Blackwater cases (*U.S. vs. Slatten* and *U.S. vs. Slough*) there are not many examples of PMSC personnel being tried in the domestic courts either for crimes committed during armed conflicts. Another example can though be found again from the U.S., where two ex-Blackwater employees who were contracted to serve as weapons instructors (among other tasks) in Afghanistan, opened fire seemingly unprovoked against three civilians, resulting in two deaths.[418] They were convicted for involuntary manslaughter in the U.S. by the District Court for the Eastern District of Virginia, at Norfolk.[419] Nevertheless, it seems evident that these kind of cases have not been brought in front of many domestic courts either. However, the increased attention by the public may lead to new proceedings in the future, as the media and public attention seemingly already put pressure on the U.S. in bringing the Blackwater employees in front of the U.S. courts as well.[420]

7.3. Possible Future Developments for Prosecution in the International and Domestic Courts

As has been described above, neither the international avenue nor the domestic one is an easy or straightforward path for prosecuting the personnel of private military and security companies for international crimes. In principle, in domestic settings the PMSC employees could be prosecuted in the state where they operate, or they could be transferred to another state for trial (i.e. prosecuted in the contracting state, host state or home state of the company).[421] The ICC

[415] Quirico 2011 p. 441.
[416] Schaub & Kelty 2016 p. 28.
[417] Quirico 2011 p. 443.
[418] U.S. vs. Drotleff, No. 11-4677, 29.11.2012.
[419] U.S. vs. Drotleff, No. 11-4677, 29.11.2012, pp. 1–4.
[420] Brooks, Koch & Schaub 2016 p. 202.
[421] Bakker 2009 pp. 17–19.

or another international tribunal is also an option, although certain difficult questions of admissibility or jurisdiction may have to be considered.[422]

Other possibilities for tackling the impunity of private actors have also been presented and deserve a brief mention here as well. *Sivakumaran* points out that there is a general lack of ownership of any non-state armed groups in the enforcement of IHL.[423] He states that encouraging non-state actors to prosecute the violations of IHL themselves "may be the only means by which to avoid a climate of impunity". However, he also recognizes that this might not be highly likely in the near future, since it would probably bring along other problems, among others that the states may view it as "encroaching into their space and infringing on their sovereignty".[424] While PMSCs are not by definition traditional non-state armed groups, the notion that any non-state actors could have a broader ownership in the enforcement of IHL, might be an interesting one also from the point of view of private companies and initiatives to tackle the impunity related to their actions in the future.

Lastly, it could be mentioned that since it seems evident that in many cases there are obstacles present for the criminal proceeding to advance, the possibility of utilizing private law accountability tools such as litigation have also been presented as alternatives.[425] *Ryngaert* notes that the accountability mechanisms of criminal law might not always be exercised because of various reasons, such as (hiring) states lacking extraterritorial jurisdiction, questions of sovereignty of involved states, corporations not being held criminally liable or simply state prosecutors just lacking the willingness to initiate prosecutions against the private companies, despite the obligations for the state to prosecute at least crimes of certain gravity.[426] However, Ryngaert also agrees that at least for "the worst - - abuses", criminal prosecution would definitely still be warranted, and as stated above, it also is the obligation of a state to prosecute at least the gravest breaches of IHL.[427]

[422] Lenhardt 2008 p. 1030. *See* chapter 6.4.1 of this thesis.
[423] Sivakumaran 2012 pp. 89–97.
[424] Sivakumaran 2012 pp. 94–97.
[425] Ryngaert 2008 pp. 1035–1053.
[426] Ryngaert 2008 p. 1052.
[427] Cameron & Chetail 2013 p. 598.

8. Conclusions

In international law, there should not be any question about whether any individual should bear criminal responsibility for their participation in international crimes, especially regarding the gravest violations of IHL and the other most serious crimes of concern to the international community.[428] Thus, the fact that the personnel of PMSCs are working for a private company, does or at least should not exclude them from individual criminal liability, despite the claims that they are currently operating in some type of a "legal vacuum".[429] However, very few PMSC employees have actually ever been brought to justice, even though the use of these companies has expanded notably in the world during the last decades, including in conflict zones, and there have been multiple reports of grave breaches of IHL by them.[430] Or as *Lenhardt* has described it, "the ambiguous legal status" of the PMSCs and their employees has resulted in "an almost complete absence of legal prosecution where there have been accusations of wrongdoing that arguably amounts to international crime".[431] The international legal framework also remains fragmented, even though there are some efforts to regulate at least the actions of states as contractors (i.e. the Montreux Document) and to create a framework for the self-regulation of the companies themselves (notably the ICoC), as well as the initiative by the UN Working Group on Mercenaries to start negotiations for an international convention on the use of PMSCs.[432]

Even though it is clear that the PMSC personnel should not escape individual criminal responsibility for committing international crimes, certain difficult and fundamental questions arise when examining the question of their individual criminal liability for international crimes further. Firstly, their ambiguous and unclear status under IHL seems to raise some questions about both the privileges and responsibilities that employees of the PMSCs have when they are acting in the battlefield or in other ways operating in the context of armed conflicts.[433] After all, it seems evident that it is not at all an uncommon scenario that the PMSCs could be possibly engaging in situations that have a potential to result to war crimes, grave breaches of IHL or international crimes, taken into account that they mostly provide a wide range of private

[428] Rome Statute of the International Criminal Court (last amended 2010), Art. 8.
[429] Melzer 2022 pp. 285-286, El Mquirmi 2022 p. 1, Quirico 2011 p. 423.
[430] Sossai 2009 p. 1, ICRC 2012.
[431] Lenhardt 2008 p. 1016.
[432] Global Policy Forum 2013, Prem 2021 p. 357.
[433] Lenhardt 2008 p. 1016.

military and security services and indeed often act in conflict settings.[434] Whether they are considered to be combatants or civilians under IHL, is highly relevant in this regard.[435] Based on the views of legal scholars, it seems that the employees of PMSCs can also in some circumstances fall into the somewhat controversial concept of a "third category", which is the one of the "unlawful combatant" or "unprivileged combatant", even though some might contest the concept of a third category and rather call this "falling outside the two categories".[436] PMSC employees may indeed in certain occasions fall into this category of unlawful or unprivileged combatants and not be considered as civilians, based on the fact that their actions are rarely "spontaneous" but are actually nearly always conducted in an organized and continuous basis.[437] This also means that like combatants, they more permanently lose the protection that is granted to civilians against being directly attacked, but they still don't gain the "combatant's privilege", and can be prosecuted for lawful acts of war, under the applicable domestic legislation.[438]

Another relevant question to ask about the status of PMSC personnel is whether they sometimes qualify as mercenaries. The act of mercenarism in itself can also under certain conditions be considered to be a punishable crime, although the international UN Mercenary Convention of 1989 has not been ratified by many states, and definitely not by the biggest host states of the PMSCs or by the ones that contract most of the PMSCs globally. The PMSCs themselves and their personnel are often referred to as "mercenaries" by the public and the media and for political purposes, but as has been concluded in this thesis, in most cases this terminology represents more of a political statement of the speaker than a legal distinction. The definition of a mercenary presented e.g. in AP II is very narrow and not very often fulfilled by the personnel of PMSCs. In conclusion, while it does seem unlikely that PMSC employees could face criminal liability only based on the fact that they would be considered to have acted as mercenaries in an armed conflict, and the relevant state should also then have adopted domestic legislation and/or ratified one of the international conventions that prohibit mercenarism, the scenario of PMSC employees being considered mercenaries is still not impossible and must always be examined on a strict case-by-case basis.[439]

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[434] *Ibid*.
[435] Cameron & Chetail 2013 p. 385–386.
[436] Melzer 2022 p. 88, Värk 2005 p. 191-192, Cameron & Chetail 2013 p. 425–426.
[437] Melzer 2022 p. 88.
[438] Elsea & Serafino 2009 p. 45, Sossai 2009 p. 24, Faite 2004 p. 6.
[439] Elsea & Serafino 2009 p. 45-46, Faite 2004 p. 4, Cameron & Chetail 2013 pp. 70–71.

As long as international courts have no jurisdiction over the private military and security companies as corporations, it seems most relevant to look at the individual criminal responsibility of PMSC personnel, as it appears to be the most likely avenue to hold the actors of PMSCs responsible for international crimes.[440] At the same time, there have been notable allegations of misconduct of PMSCs in armed conflict, including especially war crimes and/or crimes against humanity.[441] It again also seems evident, that PMSC personnel can more easily than other groups of individuals, apart from perhaps only state armies of similar entities, become perpetrators of such crimes, taking into account the nature of the business which very often leads to them operating in armed conflicts and in highly fragile settings.[442] It has though remained somewhat of an uncertainty, that to which extent individuals who are not acting as state agents are bound by all the rules of international (humanitarian) law. However, the ICTR has clearly stated in the *Akayesu* case that IHL would be lessened and called into question, if certain persons could simply be exonerated from individual criminal responsibility only on the basis of not belonging to a certain category.[443]

In addition, the individuals who are considered as perpetrators of international crimes are most often those who are somehow integrated into "a hierarchically structured collective" of a state.[444] However, it seems evident that PMSC employees can indeed act in various different roles, including taking direct part in hostilities or performing functions that can be very closely related to the military functions of the army of the state that is involved as a party in an armed conflict.[445] In this regard, certain principles, like the principle of command and superior responsibility which can be instrumental questions when discussing the accountability of a particular individual in the context of international law, could also be relevant in the case of examining the individual criminal liability of PMSC personnel, especially regarding the supervisors but in certain cases also possibly the senior management of the PMSC's. Other relevant questions include the possibility of prosecuting PMSC personnel on the grounds of

[440] Bantekas & Nash 2007 p. 18, Cameron & Chetail 2013 p. 626.
[441] Montreux Document Forum 2021 p.3, Lenhardt 2008 p. 1016.
[442] Cameron & Chetail 2013 pp. 598–599.
[443]ICTR Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu, IT 96-4, judgment, 1 June 2001, at para. 444. Lenhardt 2008, p. 1018.
[444] Lenhardt 2008 p. 1033.
[445] Lenhardt 2008 p. 1024–1025.

aiding or abetting others in the commission of international crimes or based on joint criminal enterprise, both of which cannot be excluded in the case of PMSC personnel.[446]

Lastly, when examining the actual possibilities of holding PMSC personnel responsible for international crimes, the question of the possible appropriate forum for their prosecution is also a highly relevant one. As the international tribunals like the ICC only focus on the most serious crimes of concern to the international community which go beyond a certain threshold of sufficient gravity,[447] there have not been such cases yet where PMSC employees would have been tried for international crimes by international courts. For the same reasons, it also seems at the moment unlikely that a member of a PMSC personnel would actually be prosecuted at such a level.[448] However, not all crimes committed by the personnel of PMSCs can be excluded from the jurisdiction of ICC just based on the "sufficient gravity" threshold, since the assessment should always be made on a case-by-case basis, as the ICC Appeals Court has confirmed in their *Al Hassan* judgement.[449] Also, while the significance and size of the industry is growing especially in conflict settings, the question of whether the appetite of the prosecutors of international tribunals could increase to seek to prosecute also private entities for the gravest violations of IHL, should be asked. In any case, the avenue of domestic courts seems the most likely at the moment for tackling impunity for the crimes committed by PMSC personnel, at least when taking into account e.g. the mandatory universal jurisdiction of states to prosecute grave breaches of the Geneva Conventions of 1949.[450]

As stated in the beginning of this thesis, the increased visibility of PMSCs in armed conflicts has caught the increased attention of the public, but also of legal scholars, during at least the last decade, if not longer. The trend of privatizing war is not decreasing, but vice versa, as the actions of PMSCs have also continued to expand and intensify globally.[451] It seems evident, that while the norms to regulate the industry are seen as inadequate and certain initiatives have been made to establish new instruments, the interpretation of current norms in place remains unpolished as well and divides the opinions of legal scholars.

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[446] Cameron & Chetail 2013 p. 612, Lenhardt 2008 p. 1023.
[447] Rome Statute of the International Criminal Court (last amended 2010), Article 17.1 (d).
[448] Cameron & Chetail 2013 pp. 597–598.
[449] ICC Appeals Chamber, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense, No. ICC-01/12-01/18 OA, 19 February 2020, paras 2, 53.
[450] Bakker 2009 pp. 17–19.
[451] Sossai 2009 p. 1.

As has been described in this thesis, the relevant questions in this regard go from the ambiguous status of PMSC employees under IHL, to the very restrictive definition of mercenarism based on a more traditional view of mercenaries in international law, as well as to the scope of individual criminal liability of PMSC personnel for international crimes in the context of e.g. the doctrine of command and superior-subordinate relationship. Since there is barely any international or domestic case law about most of these questions yet related to the actions of employees of private companies, the interpretation of the individual criminal liability of PMSC personnel for international crimes and breaches of IHL lies at the moment very much on the views of legal scholars, even though selective case law by the international tribunals may be utilized in assessing the scope of their accountability. However, to quote *Neilson:* "if the impunity of PMSCs is not addressed, then international criminal law will lose much of its legitimacy".[452]

[452] Neilson 2011 p. 158.

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