



ICRC

**Third Expert Meeting
on the Notion of Direct Participation in Hostilities
Geneva, October 2005**

Private Military/Security Companies:

the Status of their Staff and their Obligations under International Humanitarian
Law and the Responsibilities of States in Relation to their Operations

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Over the last decade and a half, functions traditionally performed by states' security or military apparatuses have increasingly been contracted out to private military/security companies ("PMCs/PSCs"). In view of the increased presence of these relatively new actors, carrying out a range of tasks that is getting increasingly closer to the heart of military operations in situations of armed conflict, including military occupation, and which often puts them in direct contact with persons protected by international humanitarian law, it is natural for the International Committee of the Red Cross ("ICRC") to have commenced a dialogue with these actors and with the states with responsibilities for their operations. The aim of the dialogue is twofold: first, to promote compliance with international humanitarian law by ensuring that PMCs/PSCs and the relevant states are aware of their obligations; and, secondly, to ensure PMCs/PSCs are aware of and understand the ICRC's mandate and its activities for persons affected by armed conflict.

PMCs/PSCs have featured widely in the media in recent months and it is often asserted, both in the popular press and in expert publications, that there is a vacuum in the law when it comes to their operations. In view of this, the ICRC considers it important to emphasise that in situations of armed conflict there is a body of law that regulates both the activities of PMC/PSC staff and the responsibilities of the states that hire them. The states that hire PMCs/PSCs and the staff of PMCs/PSCs them have concurrent responsibilities under international humanitarian law. Moreover, states in whose territories such companies are incorporated or operate have a responsibility to ensure respect for international humanitarian law by PMCs/PSCs.

In case of violations of international humanitarian law the responsibilities of PMC/PSC staff and of the states that hire them are well-established as a matter of law. However, practical difficulties often arise in bringing proceedings in respect of violations.

Where it is true that there is very limited law in the field of national or international control of the services PMCs/PSCs may provide and the administrative processes, if any, with which they must comply in order to be allowed to operate. Only a handful of states have adopted legislation laying down procedures that PMCs/PSCs based in their territory must comply with in order to be allowed to operate abroad (eg South Africa) and equally few regulate the companies operating in their own territory (eg Iraq and Sierra Leone)

The aim of the present note is to briefly outline the ICRC's position on certain key legal issues raised by PMCs/PSCs operating in situations of armed conflict, namely: the status of the staff of these companies; their responsibilities under international humanitarian law; the responsibilities of the states that hire them; and the responsibilities of the states in whose territory PMCs/PSCs are incorporated or operate.

It should be noted at the outset that international humanitarian law does not address the lawfulness or legitimacy of PMCs/PSCs or of states' outsourcing to them of certain activities. Rather, its aim is to regulate the activities of these actors if they are operating in situations of armed conflict.

1. THE STATUS OF THE STAFF OF PMCs/PSCs UNDER INTERNATIONAL HUMANITARIAN LAW

It is often stated that PMCs/PSCs do not have a status under international law. From an international humanitarian law point of view this is misleading. The companies themselves do not have a status under international humanitarian law but their staff does. Admittedly, there is no single simple answer applicable to all PMCs/PSCs staff as their status depends on the nature of their relationship with the state that hires them and on the nature of the activities that they carry out. It is therefore something that must be determined on a case-by-case basis. However, international humanitarian law contains criteria for determining this status as well as clear consequent rights and obligations.

Before addressing the status of PMCs/PSCs staff under international humanitarian law a few words are warranted on the question of mercenaries, which although not central to international humanitarian law, has focalised much of the debate.

a. Mercenaries?

Discussions of PMCs/PSCs often focus on or at least commence with the politically fraught question of whether the staff of PMCs/PSCs are mercenaries.

Mercenaries are the subject of two specific conventions: the 1977 Organisation of African Unity Convention for the Elimination of Mercenarism in Africa and the 1989 United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The aim of these instruments is to prohibit the use of mercenaries and to criminalise both resort to mercenaries and participation in hostilities as a mercenary.

International humanitarian law tackles the issue of mercenaries from a rather different angle. It does not prohibit the use of mercenaries or criminalise their activities. Instead, it focuses on the *status* to be granted to them if captured. Article 47 of Additional Protocol I lays down a definition of mercenaries –in fact the one subsequently adopted by the two specialised conventions, subject to some minor changes - and provides that persons falling within this definition are not entitled to prisoner-of-war status if captured.¹

Mercenaries, unlike members of states' armed forces, are thus “unprivileged combatants” and have the same position, rights and obligations as any civilian who directly participates in hostilities.

¹ Article 47 of Additional Protocol I provides as follows:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
 - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) does, in fact, take a direct part in the hostilities;
 - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
 - (e) is not a member of the armed forces of a Party to the conflict; and
 - (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

What does this mean in practice? Members of the armed forces of a state party to an armed conflict have a right to participate in hostilities. If captured, they are entitled to be treated as prisoners of war and are protected by the Third Geneva Convention of 1949. Moreover, they cannot be tried merely for having participated in hostilities.

Mercenaries, on the other hand, are treated in the same way as civilians: they do not have a right to participate directly in hostilities. Should they do so and be captured, they are not entitled to prisoner-of-war status or to the protection of the Third Geneva Convention and can be tried under national law for the mere fact of having participated in hostilities, even though in doing so they did not violate any rules of international humanitarian law.

This does not mean, however, that once captured, mercenaries are not protected by international humanitarian law. Like all civilians who participate in hostilities, they are protected by the Fourth Geneva Convention, which lays down minimum standards to regulate their deprivation of liberty, as well as minimum judicial guarantees to be respected in any criminal proceedings. Moreover, should the person concerned fall within the exceptions to the Fourth Geneva Convention, s/he will nonetheless still be entitled to the fundamental guarantees laid down in Article 75 of Additional Protocol I as well as the customary rules of international humanitarian law applicable in international armed conflicts.

This being said, it should be noted that Article 47 of Additional Protocol I does not prohibit states from giving mercenaries prisoner-of-war status. It merely provides that mercenaries, unlike members of states' armed forces, are not entitled to it as a matter of right.

Article 47 only applies in international armed conflicts, including during military occupation. international humanitarian law is silent as to the position of mercenaries in non-international armed conflicts. As, by definition, mercenaries are not incorporated into the armed forces of a state, in non-international armed conflicts their position will be the same as that of all other persons taking a direct part in such hostilities.

Thus, although entitled to the minimum protections laid down in common Article 3 of the Geneva Conventions, Additional Protocol II and the customary rules of international humanitarian law applicable in non-international armed conflict, persons falling within the definition of mercenaries, like anyone other than members of a state's armed forces, may be tried under national law for merely taking part in hostilities, even though they did not violate any rules of international humanitarian law.

b. Combatants or civilians?

i. Members of a state's armed forces?

A more central question for the purposes of IHL, with very immediate practical consequences for the persons involved, is the status of the staff of PMCs/PSCs: are they combatants or are they civilians? If they are combatants, they can be targeted but, if captured, are entitled to prisoner-of-war status. If they are civilians, on the other hand, they may not be attacked. However, if they take direct part in hostilities they will lose this immunity from attack and, as already noted, if captured, are not entitled to prisoner-of-war status.

Only members of a state's armed forces are combatants. Therefore, at risk of stating the obvious, as a preliminary point it should be noted that the question of whether they are combatants only arises in respect of the staff of PMCs/PSCs hired by states.

PMC/PSC staff can only be considered members of a state's armed forces if they "form part" of these forces. International humanitarian law does not lay down criteria to be met for someone to "form part" of the armed forces of a state. The mere fact that they have been hired to provide assistance to a state's armed forces is not relevant *per se*. Similarly, the nature of their activities, although determinative of whether they are taking a direct part in hostilities for targeting purposes, is also not a key element for determining whether they "form part" of the armed forces.

The position is thus unclear. This is unfortunate from both a legal and practical point of view. Whether a person is a member of a state's armed forces or not should be a straightforward determination that can easily be made upon capture so that the person concerned can immediately be granted prisoner-of-war status if s/he is entitled to it.

In any event, as the policy underlying much of the outsourcing of the activities formerly carried out by the armed forces is to reduce numbers of the armed forces and related costs, there are likely to be very few instances in which PMCs/PSCs staff are incorporated into the armed forces to the extent necessary for them to be considered as forming part thereof for the purposes of determination of status under international humanitarian law.

ii. Civilians accompanying the armed forces

The Third Geneva Convention establishes a narrow exception to the principle that it is only members of a state's armed forces who are entitled to prisoner-of-war status if captured. In addition to the abovementioned members of the armed forces, Article 4(4) includes among persons entitled to prisoner-of-war status if captured:

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

The legal position of persons falling within this category is clear: they are not members of the armed forces and are not combatants but are entitled to prisoner-of-war status if captured.

What is not clear is precisely who falls within this exception. The list of possible activities ("civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces") is indicative, not exhaustive. What other activities could fall within it? The non-combatant status of civilians accompanying the armed forces and the nature of the activities listed by way of example in Article 4(4) would indicate that the drafters had intended that this category of people would *not* include those carrying out activities that amount to taking a direct part in hostilities.

In view of this, it is unlikely that *all* PMC/PSC staff hired by states would fall within this category. The matter must be determined on a case-by-case basis, depending on the nature of the activities carried out. While many of the support functions carried out by contractors for the armed forces doubtlessly do fall within Article 4(4) there are also many others, notably those closer to the heart of military operations, which probably do not.

iii. Civilians

In view of the above, it seems safe to conclude that the majority of PMCs/PSCs staff hired by states can be considered "ordinary" civilians. This is also the status of all PMC/PSC staff present in situations of armed conflict hired by entities other than states party to a conflict, such as companies operating in the state in question, third states, inter-governmental organisations, non-governmental organisations and, as this is not an impossibility, organised armed groups participating in a non-international conflict.

As civilians, the staff of PMCs/PSCs must not be the object of attack. However, if they engage in activities that amount to taking a direct part in hostilities, they would lose immunity for the duration of participation. Moreover, as has already been stated, if captured having taken direct part in hostilities, they are not entitled to prisoner-of-war status and could be tried under the national law of the state that is holding them for their participation in hostilities. As already explained in relation to mercenaries, although not protected by the Third Geneva Convention, if they participated in an international armed conflict, such persons would benefit from the protection of the Fourth Geneva Convention, Article 75 of Additional Protocol I and the customary law rules applicable in international conflicts. If they participated in a non-international conflict they would benefit from the protections of common Article 3 of the Geneva Conventions, Additional Protocol II and the customary rules applicable in non-international conflicts.

The question of what activities amount to "taking a direct part in hostilities" is obviously crucial to determining the protections to which the staff of PMCs/PSCs are entitled. While this is a question central to the whole of international humanitarian law, treaties provide neither a definition nor precise guidance as to the nature of the activities covered. It is generally understood that the commission of acts which, by their nature or purpose may cause actual harm to enemy personnel and *matériel*, amounts to a direct participation in hostilities, while the supply of food and shelter to combatants or generally "sympathising" with them does not. A considerable grey zone exists between these two ends of the spectrum.

The answer is the same as for any other civilian and not just one pertinent to PMC/PSC staff. This series of expert meetings on direct participation in hostilities has so far provided useful guidance.

A detailed analysis of the different activities carried out by PMCs/PSCs in recent years to determine whether they amount to direct participation in hostilities is, of course, beyond the scope of this presentation. Two points nonetheless deserve to be highlighted.

First, in response to the argument often made that PMCs/PSCs are only providing *defensive* services, it should be noted that international humanitarian law does not draw a distinction between offensive or defensive operations. In Iraq PMCs/PSCs have often been retained to protect military installations, such as barracks and military hardware. These are military objectives and defending them amounts to taking direct part in hostilities.

Secondly, even though the staff of PMCs/PSCs may not in fact be taking a direct part in hostilities, they often work in close proximity to members of the armed forces and other military objectives. This puts them at risk of being permissible "collateral damage" in case of attacks.

2. THE RESPONSIBILITIES UNDER INTERNATIONAL HUMANITARIAN LAW OF THE STAFF OF PMCs/PSCs

Regardless of their status – ie combatants, civilians accompanying the armed forces or "ordinary" civilians - like all actors in a country experiencing armed conflict, the staff of PMCs/PSCs are bound by international humanitarian law and face individual criminal responsibility for any war crimes they may commit.

What steps can be taken by PMCs/PSCs to ensure their staff respect international humanitarian law? This is not addressed expressly in any treaty but, as a minimum, the following elements would seem necessary:

- vetting of staff to ensure they have not committed violations of international humanitarian law or relevant criminal offences in the past;
- awareness of IHL: PMCs/PSCs should provide all their staff with general and situation- and task- specific training in international humanitarian law. It is not sufficient to rely on training they may have received in their previous careers with the armed forces;
- PMCs/PSCs staff should be issued with standard operating procedures and rules of engagement that comply with the relevant rules of international humanitarian law; and
- mechanisms should be established for investigating any alleged violations and ensuring accountability for any violations, including by communicating the results of such investigations to the relevant state authority for prosecution.

3. THE RESPONSIBILITIES UNDER INTERNATIONAL HUMANITARIAN LAW OF STATES THAT HIRE PMCs/PSCs

As stated at the outset, the responsibility under international humanitarian law of the staff of PMCs/PSCs exists alongside that of the states that hire them. While some aspects and/or consequences of this parallel responsibility are expressly addressed in international humanitarian law treaties, the provisions doing so are just a specific expression of the general rules relating to the responsibility of states for the acts of their agents under general public international law.

a. States cannot absolve themselves of their obligations under international humanitarian law by hiring PMCs/PSCs

While international humanitarian law does not preclude states from hiring PMCs/PSCs to carry out certain activities, they remain responsible for meeting their obligations under international humanitarian law. A failure by the PMC/PSC to comply with the states' obligations will not absolve the latter of their responsibility.

So, for example, if it hires a PMC/PSC to operate a prisoner-of-war camp, a detaining state must still ensure the standards of internment and of treatment laid down in the Third Geneva Convention are met, and cannot avoid responsibility by claiming it has hired a PMC/PSC to do it.²

² See, for example, Article 12(1) of the Third Geneva Convention which provides that:

[p]risoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

b. States are under an obligation to ensure respect for international humanitarian law by the PMCs/PSCs they hire

As is the case for their armed forces, as well as anyone acting on their behalf, states must ensure they respect international humanitarian law. As discussed below, states in whose territory PMCs/PSCs operate or are incorporated have a similar responsibility.

What steps can a state take to meet this obligation? Possible measures could include:

- requiring that the staff of PMCs/PSCs they hire are properly trained in international humanitarian law. Indeed this is expressly foreseen for persons who assume responsibilities in respect of prisoners of war and protected persons during occupation in Articles 39 and 127 of the Third Geneva Convention and Articles 99 and 143 of the Fourth Geneva Convention respectively; and
- requiring that PMCs/PSCs' standard operating procedures/rules of engagement comply with international humanitarian law.

c. States may be responsible for violations of international humanitarian law committed by the PMCs/PSCs they hire

States are responsible for violations of international humanitarian law that can be attributed to them. These include those committed by:

- their agents, including members of their armed forces
- persons or entities empowered to exercise elements of governmental authority - even if they act contrary to instructions
- persons acting on the instructions of a state or under its direction or control.

This is a generally accepted principle of international law, recently re-stated in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts of 2001.

This responsibility of the state exists alongside the responsibility of the PMCs/PSCs staff and that of the PMCs/PSCs themselves.

While this responsibility of states is well-established as a matter of law, it is often difficult to enforce as a matter of practice, both before international tribunals, because of the absence of a body with compulsory jurisdiction and the unlikelihood that another state would commence proceedings, and before national courts, where proceedings may be thwarted by the non-self executing nature of international humanitarian law in certain states or assertions of sovereign immunity.

d. States must investigate and, if warranted, prosecute violations of international humanitarian law alleged to have been committed by the staff of PMCs/PSCs they hire

The Geneva Conventions require states to take measures necessary for the suppression of all acts contrary to the Conventions as well as to search for and bring before their courts persons alleged to have committed grave breaches.³ Effectively, this requires states to grant their courts universal jurisdiction over grave breaches. This obligation exists for *all* persons and applies *a fortiori* in respect of persons hired by a state. Accordingly, states must establish

³ See Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention, Article 146 of the Fourth Geneva Convention and Article 85 of Additional Protocol I.

mechanisms for holding PMCs/PSCs and their staff accountable should they commit violations of international humanitarian law.

Various possible parallel avenues for doing so exist, including by means of the civil responsibility of PMCs/PSCs and criminal responsibility of staff members. While the criminal responsibility of individuals is well-established, its enforcement in practice has proved problematic for the following reasons:

- PMCs/PSCs and their staff are often given immunity in country where they operate (this was the case in Iraq, for example, by means of CPA Order 17);
- courts in countries where the PMCs/PSCs are operating may not be functioning because of the conflict;
- the state hiring the PMCs/PSCs – or, indeed, any third state, including that where the PMCs/PSCs are registered/incorporated - may be unable/unwilling to exercise extraterritorial jurisdiction over the PMCs/PSCs in civil matters or criminally over their staff;
- even where the courts of the state hiring the PMC/PSC – or, indeed, any third state on the basis of universal jurisdiction - can and will exercise jurisdiction, much of the evidence and witnesses are in the country where the violations took place, making prosecutions and proceedings complicated.

Problems also arise with regard to the responsibilities of the PMCs/PSCs themselves, as opposed to their staff. First, it is questionable whether PMCs/PSCs are directly bound by international humanitarian law, in the same way as states and individuals. Secondly, apart from this question, few states recognise the criminal responsibility of companies. In practice this means that the most likely form of proceedings against PMCs/PSCs are civil rather than criminal actions, which raises a third problem: the fact that while many national courts have extraterritorial criminal jurisdiction, extra-territorial *civil* jurisdiction is very rare.

4. THE RESPONSIBILITIES UNDER INTERNATIONAL HUMANITARIAN LAW OF THE STATES IN WHOSE TERRITORY PMCs/PSCs ARE INCORPORATED OR OPERATE

The previous section addressed the obligations of states engaged in armed conflict that hire PMCs/PSCs. Those states have direct obligations and responsibilities. While their responsibilities are evident and clear cut, other states also have a role to play in ensuring compliance with international humanitarian law by the staff of PMCs/PSCs operating in situations of armed conflict.

Common Article 1 of the Geneva Conventions requires *all* states to take steps to ensure respect for international humanitarian law. States in whose territory PMCs/ PSCs are incorporated or operate are in a particularly favourable position to affect their behaviour.

One way for the state of incorporation to exercise some control and oversight could be by establishing a licensing/regulatory system. A review of existing regulatory systems and of possible elements are beyond the scope of the present paper, which will limit itself to outline possible key elements of a regulatory system. These basic elements could include:

- a prohibition of certain activities (eg direct participation in hostilities unless incorporated in the armed forces of the hiring state);

- a requirement that PMCs/PSCs obtain operating licences based on meeting certain criteria, including, for the purpose of ensuring compliance with international humanitarian law, requirements that the PMCs/PSCs
 - train their staff in international humanitarian law
 - adopt standard operating procedures/rules of engagement that respect international humanitarian law
 - adopt appropriate disciplinary measures
- a requirement for authorisation for every contract depending on the nature of the proposed activities and the situation in country where will operate ...
- sanctions for operating without having obtained the necessary authorisations or in violation thereof (eg withdrawal of operating licence, loss of bond, criminal sanction...)

Such a regulatory system should be complemented by a functioning system for bringing to justice persons accused of having committed violations of international humanitarian law, including the staff of PMCs/PSCs and, possibly, the PMCs/PSCs themselves in civil proceedings.

Similarly, states in whose territory PMCs/PSCs operate may not only have hired them themselves but may also be “hosting” the PMCs/PSCs hired by others – for example, in Iraq today there are PMCs/PSCs hired by the US, ie a party to the conflict, by third states not involved in the hostilities, by private companies and by inter-governmental organisations. The points made above with regard to the responsibility of the states of incorporation of PMCs/PSCs are applicable to the “host” state: it too has a responsibility to ensure the respect of international humanitarian law and accountability for violations.

Accordingly, such states could also establish a mechanism for registration/licensing of PMCs/PSCs operating on their territory, setting out similar requirements, with possibly certain more specific ones, for example, relating to the type of weapons that can be employed, and also take measures to punish violations of international humanitarian law that may be committed.