

Chapter 10: Private security and international law

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Introduction

Mercenaries and mercenarism have been debated for a very long time. While there is a relatively strict definition of the status of a mercenary and mercenary activity, ‘private violence’ which becomes protracted or is assisted by private companies, reflects a much broader topic. In recent years, a host of private companies emerged that provide various ‘security services’. These services are often offered amidst situations of internal strife or armed conflict. It is therefore not merely the issue of mercenaries in the context of international law that requires investigation. Equally important is the significance of a much broader range of security services, their compatibility with international law, and the requirements that companies providing such services have to meet within the more precise framework of international humanitarian law.¹

This chapter starts with a general discussion of international humanitarian law, before presenting an overview of the debate on mercenarism within the United Nations. Against this backdrop, a closer investigation of the lawfulness of the relationship between a recognised government or a dissident authority on the one hand, and the private entities that provide it with military support on the other, can be undertaken.

A second issue that is examined, is the relationship that develops between those companies that provide security services and others that benefit from or contract them, such as multinational mining companies or even humanitarian organisations.

The responsibility of the states within whose territory the headquarters of private security companies are located, or that allow those organisations to set up logistic or administrative bases on their territory, is also considered. From the point of view of international humanitarian law, the issue at stake appears to be the rules relating to state responsibility and, in time of war, the rules governing neutrality.

International humanitarian law

The purpose of international humanitarian law is to preserve a measure of humanity during the conduct of war. When first developed, this body of law was consistent with the prevailing order of international relations, which did not rule out the possibility of war. Subsequently, it evolved to respond more effectively to the humanitarian problems engendered by war, but was gradually relegated to the sidelines with the move to ‘outlaw’ war, most prominently through the adoption of the UN Charter.²

The UN did not succeed, however, in fulfilling the ambitions of its founding fathers, particularly on account of the tension that existed from the outset between the Soviet Union

and the other members of the Security Council. The Cold War that followed, led to the failure of negotiations on the implementation of Article 45 and the provisions of the UN Charter which were envisaged to enable the organisation “... *to take urgent military measures*” where international peace and security were breached. The proceedings in the Security Council were soon paralysed by the systematic exercise of the right to veto. Once it was clear that the UN would be unable to prevent war, states agreed to reopen the debate on international humanitarian law. The result was the four Geneva Conventions which were adopted in 1949 and which are still in force today. At the time, the atrocities committed during World War II were still fresh in the public mind and there was a strong moral impetus to support the conventions.

The boost given to human rights by the adoption in 1948 of the Universal Declaration of Human Rights provided another impetus behind the 1949 Geneva Conventions. The internal affairs of countries were no longer considered to be out of bounds. Albeit still very cautiously, states started to accept the idea that international humanitarian rules could be established to be observed in the conduct of internal conflicts.³

International humanitarian law therefore provides safeguards – a last bastion against the excesses associated with an outbreak of violence that could not be avoided. In order to be effective and respected by the combatants, whom it primarily affects, international humanitarian law must meet three conditions.

- It must be rooted in absolute fundamental rules or ‘first principles’ that command universal respect. The violation of these first principles must place the perpetrators beyond the pale, so to speak, of the international community. This is particularly important during internal conflicts, since the dissident party may wish to distance itself from international obligations incurred by the government that it is opposing.⁴ Once these rules form part of customary international law, their application no longer depends on the formal commitment made by the government.⁵ A dissident party must therefore be left with no practical possibility of rejecting the obligations arising under international humanitarian law without discrediting itself in the eyes of the entire international community.
- Respect for international humanitarian law should not detract from the effectiveness of military action. It is unlikely that parties that have decided to go to war, often in defiance of international law, would be willing to lose the struggle for the sake of observing humanitarian rules. It is important to demonstrate that the requirements of international humanitarian law do not undermine military effectiveness.⁶ This presupposes that certain limits to the use and application of force, relating to the ‘public conscience’⁷ and the demands of international security, are recognised and observed. First and foremost among these is the notion that the aim of war is not the complete annihilation of the enemy, since the wholesale use of weapons of mass destruction against enemy armed forces would obviously be ‘effective’ in such a case.
- International humanitarian law, although subsidiary law, should apply alongside general international law, without any cause-and-effect relationship. In other words, belligerents

should be judged under humanitarian law only in terms of their behaviour in conflict and not in terms of the cause they are defending. Humanitarian law may be breached in pursuit of a good cause and respected in pursuit of an unjust cause. This aspect is particularly important at the level of the individual soldier, who cannot be held accountable for the political decisions taken by his government, but who must be held responsible for breaches of basic and widely recognised humanitarian rules.

This does not mean that everyone is absolved of all responsibility under general international law. But it does mean that responsibility for political or strategic decisions lies at another level and, above all, that the two aspects must be kept separate.

This interpretation of humanitarian law has certain limits, however, particularly in the context of internal conflicts. In an international conflict, a captured combatant can be punished only if he has committed war crimes or other breaches of international humanitarian law. If he has not, he may not be punished, but only ‘neutralised’, and his internment should serve that purpose only, with all kinds of guarantees to ensure this. But this is not the case in internal conflicts. Indeed, the law does not prohibit the punishment of a combatant on the sole grounds that he took up arms against the government, regardless of his behaviour as a combatant – unless, of course, the government recognises the existence of a state of belligerence.⁸ Such a recognition would confer a status on combatants and prisoners of the adverse party, similar to that which they would enjoy in an international conflict. But there has been virtually no instance of this kind of recognition in recent times.

It follows that the governments of states involved in internal conflicts must be convinced on a case-by-case basis of the continuing importance of differentiating between the illegality of the act of rebellion, on the one hand, and acts of war that are illegal in themselves, on the other. It is therefore generally recommended that convictions on the sole grounds of having taken up arms should be ‘frozen’, as it were, until the end of the conflict, and that irreversible measures, such as the death penalty, should be avoided. Besides, the soldiers of a government that resorts to measures of this kind during hostilities are unlikely to be treated much differently if they were captured by the dissident party. The upshot is almost inevitably a spiral of reprisals and counterreprisals during which all humanitarian rules are thrown out of the window.

International humanitarian law therefore draws a distinction between the justification of the use of force, which lies outside its scope, and the manner in which military action is conducted, which is its primary concern. It is within this context, therefore, that the question of ‘private violence’ must be addressed.

The debate on mercenarism within the United Nations

The contemporary image and concept of mercenarism only came into focus during the process of decolonisation. It was not so much the phenomenon itself that came under attack as the support that was given by mercenaries to colonial governments intent on remaining in place – and hence opposed to the struggle for national liberation.

Resolution 3103, adopted by the UN General Assembly in 1973, aptly illustrates this situation, particularly in paragraph 5:

“The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and these mercenaries should accordingly be punished as criminals.”

The use of the phrase ‘these mercenaries’ and not ‘the mercenaries’, clearly shows that mercenary activity was identified with opposition to liberation struggles.

At the same time, efforts were being made to enhance the status of ‘liberation movements’ by placing ‘wars of liberation’ on the same footing as international conflicts. This was finally achieved in Protocol I of 1977 additional to the 1949 Geneva Conventions.⁹ Although the rules of international humanitarian law that are applicable in such conflicts ultimately remain the same for each of the belligerents – a vital prerequisite if the law is to have any prospect of implementation – many people were far more amenable to the idea of giving foreign aid to liberation movements than to the governments that opposed them.

The generally negative image of the role of the mercenary also stemmed from the idea that, since the right of peoples to self-determination acquired the status of a human right in the two International Covenants adopted by the UN in 1966,¹⁰ the very fact of taking up arms on a government’s side in such circumstances could be viewed as a violation of human rights. This further strengthened the perception that mercenaries were combatants who disregarded all such rights.

Since then the situation has changed considerably. The greatest fear at present, is the prospect of destabilisation of newly independent countries, or even covert recolonisation through the control exerted by big multinational companies over a large part of the national economy. Although governments still generally take a dim view of mercenaries – not only because of their willingness to make war for money, but also because of their role during the decolonisation process – many governments have recourse to private firms offering services similar or related to those previously provided by mercenaries. This relationship does not trigger a violently negative reaction, precisely because the purpose is to strengthen the post-colonial government and not to weaken it.

Security services provided to a public entity

Military assistance, even private assistance, to a government in office generally elicits less negative reaction than assistance to the dissident party in an internal conflict. Since such assistance is requested by the government, it does not pose – on the face of it – a threat to national sovereignty. Indeed, a government might claim that it helps to preserve such sovereignty.

The fear expressed by some is that the need to resort to private companies betrays the weakening of the state. This perception is not unjustified. In soliciting such support, a

government is accused of ‘selling its soul to the devil’ and could subsequently have to make concessions that would undermine national sovereignty. Obviously, this will also depend on the nature and the ethics of the private organisation selling its services.

The question whether security services¹¹ furnished to a public entity are lawful or unlawful ultimately depends on the legitimacy of the entity concerned, the origin of the services provided, the framework in which they are provided, their nature, and the manner in which they are provided. Each is discussed in turn.

The nature of the public entity

When security services are requested or commissioned by a government, the sovereignty being protected in terms of international law is not that of the government, but that of the state. Needless to say, the government must be established in a recognised state and must be the legitimate representative of that state. Both are complex issues in themselves that require separate analyses beyond the scope of this chapter. Suffice it to state that current international law is not precise, nor effective with regard to the requirements relating to legitimate states and governments. As has been noted,

*“... an irregular change of government does not automatically have a direct impact on a State’s participation in international organisations: the principle of the continuity of the State runs counter to the possibility of using this political turn of events as a pretext for expulsion or readmission. [In practice,] ... the principle of effectivity prevails over that of legitimacy.”*¹²

This was most vividly illustrated during 1997 when an armed campaign deposed former President Mobutu in Zaire, installing Laurent Kabila as the head of the government of the newly named Democratic Republic of Congo (DRC). The extent of the regional and indeed global relief at the end of a notorious dictatorship translated a *de facto* transfer of power almost immediately into legal recognition.

The international community has consistently been trapped between the need to protect the national sovereignty of states, on the one hand, and the right of people to self-determination, on the other. In fact, the balance between the two is contested and has shifted markedly in recent decades. It is useful to note, for example, that,

*“... while it was necessary in the historical circumstances of decolonisation to recognise that peoples enjoyed certain rights in order to facilitate their attainment of independence, there was no question of the new States sharing with peoples the powers and rights traditionally exercised by States alone. Once the State was established, it confiscated the rights formally recognised as pertaining to peoples.”*¹³

Moreover, the situation with regard to existing political borders is not definitive – new states can and are being created. Recent examples include the disintegration of the former Soviet Union and the former Yugoslavia, and the partition of Czechoslovakia and Ethiopia, all of which were members of the UN. In these developments, there was no *a priori* arbitration and

the role of the International Court of Justice remains modest. It is the material existence of these new states that gives them a recognised place in the international community. In effect, it is the success of a secessionist struggle that endows such a state with legitimacy *a posteriori*.

The international community constantly veers between the need for absolute protection of the national sovereignty of every state on the one hand, and respect for peoples' right to self-determination, which may lead to changes in state borders, on the other.¹⁴

It is difficult to assess the lawfulness of any support given to a government in terms of the latter's nature and 'legitimacy' under international law. Only in extreme and exceptional cases does the international community call the legitimacy of a government into question. The concern to maintain stability in international relations undeniably favours governments, even though there has been some degree of tolerance, in cases such as the civil war in the former Zaire, for support to rebels opposing a government that has lost a large part of its credibility, if not its legitimacy.

Thus, a private company can lawfully provide support for a struggle against a government only if, within the framework of the UN, both the illegitimacy of the government and the legitimacy of those engaged in the struggle are indisputably acknowledged. If that were not the case, the very act of entering the territory of a state without the consent of the government will be a violation of sovereignty, whatever the reasons for such an action. Even international humanitarian relief operations conducted in the context of internal armed conflicts require the consent of the government. Admittedly, such relief actions cannot legitimately be refused if the aid they bring is indispensable, but the principle of consent does exist and is the crux of all the discussion generated by the *droit d'ingérence* (right to intervene).¹⁵ If this restriction is disputed in the case of those who claim to be bringing humanitarian aid in full compliance with the principles of impartiality and neutrality, it is easy to understand that states would not consider recognising a 'right' to provide military support – whether directly or indirectly – by a dissident entity, except pursuant to a decision of the Security Council.

The reluctance shown by the UN to rule on the legitimacy of governments, or of struggles undertaken in the name of the right of peoples to self-determination, does not entitle a private entity (or, indeed, a state acting individually) to substitute itself for the international community and decide unilaterally whether any of its support activities on behalf of an entity involved in a struggle against a government are lawful or otherwise. This has been confirmed by the International Court of Justice, notably in its judgement of 27 June 1986 on 'Military and Paramilitary Activities in and against Nicaragua'. In specifying the scope of the prohibition on direct or indirect interference in the internal or external affairs of another state, the Court stressed, in particular, that

*"... the element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State."*¹⁶

Indeed, the Court had specified much earlier, in the Corfu Channel case, that an alleged right of intervention “... cannot, whatever be the present defects in international organisation, find a place in international law.”¹⁷ While it is true that international law does allow for certain exceptions (state of distress, state of necessity), these are strictly limited.¹⁸

International law has been strict in its judgement that the means cannot justify the ends. For that reason, there is little room for exceptions, and “... any derogation to the prohibition on interference must be subject to strict interpretation.”¹⁹

Can a private company lawfully provide military assistance to a UN sanctioned government even if that government’s legitimacy is hotly disputed? Placing the obligation on private entities to separate the wheat from the chaff is obviously an impossible burden. However, in situations of stabilisation there is a clear limit – the private military services provided should in no way hinder or restrict peacekeeping or peacemaking measures mandated by the UN.

Moreover, “... the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the [UN] Charter,”²⁰ and not to “...interfere in civil strife in another State.” does imply restraint in the assistance offered to a government. A case could therefore be made that this principle applies to those individuals or organisations providing private military services to governments. While some would argue that such assistance to governments is also interference in civil strife, others could interpret the principles as parameters that limit the undermining of a government’s authority.

Operationalisation of this principle could take the form of a transparent and coherent approach taken by the UN and in particular the Security Council. This would shed a new light on the provisions of Chapter VIII of the UN Charter and the role of regional organisations.

Origin of the services rendered

International humanitarian law is only concerned with recourse to private entities in the context of armed conflict in relation to mercenaries and not in relation to other security services. But the definition of a mercenary given in Article 47 of Protocol I sets out five requirements, in addition to the definition of the service rendered, which must be fulfilled. To be considered as a mercenary, a person who takes a direct part in the hostilities:

- must be specially recruited to fight;
- must be motivated essentially by the desire for private gain and, in fact, be promised remuneration in excess of that paid to those of similar rank or function in the armed forces of the party to the conflict that uses his services;
- must be neither a national of a party to the conflict nor a resident of territory controlled by that party. It should be noted in this connection that the fourth Geneva Convention prohibits the enforced enlistment of a national of occupied territories, with such an act actually being considered as a war crime.²¹ To avoid any danger of abuse, it was

nevertheless deemed necessary to specify that a resident of occupied territories could not be considered as a mercenary under any circumstances;²²

- must not be a member of the armed forces of a party to the conflict; and
- must not have been sent on official duty by another state.

The last two conditions are obviously incompatible with the notion of ‘private’ violence.

In the final analysis, the decisive factors are, on the one hand, the degree of involvement in the hostilities, which will be considered below, and, on the other, the purely financial motivation. The definition of a mercenary therefore places us at the core of the current debate, the key question being the extent to which the involvement of private individuals (as opposed to members of armed forces) is acceptable in a conflict.

The context in which private violence occurs

In formal terms, international humanitarian law only deals with mercenaries in the context of **international** armed conflicts, although Protocol I extends the definition of an international armed conflict to include wars of liberation.²³

However, the matter is not restricted to international conflicts in either the 1989 UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries,²⁴ or in the 1977 Convention for the Elimination of Mercenarism in Africa of the Organisation of African Unity (OAU).²⁵

Security services furnished outside of situations of armed conflict are therefore not covered by international humanitarian law, but are obviously directly relevant in the present context, where private security companies provide training of military personnel, the delivery of arms, training in the handling of high-technology weapons, contributions to police operations, and the like. The fact that there is no article on mercenaries in Protocol II of 1977 is actually of no great significance, in view of the purpose of the provision in Protocol I. The aim of Article 47 of Protocol I is to discourage mercenarism by penalising mercenaries, that is, by denying them the protection enjoyed by prisoners of war. In an international conflict, as already mentioned, prisoners of war can be held during the conflict for purposes of ‘neutralisation’, but cannot be convicted merely on the basis of having taken part in the conflict. There is no such immunity for combatants captured in an internal conflict, the context within which most modern mercenaries operate.

In practice, a combatant captured in an internal conflict – as long as it is not a war of liberation that has the status of an international conflict – can be punished under domestic law on the sole basis of having taken up arms. There is nothing to prevent lawmakers from prescribing a more severe penalty for a foreign combatant motivated by the prospect of gain.

On the other hand, there can be no question of denying a mercenary the protection afforded by Part II of Protocol II (Humane treatment). The three constituent articles – Article 4

(Fundamental guarantees), Article 5 (Persons whose liberty has been restricted), and Article 6 (Penal prosecutions), stipulate that all captured persons shall be treated humanely. These articles lay down minimum requirements for the treatment of detainees and set forth principles to be observed in criminal proceedings (prosecution, trial, conviction). The prohibition of the death penalty contained in Article 6, paragraph 4 – for acts committed by a person who was under the age of eighteen years at the time of the offence – would also be applicable to a combatant who might be described as a mercenary.

These articles contain fundamental and universal guarantees that, among others, should prevent an individual from being falsely described as a mercenary. Mercenaries cannot be excluded from the protection afforded by these provisions. Moreover, these guarantees are consistent with the appropriate approach to international conflicts inasmuch as Article 75 of Protocol I, listing similar fundamental guarantees, is applicable to all persons having any connection with an armed conflict, including mercenaries.

Nature of the services rendered

The nature of the security service that is provided, is a crucial issue, since it is decisive in determining whether or not the term ‘mercenary’ is appropriate. It is, in fact, the key issue in the current debate on companies providing security services. It is therefore useful to revert to international humanitarian law and its definition of a mercenary. Of the six components of the definition of the term in Article 47 of Protocol I, only one concerns the services rendered: the mercenary must “... *take a direct part in the hostilities*.”²⁶ It is thus essential to determine what this phrase means. The commentary published by the International Committee of the Red Cross (ICRC) states that the services of military advisors and technicians are not seen as mercenary activities:

*“The increasingly perfected character of modern weapons, which have spread throughout the world at an ever-increasing rate, requires the presence of such specialists, either for the selection of military personnel, their training or the correct maintenance of the weapons. As long as these experts do not take any direct part in the hostilities, they are neither combatants nor mercenaries, but civilians who do not participate in combat.”*²⁷

The commentary on Article 43 (Armed forces), states more specifically: “*Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.*”²⁸

To sum up, the unlawfulness of the ‘services’ rendered, relates only to direct participation in the hostilities, which implies actual involvement and would exclude the provision of advice, services or support. Even though some individuals do take an active part in the hostilities, they are in a minority. This was, in fact, the case under an agreement for the provision of military assistance signed on 31 January 1997 between the government of Papua New Guinea and Sandline International. One may therefore ask, on the one hand, whether this criterion is still valid today and, on the other, whether it is the only criterion to be taken into account.

Manner in which the services are rendered

The primary aim of international humanitarian law is to prevent the excesses that are perpetrated during hostilities. From the perspective of this body of law, therefore, it is far more important to know **how** mercenaries behave, or indeed how any participants in the hostilities behave, than to determine whether they are really involved in the hostilities or whether they earn a great deal of money. There can be no denying that the negative connotations of the term ‘mercenary’ are based on prejudices that need to be investigated. The Special Rapporteur of the Commission on Human Rights did not avoid prejudging the matter when he said:

*“Mercenary activities are a form of violence which has been used in the last 40 years to hamper the exercise of the right to self-determination of peoples **and to violate human rights.** Mercenaries tend to be present mainly in armed conflicts, where they offer their services to one or more parties to the conflict in exchange for payment, **causing serious damage to the people and territories that are victims of their actions.**”²⁹*

The basic question that arises from the standpoint of international humanitarian law is whether a person who takes part in hostilities for financial reasons acts *a priori*, contrary to the principles of international humanitarian law and human rights law. The definition of a mercenary contains no condition relating to behaviour, probably because of a reluctance to imply that there can be ‘good’ mercenaries in terms of their compliance with the rules of international humanitarian law. At the same time, the fact cannot be overlooked that the conduct of certain ‘regular’ combatants can certainly be worse than that of mercenaries. Recent events and indeed history have amply demonstrated that combatants driven by ideological, ethnic or religious fanaticism are capable of far worse behaviour towards the general population than that of persons popularly depicted as mercenaries.

Security services rendered to private corporations

Those services on offer to private business concerns are central to the current debate. There is a general trend towards the curtailment of public authority and state control over several sectors of society in certain parts of the world. The doctrine of privatisation and outsourcing has gained particular popularity in areas such as education and health. In the area of human rights, a variety of watchdogs and advocacy organisations have sprung up and serve to supplement and augment the responsibility of states in the implementation of human rights. This raises a particular question regarding the delegation of state responsibility in the area of security. What responsibility is devolved to private companies that *de facto* perform tasks that are usually incumbent on the public authorities?

This issue will be at the heart of future discussions. As far as international humanitarian law is concerned, the problem is most acute in the context of armed conflicts taking place in situations where state structures have been weakened or are disintegrating.³⁰

Private security is an increasingly widespread phenomenon. Passive security measures involving increasingly sophisticated protective installations are often accompanied by the services of armed guards. Private security in this form can occur on a very large scale in the case of major facilities, such as an industrial plant or mining operation.

Normally, such security services are administered and regulated by the state through licensing systems such as those regarding the carrying of firearms. The weaker the state and the more chaotic the situation, the less effective this type of control and the more extensive the direct security services provided by private bodies. In conflicts marked by the virtual disintegration of state structures, such licensing by the authorities is frequently sullied by corruption, or the licensing system itself may simply no longer work.

In most cases, private security companies are employed to protect particular economic interests. Such protection may be quite extensive, involving security measures that cover large parts of the territory. An example would be the protection of mining or oil installations, which would also require that access routes and links with ports or other communication centres are safeguarded. Measures of this kind may therefore affect a large number of people and may be geographically expansive.

When these privatised security measures occur within the context of an armed conflict, they may lead to acts related to the conflict. If they do, responsibility for such acts must be clearly determined in terms of international humanitarian law. Companies that provide security services for major private corporations must do so within the legislative and administrative framework established by the state. When this framework has practically disappeared and the security companies take on increasingly large-scale assignments, they assume some of the responsibility incumbent on the state. Is this necessarily undesirable where the international community has taken no other action to remedy the situation? This is essentially a political question that merits an examination of the principle involved and that needs to be assessed on a case-by-case basis.

Moreover, the manner in which security is provided, is not beyond the scope of human rights obligations or, in situations of armed conflict, of obligations arising from international humanitarian law. To what extent is this responsibility borne by the security company or by the corporation which enlists its services? The general rules governing criminal and civil responsibility should offer guidance in such cases. As far as sanctions for violations of international humanitarian law are concerned, the rule of individual responsibility and that defining the responsibility of superiors apply.³¹

But who is to ensure observance of those rules? The fact that responsibility for the punishment of breaches of international humanitarian law lies primarily with each party to a conflict in respect of offences committed by its own combatants, is all too frequently overlooked. The responsibility of a private company becomes so much greater in this regard if it is no longer subject to the control of the public authorities. But how can the company exercise the responsibility it has incurred? It may have recourse to administrative sanctions such as dismissal, but it is still hard to imagine a private company assuming the power to dispense justice. Serious cases would have to be referred to the courts in the company's country of origin or even to an international criminal court.

The problem takes on a new dimension in the event of grave and repeated violations of international humanitarian law – as opposed to occasional transgressions. In such a case, primary responsibility must be sought at the highest level, either of the corporation that hired the security company, or of the security company providing the service. But who is going to do this?

A peculiarity of the 1949 Geneva Conventions is that they assign collective responsibility to all states party to the Conventions for ensuring compliance with their provisions.³² This means that states cannot remain indifferent to such problems and must at least examine the possibilities for taking practical action. In the hypothetical situation described above, one might feel that states could at least agree to investigate, prosecute and, if appropriate, try cases in which their own nationals are alleged to have committed war crimes. The states on whose territory private security companies are located, or on whose territory corporations are located who pay for private security services, should be particularly vigilant. They should not hesitate to investigate serious cases involving such companies or even, where necessary, to bring charges against senior management.

The establishment of an international criminal court³³ will give fresh impetus to this collective responsibility of the international community, since the court will have every reason to pay particularly close attention to situations in which the public authorities are incapable of shouldering their responsibilities.

Responsibility of the state on whose territory a private security company is based

The question of the responsibility of a state in relation to a security company that is based on its territory, or uses its territory as a logistic base for providing security services, can be viewed from two angles. Firstly, there are services that are unlawful in themselves, and secondly, violations of human rights law or international humanitarian law may have been committed in providing such services, whether the latter are intrinsically lawful or unlawful.

Services unlawful in themselves

The services provided by a security company will be regarded as unlawful in themselves if they contravene the international instruments concerning mercenarism or, as a general rule, if their object is to support an entity engaged in a struggle with a legal government. The question here is the responsibility of a state in relation to those services emanating from its territory. The reply to this question must be sought in the rules governing the international responsibility of states.

The draft articles on state responsibility drawn up by the UN International Law Commission specified that “... *every internationally wrongful act of a State entails the international responsibility of that State.*” It sees the state as being responsible for the conduct of its organs, whatever the authority on which they depend, and for other bodies empowered to

exercise the prerogatives of the government authority. On the other hand, it does not bear direct responsibility for the conduct of private companies: “*The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.*” The state is not released from its responsibility, however, “... if any ... conduct which is related to that of the persons or groups of persons ... is to be considered as an act of State.” It is therefore important to establish the nature of the link that actually exists between the company concerned and the state on whose territory it has its headquarters, or which agrees to the company conducting its activities on and from that territory.

However, even if the act that is unlawful in itself, except in the eventuality mentioned above, is not considered as an act of the state, the latter could be criticised for failing in its duty of ‘due diligence’.³⁴ An act of the state which is unlawful under international law is a ‘behaviour’ which amounts to a violation of an international obligation binding on that state, and behaviour attributable to the state under international law may be “... *an act or an omission.*” As Max Huber mentioned in the decision of the arbitration board in the Palmas Island case, territorial sovereignty “... *has as its corollary a duty – the obligation to protect, within the territory, the rights of other States, in particular their right to integrity and inviolability in time of peace and in time of war.*”³⁵

In fact, the state is not responsible for the acts of the private company in such cases, but for its own agents’ lack of vigilance. A distinction will therefore be drawn between the case of a company which has its headquarters in a state and in whose affairs the state can play a decisive role by withdrawing its licence to operate, and the situation where a company uses the territory of a state without the formal agreement of the government. In the latter case, all that can be required of the government is a high degree of vigilance.

In a situation of armed conflict, the law governing neutrality must also be taken into account in assessing the acceptable limits of ‘security’ services. According to this law, “... *corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.*”³⁶ The question here is thus whether the ‘security services’ that are rendered, involves the recruitment or training of combatants. On the other hand, the combatants who are recruited or trained, do not have to meet all the criteria included in the definition of a mercenary, particularly the financial requirement, for there to be a breach of the law of neutrality. Moreover, the state cannot be absolved of its responsibility by claiming that the activity is carried out by a private company. It is clearly responsible for making sure that such an activity does not take place.

In a situation of internal conflict, support for a government in office does not constitute a breach of the law of neutrality. As discussed earlier, there are two exceptions to this rule:

- where the conflict is a ‘war of liberation’ according to Protocol I, in which case it is ‘elevated’ to the rank of an international armed conflict in terms of international humanitarian law; and
- where there is ‘recognition of belligerence’ (see above), which has a similar effect.

However, these two exceptions are more theoretical than practical, since they have not arisen in any of the conflicts that have occurred in recent years.

The provision of private security services to private business organisations or the use of such services by organisations in situations where state structures are no longer functioning, must be judged in the light of the prevailing circumstances. If an internationally recognised government still exists, its position will be decisive. Harbours the headquarters of a company that provides or uses such services may be viewed as an infringement of national sovereignty if the government in office is opposed to those services. If there is no longer a government that is internationally recognised, notably by the UN, as representing the country concerned, the acceptability or otherwise of such services should be determined primarily by the Security Council on the basis of a general assessment of the situation as it affects the maintenance of international peace and security.

Violations of international humanitarian law

Another issue to be considered is that of violations of international humanitarian law, regardless of who the beneficiary of the security services is. The state in which a company that uses or provides security services has its headquarters, would not appear to bear direct responsibility for the results of such violations. In this regard, mention may be made of the judgement of the International Court of Justice on 'Military and Paramilitary Activities in and against Nicaragua', in which the Court expressed the view that a state would incur legal responsibility for the results of violations only if it "... *had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.*"³⁷

On the other hand, if the acts in question amount to war crimes in particular, the state should ensure that the culprits are found and punished by compelling the company's management to take the appropriate action. This stems from the international obligation to punish war criminals or to make sure they are punished³⁸ and, more generally, from the duty to ensure respect for international law under all circumstances.³⁹

National legislation

A number of people have been convicted under the rules relating to mercenaries, the best-known instance being the trial of thirteen mercenaries in Angola in 1976.⁴⁰ Elsewhere in Africa, the issue of mercenaries had already attracted attention, notably during the civil war in Nigeria. The code of conduct drawn up at the time stated that, "[f]oreign nationals on legitimate business will not be molested, but mercenaries will not be spared: they are the worst of enemies."⁴¹

In principle, countries should have adopted internal legislation to punish mercenaries, in order to meet the obligations set out in international humanitarian law and in the specific conventions on mercenarism. Although no exhaustive study has been carried out on the subject, this is obviously not the case.

However, several countries of the former Soviet Union have recently examined the matter and have incorporated the relevant provisions in their penal codes. The new Penal Code of the Russian Federation, adopted on 17 June 1996, includes punishment for a number of violations of international humanitarian law, and makes no distinction between offences committed in international conflicts and those committed in internal conflicts. The Code punishes, on the same basis, not only the use of mercenaries (four to eight years' imprisonment), but also recruitment, funding and training. The use of minors is an aggravating circumstance (seven to fifteen years' imprisonment). Taking part in a conflict as a mercenary is punishable by three to seven years' imprisonment. The Kyrgyz Penal Code contains similar provisions, but defines the use of an official position for the commission of such acts as an additional aggravating circumstance. It seems that such rules are also included in the codes of Georgia and the Ukraine.

Although there are other countries whose penal codes contain comparable provisions, there does not appear to be a very strong commitment to an absolute ban on mercenarism. In fact, such rules intend primarily to protect national sovereignty. As has been pointed out, "*... there are powerful proscriptions against mercenary activity which could jeopardise the neutrality or interests of home states, and less concentration on the absolute abolition of mercenary activity.*"⁴²

The inclusion of specific provisions relating to mercenaries in penal codes, however necessary, does not therefore answer all the questions raised by the growing phenomenon of private companies selling security services.

The new South African Regulation of Foreign Military Assistance Act, in particular, is interesting because it goes further than most other examples in this regard. Indeed, companies offering security services were only partially covered by the law in force before the adoption of this legislation in 1998. Section 121A of the Defence Act prohibits members of the South African armed forces from serving as mercenaries, but this law does not apply to all South African nationals. The 1980 Keypoints Act, the 1987 Security Officers Act and the second amendment of the Penal Code of 1992 contain provisions applicable to security companies operating on South African soil. In particular, such companies may not use firearms or explosives, and may not train their personnel in certain types of military or paramilitary operations.

The Regulation of Foreign Military Assistance Act expands on these limitations, especially with concern to controls, through the strengthening of the powers of the National Conventional Arms Control Committee (NCACC) set up in 1995. Under the terms of the Act, foreign military assistance would be subject to an approval procedure before such services could be offered. Moreover, prior authorisation is required before contact can be made with a third party in order to offer such services, similar to the South African arms export control regime.

The South African legislation has adopted a broad definition of foreign military assistance. Indeed, foreign military assistance includes not only direct combative participation in armed conflict, but also military assistance to a party to an armed conflict in the form of advice or

training; personnel, financial, logistic, intelligence or operational support; recruitment; procurement of equipment; and even, surprisingly, medical or paramedical services. This list is supplemented by a general clause referring to “... *any other action that has the result of furthering the military interests of a party to the armed conflict.*” Finally, the definition of foreign military assistance encompasses not only the rendering of the services mentioned above, but also “... *any attempt, encouragement, incitement or solicitation to render such services.*”

The provision concerning those receiving such assistance is also broad in scope. It covers all parties to a conflict – the armed forces of foreign states involved in an international or non-international armed conflict, dissident forces opposing government forces in an internal conflict, and non-governmental armed groups fighting among themselves in an internal conflict – and also applies to security services for the protection of individuals involved in armed conflict or their property.

On the other hand, the definition of foreign military assistance seems to be strictly limited to armed conflicts, which raises certain questions. Indeed, services of the type listed above could be offered for preventive purposes, notably in situations where internal strife, that has not yet reached the intensity of an armed conflict, prompts a government to seek such services in order to restore public order. Should these services be subject to no rules at all? What happens when internal strife escalates into armed conflict and services covered by the Regulation of Foreign Military Assistance Act are already being rendered?

It is also interesting to examine United States legislation as several companies offering security services are based in that country. The principal rules relating to the matter are to be found in the amendments to the International Traffic in Arms Regulations.⁴³ Without going into the minutiae of these very detailed regulations “... *any person in the United States or otherwise subject to US jurisdiction who is in the business of brokering transfers of defence articles or services is required to register and pay a fee.*”⁴⁴ ‘Defence services’ are defined as follows:

- “(1) *The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad, in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarisation, destruction, processing or use of defence articles;*
- (2) *The furnishing to foreign persons of any technical data controlled under this subchapter, whether in the United States or abroad; or*
- (3) *Military training of foreign units and forces, regular or irregular, including formal or informal instruction of foreign persons from the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercises and military advice.”*

Defence services in excess of \$50 million may furthermore not be concluded until the Office of Defence Trade Controls notifies the service provider through the issue of a

licence or other approval that Congress has not enacted a joint resolution prohibiting the rendering of the service. Any person who engages in brokering activities in this sphere is required to register with the Office of Defence Trade Controls, with certain specified exemptions. Activities conducted for close allies of the US – members of NATO and a few other countries – are not subject to this constraint, except in the case of some specifically sensitive activities such as the provision of fully automatic firearms or nuclear weapons strategic delivery systems. Brokering activities are prohibited in respect of certain countries, in particular those under US embargo and those subject to special regulations for reasons of national security.

Thus, the system does not rule out the activities of organisations providing security services, but subjects them to restrictions which have more to do with US foreign policy than with the provisions of international law. This is clearly illustrated, especially in the diverse treatment meted out to different countries and the fact that no distinction is drawn *a priori* between services rendered to a government and those rendered to irregular forces.

The United Kingdom is also home to a number of companies offering security services. The Foreign Enlistment Act of 1870 prohibits British subjects from recruiting for or enlisting in the armed forces of a foreign state. The Diplock Report⁴⁵ – on the issue of mercenaries, requested after the trial of British mercenaries in Angola – concluded that preventing British citizens from working abroad as mercenaries was an unjustified infringement of individuals' personal freedom. It recommended that a legal system should be established whereby the government could draw up a list of countries in which British nationals were not permitted to enlist by reason of the country's international relations. To date, there has been no change in the law, with the result that security companies can operate out of the UK with very little restriction.⁴⁶

Private violence and humanitarian organisations

The problem of armed escorts

Humanitarian action is particularly difficult in situations of armed conflict in which state structures are weak or have disintegrated. In these circumstances, humanitarian organisations face a major security problem. They no longer have recourse to anyone who is in a position to make and enforce commitments regarding the delivery of humanitarian aid and, in particular, the movement of numerous food aid convoys.

Of course, the basic condition is still that humanitarian assistance should be publicised and accepted by all the combatants. Every means of communicating information about such assistance to the various combatants have to be used. In Somalia, for instance, extensive use was made of radio broadcasts. In circumstances where there is no assurance that all the combatants have agreed to the provision of humanitarian assistance, practical working methods have to be identified which would reduce the exposure of humanitarian personnel to danger. One possibility that may be considered, and that has been utilised in the past, is the use of armed escorts.

For the ICRC, the concept of a humanitarian organisation using armed escorts to impose humanitarian action on parties against their will is untenable. Should a party to the conflict oppose humanitarian action – thereby withholding aid from people who urgently need it – humanitarian organisations have no choice but to report the situation to the international community, in particular the Security Council. It is then up to the Security Council to take the appropriate corrective steps. In these circumstances, the challenge clearly exceeds the responsibility and authority of the humanitarian organisations. The role they may subsequently play in the event of action by the Security Council or regional organisations is another matter, which falls outside the scope of this chapter.

The issue at stake is the question of limited armed protection – not for the purpose of imposing anything on a party to the conflict – but in order to protect humanitarian action, particularly convoys, against banditry attacks in circumstances in which the weakness of the public authorities has led to a very sharp increase in criminal activity. It should be borne in mind that international humanitarian law itself does not preclude medical personnel from bearing light weapons, precisely for the purpose of protecting hospitals or convoys of casualties from looting and attacks.⁴⁷

After investigating this challenge, the International Red Cross and Red Crescent Movement did not entirely rule out the use of armed protection of humanitarian convoys in exceptional circumstances,⁴⁸ but viewed it with great misgivings and extreme caution. The ICRC justifies this approach on a number of counts. The most serious is the risk of tarnishing the image and hence the general acceptability of Red Cross or Red Crescent organisations in the event of untoward incidents, should an individual member of an armed escort use his weapon without proper justification. The following also have to be considered:

- the questions of insurance and responsibility, which are extremely complex in such circumstances;
- the continuing security risks involved – if the escort is inadequate, the convoy may come under attack anyway, with the use of greater firepower and the attendant danger of escalation; and
- the ambivalent link that may be forged with those supplying the escorts – for example, they may exert pressure or even threaten reprisals, possibly to demand more money, especially if the humanitarian organisation concerned wishes to terminate the contract.

The use of escorts from outside the country is also a matter requiring careful consideration. In some cases, troops involved in peacekeeping operations have played this role. It is a relatively understandable option in the case of genuine peacekeeping operations that were launched with the consent of the protagonists in terms of Chapter VI of the UN Charter. But experience has shown that these operations are very frequently of a mixed nature, i.e. including limited Chapter VII powers. By virtue of its responsibility for the maintenance of international peace and security, the Security Council can impose appropriate measures or even take coercive action in terms of Chapter VII of the UN Charter. That being so, an armed escort consisting of UN forces projects a composite image of political measures and humanitarian action which

the ICRC views as undesirable. Depending on the particular situation, and the mandate and actions of the UN forces, the humanitarian organisation under escort will be closely associated with the actions of the world body. In the case of enforcement actions, this carries the risk of being unacceptable to one or more of the parties to the conflict or peace agreement. Where a major UN agency is involved, this option has been used in the past and cannot be ruled out in extreme circumstances. But there is still a need for a detailed assessment of the advantages and disadvantages that such measures entail.

The situation is entirely different when no UN soldiers are involved. Should humanitarian organisations contemplate training permanent armed guards? It is extremely difficult to envisage this course of action, as it would lay humanitarian workers open to suspicion of a lack of impartiality and make their presence less acceptable. One wonders, therefore, whether humanitarian staff should or could enlist the services of security forces hired out by private companies in certain circumstances. In this regard, the Special Rapporteur referred to statements made by the managing director of Executive Outcomes, who admitted that men attached to his company “... *had taken part in some military action in Sierra Leone, but had done so at the request of humanitarian agencies which wanted food aid to reach the interior of the country.*”⁴⁹ This approach is problematic, since humanitarian organisations that use such services would incur responsibilities and risks extending far beyond their terms of reference and would be likely, in the long run, to taint all humanitarian organisations.

To sum up, there are no simple answers to this problem. Every effort must be made to ensure that the work of humanitarian organisations is universally respected. A far better way of going beyond the limits of what is possible in difficult circumstances, is to improve the working methods and the quality of the services provided by the humanitarian organisations through careful staff selection and appropriate training, and to ensure a strictly ethical approach in their activities.⁵⁰ The ambition to ‘do more’ by relying on locally available armed forces is liable to divest the organisations of their credibility and to offer cogent arguments to those who distrust all international humanitarian aid agencies and organisations. The use of private security companies by humanitarian organisations is therefore likely to prove a ‘step too far’ and should be discouraged.

It is clear, moreover, that a private organisation that accepts ‘security’ or even military assignments in a particular country cannot hide behind a contract with a humanitarian organisation. Such a company must assume direct responsibility *vis-à-vis* the country concerned, whose government would be quite justified, if necessary, in accusing it of a breach of sovereignty.

The responsibility of the International Committee of the Red Cross to ensure compliance with international humanitarian law

The Geneva Conventions of 12 August 1949 and their Additional Protocols of 1977 entrust the ICRC not only with a broad right of initiative, but also with the authority to offer its services as a substitute for Protecting Powers in armed conflicts in which such Powers have not been designated.⁵¹ This role involves ensuring that the parties to armed conflicts fulfil

their obligations under international humanitarian law, specifically the humane treatment of all persons under their control, observance of the rules pertaining to occupied territories, and compliance by their armed forces with the restrictions relating to the conduct of hostilities.

The Protecting Powers system does not really function in practice⁵² and does not apply formally in non-international conflicts, which account for the vast majority of conflicts today. On a pragmatic basis, however, the ICRC plays its role as “... *guardian of international humanitarian law*”⁵³ in a large proportion of ongoing conflicts. Moreover, this general role has been confirmed in the Statutes of the International Red Cross and Red Crescent Movement, of which the most recent version was adopted in 1986.⁵⁴

The first and most important aspect of the ICRC’s role in this regard, is the establishment of a dialogue with the conflicting parties to jointly examine the situation and to inform them of the ICRC’s findings, with a view to encouraging compliance in the areas outlined above. The involvement of large numbers of delegates in humanitarian work and the ICRC’s presence in the field, in prisons, occupied territories and hospitals, generally gives the organisation a clear picture of the problems in humanitarian terms, and this carries significant weight in the dialogue.

It may also happen, where the parties to a conflict display negative attitudes or are incapable of taking the necessary steps, that the ICRC appeals to the international community. Both the Geneva Conventions and their Additional Protocols place all states party to them under an obligation not only to respect, but also “... *to ensure respect for*” the Conventions.⁵⁵

The presence and use of private security companies in armed conflicts and potentially volatile situations, and the potential impact of such involvement, call for the ICRC’s very careful scrutiny, in a given context, of the short term practical and humanitarian implications. In light of the ICRC’s own mandate, it also calls for close consideration of the long term implications for international humanitarian law as its mandate includes the task to “... *prepare any development thereof*.”⁵⁶

Since the ICRC “... *work[s] for the faithful application of international humanitarian law*,”⁵⁷ it endeavours to contribute to the training of all those involved in armed conflict to ensure full respect of humanitarian rules pertaining to engagement. In peacetime, it contacts the armed forces in different countries, urging them to incorporate humanitarian law in their programmes of instruction and, if necessary, helping to plan the content of the courses themselves.

Should private security companies come to play a greater role in armed conflict, the question arises whether an ICRC-led dialogue with such companies should be instituted in order to ensure that their staff are familiar with and abide by international humanitarian law. The answer is clear that in a conflict situation, where all combatants have to be taken into account, such a dialogue is indispensable. The ICRC has always sought to secure compliance with humanitarian rules by all those involved in armed hostilities. Such contact has never implied the endorsement or approval of any issue related to the conflict in question. This would also appear to tip the scales in favour of such an ICRC-led dialogue with private security companies in times of peace.⁵⁸

Conclusion

The expansion of private security services is a matter of direct concern to the international community. By agreeing to 'delegate' the maintenance of order, a government endangers the very essence of public authority. Such a danger also exists when various non-state armed factions are formed, criminal activity of all sorts flourishes, not to mention situations in which the military seizes power. Is the international community justified in applying stricter standards to private security services than to the armed forces of governments of doubtful legitimacy? A security company can hardly be blamed for helping a government in office, however doubtful its democratic legitimacy, if that government is accepted by the UN. It would be more logical for the UN to apply stricter standards to its own members than to hold private security companies hostage to the lack of discretion by the international community. This is unlikely however, although the establishment of an International Criminal Court may have a salutary effect in this regard.

Most private security companies have understood the situation and restrict themselves to assisting governments in office. But in doing so, they endorse the preference of the community of states for order rather than justice. There are just struggles against governments, but who is to decide what is just? A trend is emerging whereby the states in which security companies are based, decide where those companies may operate. Such decisions are based on the judgement – or interest – of the state concerned and do not necessarily restrict the companies' activities. In so doing, these states *de facto* take over the role that should be entrusted to the UN. By agreeing to – or even encouraging – the activities of security companies, one could argue that such states assume the power to decide what is just and what is not, or what deserves to be defended and what does not.

It is therefore important for the UN to strengthen its role, as entrusted to it by Article 1 of the Charter, namely, “... *to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.*” The UN has a duty to preserve international peace founded on the respect for international law, and hence to clarify the meaning of this law, if necessary, by having recourse to the International Court of Justice. Without such clarification, the risk exists that people can and will do as they see fit. In such cases, the strongest are likely to prevail and, by so doing, confuse selfish interests and justice.

The need for clarity is even more important today, as the end of the Cold War has given new hope to entities which, rightly or wrongly, feel entitled to exercise peoples' right to self-determination. It can be argued that clarification of such entities' range of action and aspirations – whether it is the creation of a new state, conferring a status that preserves a degree of autonomy, or enhanced protection of the rights of minorities – could prevent a great deal of bitterness and suffering, and perhaps conflict. In any event, private security companies cannot be asked to perform the task of deciding for themselves which causes are just or not. It is also dangerous to leave such decisions to individual states who may not always respect democratic principles and the rule of law.

Furthermore, it would seem that the international community should conduct a more thorough examination of the problem of private security companies taking measures on behalf of public authorities to undertake, pursue or develop security activities in their respective countries. In weak states, such situations may undermine international peace and stability. It may therefore be concluded that the topical issue of 'new mercenaries' must be approached from a different angle than in the past. Indeed, how can the international community react without calling the principle of state sovereignty into question?

The issue of the 'new mercenaries' should be addressed by placing it in the flawed context of international relations as they stand today. There can be no hesitation in affirming that, in the spirit of international humanitarian law, any action of a military nature has to comply with the principles of that body of law. This obligation is further binding on anyone directly or indirectly involved in armed hostilities. The key question is deceptively simple: should we tolerate the provision of private security services to governments or industry in situations threatening anarchy in an attempt to save what can be saved, or rather, do we severely regulate a phenomenon which, in the long term, could erode the very foundations of an international system based on national sovereignty? This should be the crux of the debate, particularly within the UN, as it reflects on its own weaknesses.

Endnotes

- 1 Reflection on this topic only began recently. See, in particular, J C Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, Stanford Journal of International Law, 34(1), Winter 1998.
- 2 On the history and development of international humanitarian law, see, in particular, F Bugnion, Le Comité international de la Croix-Rouge et la protection des victimes de la guerre, ICRC, Geneva, 1994, pp. 345-457; K J Partsch, *Humanitarian Law and Armed Conflicts*, Encyclopedia of Public International Law, 2, Elsevier, New York, 1995, pp. 933-936.
- 3 See article 3 common to the four 1949 Geneva Conventions. This provision was the first to lay down rules applicable during non-international armed conflicts.
- 4 J Pictet (ed.), Commentary on the Geneva Convention relative to the Protection of Civilian Persons in Time of War, ICRC, Geneva, 1958, pp. 37-38.
- 5 The ICRC is currently conducting a study of customary law for the 27th International Conference of the Red Cross and Red Crescent, due to take place in 1999.
- 6 This was an important element of the debate on the use of anti-personnel mines: see ICRC, Anti-personnel Landmines: Friend or Foe? A Study of the Military Use and Effectiveness of Anti-personnel Mines, ICRC, Geneva, March 1996.
- 7 On this notion, see, in particular, H Strebel, *Marten's Clause*, Encyclopedia of Public International Law, 3, Elsevier, New York, 1997, pp. 326-327.
- 8 See, in particular, J Crawford, The Creation of States in International Law, Clarendon Press, Oxford, 1979, p. 255; C Zorngibe, *Sources of the Recognition of Belligerent Status*, International Review of the Red Cross, 192, March 1977, pp. 111-127.

- 9 Protocol I of 8 June 1977 additional to the Geneva Conventions of 12 August 1949 (hereinafter Protocol I), article 1, para. 4: “*The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*”. See also D Schindler & J Toman, The Laws of Armed Conflicts, Martinus Nijhoff/Henry Dunant Institute, Dordrecht/Geneva, 1988, pp. 621-68; Y Sandoz et al. (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1977, ICRC/Martinus Nijhoff, Geneva, 1987, pp. 41-56.
- 10 International Covenant on Economic, Social and Cultural Rights, article 1, and International Covenant on Civil and Political Rights, article 1.
- 11 ‘Security service’ means any service associated with state security, whether it amounts to direct military involvement, protection, intelligence, or law and order functions, or not.
- 12 N Q Dinh, P Dailler & A Pellet, Droit international public, *Librairie de droit et de jurisprudence*, Paris, 1992, No. 375, p. 540 (ICRC translation).
- 13 *Ibid.*, No. 272, p. 398 (ICRC translation).
- 14 This is reflected in the definition of ‘aggression’ annexed to Resolution 3314 (XXIX) of the United Nations General Assembly and in the Declaration on Friendly Relations and Co-operation among States in accordance with the UN Charter (hereinafter Declaration on Friendly Relations) annexed to Resolution 2625 (XXV) of the same body.

Article 1 defines aggression as “... *the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State,*” and acts of aggression are enumerated in Article 3. Article 7, however, specifies: “*Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right ... particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of those peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter ...*”

In the Declaration on Friendly Relations, the same contradiction is particularly evident when one considers two of its provisions. On the one hand, the duty to provide support for peoples seeking, in the framework of their right to self-determination, “... *the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined ...*” is stipulated under the heading *The principle of equal rights and self-determination of peoples*; but, on the other hand, the section entitled *The principle of sovereign equality of States* contains the reminder that “... *the territorial integrity and political independence of the State are inviolable.*”

However, some attempt to resolve the tension between the two requirements is made in another passage of the section entitled *The principle of equal rights and self-determination of peoples*. Although it is specified that the duty to provide support to a people, if necessary even to enable it to establish an independent and sovereign state, must not be “... *construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States,*” this restriction is tempered by the enumeration of certain requirements that the state and government to be preserved, must meet. The state concerned must conduct itself “... *in compliance with the principle of equal rights and self-determination of peoples as described above and thus [be] possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*”

These requirements relating to states and governments are interesting in that they set timid limits within which a state must remain if it is to preserve its legitimacy, and hence a limit to the right of every state “... *freely to choose and develop its political, social, economic and cultural systems*” laid down under the heading *The principle of sovereign equality of States*.

- 15 See, among others, Y Sandoz, '*Droit*' or '*devoir d'ingérence*' and the Right to Assistance: *The Issues Involved*, International Review of the Red Cross, 288, May-June 1992, pp. 215-227.
- 16 *Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v. United States of America), Merits, Judgement of 27 June 1986, ICJ Reports, 1986, para. 205.
- 17 *Corfu Channel Case*, Merits, Judgement of 9 April 1949, ICJ Reports, 1949, p. 35.
- 18 See Dinh et al., op. cit., p. 734 (ICRC translation).
- 19 Ibid., p. 870 (ICRC translation).
- 20 As set out in the Declaration on Friendly Relations, op. cit.
- 21 Article 147 of the Fourth Geneva Convention.
- 22 See Protocol I, op. cit., article 47, para. 2(d).
- 23 The relevant article in Protocol I that deals with such conflicts, does not appear in Additional Protocol II. The latter deals only with non-international conflicts.
- 24 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, United Nations General Assembly Resolution A/RES/44/34.
- 25 Convention for the Elimination of Mercenarism in Africa, Organisation of African Unity, Libreville, 3 July 1977, CM/817 (XXXIX), Annex II, Rev. 3.
- 26 Protocol I, op. cit., para. 2 (b).
- 27 Sandoz et al., op. cit., para. 1806, p. 579.
- 28 Ibid., para. 1679, p. 516. The terms used in the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries are slightly different. According to this Convention the mercenary must be recruited "... to fight in an armed conflict" and, further on, must "... take part in the hostilities." Taking the two expressions together leads one to conclude, however, that there is no divergence regarding this particular condition. The 1977 OUA Convention for the Elimination of Mercenarism in Africa combines the two notions, explicitly taking up the requirement of 'direct' participation: the mercenary is an individual "... who is specially recruited locally or abroad in order to fight in an armed conflict" and "... who does in fact take a direct part in the hostilities."
- 29 E B Ballesteros, Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination, United Nations Commission on Human Rights E/CN.4/1997/24. Author's emphasis.
- 30 See in particular *Armed Conflicts Linked to the Disintegration of State Structures*, preparatory draft document, First Periodical Meeting on International Humanitarian Law, ICRC, Geneva, 19-23 January 1998.
- 31 See, in particular, Protocol I, op. cit., article 85 ff.
- 32 Article 1 common to the 1949 Geneva Conventions and article 1 of Protocol I. See also, in particular, Pictet, 1958, op. cit., pp. 15-16; Sandoz et al., op. cit., paras. 35-51, pp. 34-38; L Condorelli & L B de Chazournes, *Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'*, Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, ICRC/Martinus Nijhoff, Geneva/The Hague, 1984, pp. 17-35.

- 33 The role which the International Criminal Court could play in repressing war crimes was raised at the First Periodical Meeting on International Humanitarian Law, ICRC, Geneva, 19-23 January 1998.
- 34 *Report of the International Law Commission on the Work of its 48th Session*, General Assembly, Official Records, 51st Session, Supplement No. 10 (A/51/10), 6 May-26 July 1996, pp. 121-132.
- 35 *Island of Palmas (Netherlands v. United States of America)*, 4.IV.1928, *Recueil des sentences arbitrales*. ICRC translation.
- 36 Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, 18 October 1907, Art 4.
- 37 ICJ Reports, 1986, op. cit., para. 115.
- 38 Articles 49/50/129/146 of the four Geneva Conventions, respectively.
- 39 See note 28.
- 40 See M S Hoover, *The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War*, Case Western Reserve Journal of International Law, 9(2), 1997.
- 41 Operational Code of Conduct for Nigerian Armed Forces, article 4(m). (ICRC Archives and Advisory Service on International Humanitarian Law).
- 42 Zarate, op. cit.
- 43 See *Rules and Regulations*, Federal Register, 62(247), 24 December 1997, pp. 67274 – 67278.
- 44 *Ibid.*, p. 67275.
- 45 Diplock Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries, London, Cmnd. 6569, 1976.
- 46 On this subject, see Zarate, op. cit., pp. 137-138.
- 47 See, in particular, article 22 of the First Geneva Convention of 1949 and J Pictet (ed.), Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, ICRC, Geneva, 1952, pp. 202-205; Protocol I, article 13, para. 2; and Sandoz et al., op. cit., paras. 557-574, pp. 176-180.
- 48 Resolution 9 adopted by the Council of Delegates at its session of 1-2 December 1995, Geneva, Switzerland: *Armed Protection of Humanitarian Assistance*, International Review of the Red Cross, 310, January-February 1996, pp. 150-151.
- 49 Ballesteros, op. cit., para. 52.
- 50 On the question of security for humanitarian organisations, see, in particular, *Respect for and Protection of the Personnel of Humanitarian Organisations*, preparatory draft document, First Periodical Meeting on International Humanitarian Law, ICRC, Geneva, 19-23 January 1998.
- 51 Articles 10/10/10/11 of the four Geneva Conventions, respectively; Pictet, 1952, op. cit., pp. 112-125; Protocol I, op. cit., article 5, para. 4; Sandoz et al., op. cit., paras. 205-224, pp. 83-87.
- 52 G Raub, *Protecting Power*, Encyclopedia of Public International Law, 3, Elsevier, New York, 1997, pp. 1147-1153.

- 53 Y Sandoz, *Le Comité international de la Croix-Rouge gardien du droit international humanitaire*, *Jugoslovenska Revija za Medunarodno Pravo*, 43, 1996, pp. 357-389.
- 54 Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross in Geneva in October 1986, article 5, in: Handbook of the International Red Cross and Red Crescent Movement, ICRC/International Federation of Red Cross and Red Crescent Societies, Geneva, 1994, p. 422.
- 55 See note 32.
- 56 Statutes, op. cit., article 5(g).
- 57 *Ibid.*, article 5(c).
- 58 See article 3 common to the 1949 Geneva Conventions, which relates to non-international armed conflict: *The Application of the Preceding Provisions Shall not Affect the Legal Status of the Parties to the Conflict*.