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# Passing the Buck: State Responsibility for Private Military Companies

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## Abstract

*States hire private military or security companies [PMSCs/contractors] in armed conflict and occupation to fulfil tasks formerly exclusively handled by soldiers, including combat, guarding and protection, and detention and interrogation. PMSC personnel, like soldiers, can and do violate or act incompatibly with International Humanitarian Law and Human Rights Law. Relying on the International Law Commission's Articles on State Responsibility, the article compares the responsibility of states for such conduct of their soldiers with that which states incur with respect to the conduct of contractors they hire. It reveals a regulatory gap which states seeking to reduce their exposure to international responsibility can exploit. Positive obligations of states under International Humanitarian Law narrow this gap to some degree. An analysis of the duty to prevent demonstrates that the potential of positive Human Rights Law obligations to bridge the gap—although important—remains limited by their due diligence nature, and problems of extraterritorial applicability. It is then argued that the conduct of certain contractors exercising coercive functions can be attributed to the hiring state as that of 'persons forming part of its armed forces' in the sense of the customary provision enshrined in Article 3 of Hague Convention IV of 1907 and Article 91 of Additional Protocol I. Where this is the case, the state will be responsible for their conduct as it would be for that of its soldiers, which fully eliminates the regulatory gap.*

## 1 Introduction

States hire private military or security companies (PMSCs/contractors) in armed conflict and occupation to fulfil many tasks formerly exclusively handled by soldiers.

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These tasks include the provision of coercive services, such as combat, guarding and protection, and interrogation and detention. Both International Humanitarian Law (IHL) and Human Rights Law (HRL) generally apply to conflicts in which states rely on PMSCs.<sup>1</sup> PMSC personnel, like soldiers, can and do violate or act incompatibly with these norms. In turn, states can be internationally responsible either *qua* attribution of an action or omission to a state agent, or when the conduct triggers a positive obligation which the state fails to meet. Most relevant for the continuing growth of the PMSC industry and the problems associated with it are the states which hire PMSCs. The present article thus focuses on the responsibility those states incur with respect to the conduct of contractors. However, the rules of attribution leave a regulatory gap. A state employing PMSC personnel will always face less international responsibility *qua* attribution than would be the case if it relied on its own armed forces, and its responsibility will be more difficult to prove.<sup>2</sup> The present article first focuses on this regulatory gap in the responsibility that states incur with respect to the conduct of contractors (Part 2). If this apparent regulatory gap cannot be filled by other norms, the situation remains open to the strategic behaviour of states seeking to reduce their exposure to international responsibility. One possible remedy lies in the positive obligations of states under IHL and HRL. Part 3 examines whether and how those bodies of law can contribute to filling the regulatory gap. Lastly, Part 4 suggests that a careful reading of the special rules of state responsibility in armed conflict can effectively close the regulatory gap.

## 2 Comparing Responsibility for Conduct of Soldiers and Contractor Personnel Exercising Coercive Services under General Law of State Responsibility: A Gap Remains

Under the ILC Articles,<sup>3</sup> it is irrelevant whether a soldier of the national army is supposed to engage in combat, or provide a guarding or protection service, or conduct an interrogation. Under Article 4 of the ILC Articles, supposing the conduct can be proved, it will suffice to show that the person in question was indeed a soldier to

<sup>1</sup> As regards HRL, this has to be qualified with respect to the extraterritorial applicability of the regional regimes: see part B 1 below.

<sup>2</sup> For a detailed analysis see Hoppe, 'State Responsibility for Violations of International Humanitarian Law Committed by Individuals Providing Coercive Services under a Contract with a State', Hague Center for Studies (2008, forthcoming). Cf. Lehnardt, 'Private Military Companies and State Responsibility', in S. Chesterman and C. Lehnardt (eds), *From Mercenaries to Market: the Rise and Regulation of Private Military Companies* (2007), at 139; Spinedi, 'Private Contractors: responsabilité internationale des entreprises ou attribution à l'Etat de la conduite des personnes privées?', 7 *FORUM du droit international* (2005) 273; but see Wolfrum, 'State Responsibility for Private Actors: an Old Problem of Renewed Relevance', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), at 423.

<sup>3</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at: [www.un.org/law/ilc/](http://www.un.org/law/ilc/); Annex to GA Res. 56/83 (12 Dec. 2001).

establish the responsibility of the state for such conduct. Taking into account the customary international law expressed in Article 3 of the fourth Hague Convention of 1907 (HC IV)<sup>4</sup> and Article 91 of Additional Protocol I (AP I),<sup>5</sup> neither the argument that the person in question did not act in his or her capacity as a soldier,<sup>6</sup> nor the argument that he or she contravened instructions<sup>7</sup> will provide a defence in international law.<sup>8</sup> On the other hand, unless incorporation of the personnel into the national army can be proven,<sup>9</sup> attribution of contractor conduct to a state under the conventional reading of the ILC Articles requires a much more complex factual inquiry.<sup>10</sup> Even if the burden of proof of attribution can be met, however, the extent of the responsibility for contractor conduct varies. Unqualified responsibility can only be established for conduct of organs of the state, as laid out in Article 4, or *de facto* organs, as explained by the International Court of Justice (ICJ) in the *Bosnia Genocide* case.<sup>11</sup> Going by the recent combat, guarding and protection, and interrogation services examples from Iraq and Afghanistan, such incorporation is not likely.<sup>12</sup> Contractors providing personal protection will usually not qualify as *de facto* organs due to the independence they tend to have in planning their operations, while interrogators, often closely bound to the state, may well qualify. As to combat, known examples display coordination or reversed power dynamics rather than subordination.<sup>13</sup>

Alternatively, Article 5, combined with Article 7 (*ultra vires*), attributes all conduct by the person to the state if that person is acting in the capacity of the state and exercising governmental control. Applying this provision, the claimant state needs to prove the conduct, the empowerment by law, and that the person acted in the governmental capacity. Thus, under Articles 4 (absent armed forces status) and 5, a gap already opens up: off-duty conduct would give rise to responsibility for a national soldier but not for a contractor. There is growing agreement in the literature that the conduct of

<sup>4</sup> Hague Convention (IV) of 1907 respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land. 3 Martens Nouveau Recueil (ser. 3) 461, 187 Consol TS 227.

<sup>5</sup> Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

<sup>6</sup> See *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005 [2005] ICJ Rep 168, at para. 213.

<sup>7</sup> *Ibid.*, at para. 214.

<sup>8</sup> See sect. C below.

<sup>9</sup> Incorporation here refers to the formal granting of regular military ranks or special commissions to the contractor's personnel.

<sup>10</sup> See Spinedi, *supra* note 2, at 276.

<sup>11</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb. 2007, not yet reported, at para. 392.

<sup>12</sup> Moreover, if the special rule of responsibility for the armed forces contained in Arts 3 HC IV and 91 AP I does not find application (see sect. 3 below), private acts of contractors who are considered organs of the state but not members of the armed forces will not be attributable.

<sup>13</sup> See, e.g., Vines, 'Mercenaries, Human Rights and Legality', in A.-F. Musah (ed.), *Mercenaries: an African Security Dilemma* (2000), at 169 (discussing the now-defunct PMSC Executive Outcomes). Power dynamics are reversed where the PMSC begins to dictate the agenda in its relationship with a (weak) state, rather than vice versa.

contractors undertaking combat missions or detention and interrogation for a state in armed conflict or occupation is attributable to the hiring state as exercise of governmental authority.<sup>14</sup> Regarding guarding and protection services this becomes a question of fact, with the standards ‘content’ and ‘purpose’ of the functions suggested in the ILC Commentaries<sup>15</sup> proving very difficult to work with.<sup>16</sup>

Lastly, under Article 8 conduct can be attributed to the state if specific orders or a certain level of direction or control over the actor can be shown. Importantly, this excludes responsibility for actions contrary to orders and beyond the control of the hiring state. Where it can be proven that, in the contract or otherwise, the state specifically ordered the conduct which gave rise to the violation of IHL or HRL, responsibility will arise. In the alternative, the conduct of contractors providing services that do not conclusively fall under at least Article 5, e.g. guarding and protection, will not give rise to responsibility. Physical control over contractors offering guarding and protection services is often lacking, especially for mobile services, and contractors’ independence in planning and execution will not meet the test.<sup>17</sup> In any event, where clear and legal rules of engagement are not complied with, the responsibility of the hiring state for the conduct of its contractors will not lie under Article 8.<sup>18</sup>

Now, comparing the responsibility of a state for the conduct of a classical soldier to all the options for attribution of private conduct, the responsibility gap becomes evident: unless a state outright incorporates the contractor personnel into its armed forces, or they can be regarded as completely dependent on it (a tough standard to meet), the state will always face less responsibility for acts of those persons than for acts of soldiers, and its responsibility will be harder to prove.<sup>19</sup> Faced with this gap authors have emphasized the role that positive obligations of states (under IHL and HRL) with respect to a contractor’s conduct may play to close it.<sup>20</sup> This is a focused, praxis-driven analysis that warrants further attention.

### 3 Positive Obligations to the Rescue?

The gaps remaining between responsibility of the hiring state for attributable contractor and soldier conduct are two-fold: first, the lack of responsibility of the hiring state for the off-duty conduct of contractors not part of the armed forces, or exercising elements of governmental authority, such as interrogation and combat contractors,<sup>21</sup> and, secondly,

<sup>14</sup> See Lehnardt, *supra* note 2; Hoppe, *supra* note 2; but see the earlier discussion by Wolfrum, *supra* note 2 (not exploring Art. 5 at all in relation to contractors in Iraq).

<sup>15</sup> ILC Arts with commentaries, *supra* note 3.

<sup>16</sup> Spinedi, *supra* note 2, at 277; see also Lehnardt and Hoppe, both also *supra* note 2.

<sup>17</sup> Cf. Lehnardt, *supra* note 2.

<sup>18</sup> But see Wolfrum, *supra* note 2 (arguing that acts *ultra vires* but closely related to the task contractors were instructed or generally contracted to perform will also give rise to responsibility of the state under Art. 8).

<sup>19</sup> Cf. Lehnardt, *supra* note 2.

<sup>20</sup> Wolfrum, *supra* note 2, at 431–432, 434.

<sup>21</sup> However, combat contractors may not easily be considered to be ‘off duty’ while they are still in the theatre of conflict.

the *ultra vires* or uncontrolled conduct of other contractors exercising coercive services, such as those providing guarding and protection services. Section A will address how IHL can help fill these two gaps, followed by section B conducting the analysis under HRL.

### A Positive Obligations of the Hiring State Under IHL

I will consider the impact of positive obligations of hiring states under IHL<sup>22</sup> first in the context of international armed conflict and secondly in the context of non-international armed conflict.

In international armed conflict, positive obligations can narrow the gap between responsibility for national armed forces and contractors in several ways. According to their duty to ensure respect for IHL under Common Article 1<sup>23</sup> states have properly to vet and train contractors they hire, to issue clear rules of engagement conforming to IHL, and to ensure that violations are reported.<sup>24</sup> The duty to ensure respect could contribute in certain guarding and protection or combat situations, in that an otherwise unrelated group of national soldiers would have a duty to call to order to try to stop contractors in their vicinity who are about to commit or already committing a violation of IHL.<sup>25</sup>

For all three types of coercive services I discuss, the off-duty conduct violating the rights of civilians under IHL otherwise not attributable may still give rise to responsibility under Article 27 of GC IV, establishing basic guarantees for the protection of civilians.<sup>26</sup> That provision may ground a duty of the hiring state strictly to regulate the exercise of coercive services and to minimize violations. Responsibility will be triggered where the hiring state failed to exercise due diligence and thus adequately protect the civilian victim.

Regarding prisoners of war, under Article 12 GC III, the hiring state will be responsible for any violation of international humanitarian law by its private contractors,<sup>27</sup>

<sup>22</sup> For a detailed analysis see Hoppe, *supra* note 2.

<sup>23</sup> "The High Contracting Parties undertake to respect and to ensure respect for this [Convention or Protocol] in all circumstances": Art. 1 GC I–IV, Art. 1.1 API (hereinafter Common Art. 1).

<sup>24</sup> University Centre for International Humanitarian Law (UCIHL), Geneva, Expert meeting on private military contractors: status and state responsibility for their actions (2005), available at: [www.adh-geneve.ch/evenements/pdf/colloques/2005/2rapport\\_compagnies\\_privées.pdf](http://www.adh-geneve.ch/evenements/pdf/colloques/2005/2rapport_compagnies_privées.pdf).

<sup>25</sup> See Hoppe, *supra* note 2.

<sup>26</sup> Art. 27 GC IV reads as follows:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

... However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

<sup>27</sup> "Prisoners 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": GC III, Art. 12. The remainder of the Art. specifies that prisoners of war cannot be transferred out of the power of the state party which captured them to anyone other than another state party.

and allowing contractors to operate a prisoner of war camp without military oversight would be a violation of IHL.<sup>28</sup>

In occupation, the hiring state has a duty under Article 43 of the Hague Regulations applying to all contractors providing coercive services to ensure that they are not unsupervised when they are off-duty.<sup>29</sup>

In non-international armed conflict, the reach attributed to Common Article 1 varies: the ICRC study suggests that it cannot go beyond the rules of attribution;<sup>30</sup> others derive a duty properly to vet and train contractors they hire, to issue clear rules of engagement conforming to IHL, and to ensure that violations are reported.<sup>31</sup> In the ICJ's judgment in *Nicaragua*, only the encouragement of violations was specifically identified to give rise to additional responsibility beyond attribution. Neither Common Article 3 nor Article 4 of Additional Protocol II grounds further positive obligations regarding the wounded, sick, and shipwrecked as well as medical and religious personnel. As concerns detainees in non-international armed conflict, unlike Articles 12 and 39 GC III, there is no express prohibition on putting detainment facilities under civilian control.

Positive obligations of the hiring state under IHL are a necessary but not sufficient step in narrowing the responsibility gap. The gap closes in international armed conflict with respect to interrogation contractors in POW camps, but the off-duty conduct of combat and guarding and protection contractors would still be checked only by the general duties to vet, train, instruct, and report, and possibly to prevent known ongoing violations. In occupation, the off-duty conduct of contractors providing coercive services may give rise to responsibility of the hiring state where it failed to exercise due diligence in vetting, training, instructing, and supervising them. In non-international armed conflict, only the general duties to vet, train, instruct, and report could narrow the gap, exposing the state to a substantially lower responsibility risk as compared to conduct of its national soldiers.

## **B Positive Human Rights Obligations: The Duty to Prevent**

Having analysed the positive obligations of hiring states under IHL, let me now turn to positive obligations under HRL. States have duties ranging from legislating in accordance with HRL obligations, the prevention of violations, to the duty to investigate and, where appropriate, prosecute and punish offenders. As a full analysis of all these obligations is beyond the scope of this article, I will focus on the duty to prevent, bearing in mind that similar analyses could be undertaken for the other positive duties accruing under HRL.

<sup>28</sup> Art. 39 GC III states: '[e]very prisoner of war camp shall be put under the *immediate authority* of a responsible commissioned officer belonging to the *regular* armed forces' (emphasis added).

<sup>29</sup> Hague Convention (IV), *supra* note 4; see also Hoppe, *supra* note 2.

<sup>30</sup> The study confines the rule to a duty of state to ensure respect for IHL by 'its armed forces, or groups acting in fact on its instructions, or under its direction or control': J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), at 495–496 (Rule 139).

<sup>31</sup> UCHL meeting, *supra* note 25.

### 1 Caveat: Applicability of HRL in Armed Conflicts

The effect of positive obligations under HRL in closing the responsibility gap left by conventional application of the ILC Articles differs for non-international and international armed conflicts. The state hiring a PMSC to provide coercive services on its territory during a non-international armed conflict has to refrain from violating rights of individuals within its jurisdiction, and protect those individuals from violations at the hands of third persons, including the contractors it hires.

In international armed conflict the main issue is to what extent states are obliged to ensure Human Rights even when acting outside their borders<sup>32</sup> (where a state defends an international armed conflict on its territory, HRL will continue to apply). I will take up the jurisprudence of the relevant judicial and quasi-judicial bodies in turn. Within the spatial constraints of this article, a full discussion of the subject is impossible, so the following will remain schematic analysis. Moreover, it is important to distinguish conceptually the level of control required to establish state responsibility, most notably under Article 8 of the ILC Articles, discussed above, and the question of control as it pertains to the extra-territorial applicability *vel non* of the various Human Rights instruments, to be discussed below. These are two separate questions, even though in practice they may overlap.

The Human Rights Committee, in evolving jurisprudence, has arrived at the formula of 'power or effective control', now taking the clear position that states have to guarantee and respect the ICCPR at home and abroad with respect to individuals within their power or effective control.<sup>33</sup> This position has been criticized by some as stretching too far.<sup>34</sup> The approach moves beyond the territorial aspect of jurisdiction, and extends it to power over individuals.<sup>35</sup>

<sup>32</sup> C. Droege, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention* (2003); Dennis, 'The Non-application of Civil and Political Rights Treaties Extraterritorially during Times of International Armed Conflict', 40 *Israel L Rev* (2007) 453; Wilde, 'Triggering State Obligations Extraterritorially: the Spatial Test in Certain Human Rights Treaties', 40 *Israel L Rev* (2007) 503.

<sup>33</sup> See *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52 (6 June 1979), UN Doc. Supp. No. 40 (A/36/40), at 176 (1981); *Lilian Celiberti de Casariego v. Uruguay*, Communication No. R.13/56, UN Doc. Supp. No. 40 (A/36/40), at 185 (1981); *Mabel Pereira Montero v. Uruguay*, Communication No. 106/1981, UN Doc. Supp. No. 40 (A/38/40), at 186 (1983); *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979 (29 July 1981), UN Doc. CCPR/C/OP/1, at 88 (1984) (holding that 'it would be unconscionable to so interpret the responsibility under article 2 of the covenant as to permit a state party to perpetrate violations of the covenant on the territory of another state, which violations it could not perpetrate on its own territory'); Human Rights Committee, General Comment 31, 'Nature of the General Legal Obligations Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 10 (protection extends to nationals and non-nationals alike who are in the power or under the effective control of the state party); Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Israel', UN Doc. CCPR/CO/78/ISR (21 Aug. 2003), para. 11 (rejecting Israel's claim that the ICCPR did not apply to the Occupied Territories).

<sup>34</sup> See, e.g., Dennis, *supra* note 32 (arguing that the position expressed in General Comment 31 is at odds with the intent of states expressed *inter alia* in the *travaux préparatoires*).

<sup>35</sup> This approach has earlier roots in the 'passport cases': UNCHR, *Nunez v. Uruguay*, Communication No. 108/1981 1990 (1983); UNCHR, *Mabel Pereira Montero v. Uruguay*, Communication No. 106/1981 (1983); UNCHR, *Sophie Vidal Martins v. Uruguay*, Communication No. R.13/57 (1982).

The ICJ for its part has narrowed the scope of extraterritorial application of the ICCPR in the context of an international armed conflict to situations where the state in question is ‘exercising’ its jurisdiction. The ICJ underscores the territorial nature of the required jurisdiction, but extends it to situations outside its national territory, and even in foreign territory.<sup>36</sup> In the *Wall*<sup>37</sup> advisory opinion the application was limited to occupied territory, while *Armed activities on the territory of the Congo* suggests that also other territorial control, for example of an invading force, outside occupation can qualify.<sup>38</sup> It remains unclear whether the violation of a negative obligation itself could form the requisite link, absent territorial control, while positive obligations outside territorial control would be likely to arise only where physical control over the victims or perpetrators exists, such as in a camp or prison on foreign soil, or where invading soldiers capture individuals.<sup>39</sup>

In the regional systems, the Inter-American standard for extraterritorial application of the American Declaration and Convention<sup>40</sup> seems very broad, especially with respect to violations of negative obligations. The Inter-American Court and Commission emphasize control over the person, rather than territory.<sup>41</sup> The Commission applied this principle to the high seas, where no other state could have had jurisdiction, but also to military invasions.<sup>42</sup> The conduct violating a negative obligation itself, e.g. killing an individual, can ground jurisdiction. However, the reach is limited territorially to the hemisphere.<sup>43</sup>

The standard the ECtHR applies for the extraterritorial application of the European Convention has evolved over time. Already in 1995, in *Loizidou v. Turkey* (preliminary

<sup>36</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ 131 (July 9), at paras 108–111; *Armed activities on the territory of the Congo*, *supra* note 5, at para. 216 (finding Uganda in violation of its obligations, *inter alia* under the ICCPR, not only as an occupying power in the Ituri province, but also elsewhere).

<sup>37</sup> *Legal Consequences of the Construction of a Wall*, *supra* note 36.

<sup>38</sup> *Armed activities on the territory of the Congo*, *supra* note 6, at para. 220 (finding Uganda in violation of its obligations, *inter alia* under the ICCPR, not only as an occupying power in the Ituri province, but also elsewhere).

<sup>39</sup> This form of jurisdiction is again fundamentally territorial, if possibly confined to a small area and time-frame.

<sup>40</sup> American Declaration of the Rights and Duties of Man, OAS Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1, at 17 (1992); American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123.

<sup>41</sup> *Coard et al. v. United States*, Case 10.951, Inter-Am. CHR, Report No. 109/99, at para. 39 (1999) (finding that being subject to a state’s jurisdiction could ‘refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another); *Alejandro v. Cuba*, Case 11.589, Inter-Am. CHR, Report No. 86/99 (military pilots’ capacity to shoot down civilian planes over international waters qualifies as exercise sufficient control). See also Pertinent Parts of Decision on Request for Precautionary Measures, available at: [www.photius.com/rogue\\_nations/guantanamo.html#ftn1](http://www.photius.com/rogue_nations/guantanamo.html#ftn1); Detainees in Guantanamo Bay, Cuba: Request for Precautionary Measures, Inter-Am. CHR (13 Mar. 2002), available at: [www1.umn.edu/humanrts/undocs/session36/12-52.htm](http://www1.umn.edu/humanrts/undocs/session36/12-52.htm).

<sup>42</sup> Cassel, ‘Extraterritorial Application of Inter-American Human Rights Instruments’, in F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004), at 178.

<sup>43</sup> The preamble to the ACHR is limited to the ‘hemisphere’. ACHR.



objections), the Court held that jurisdiction under Article 1 is not limited to national territory;<sup>44</sup> rather responsibility under the ECHR can arise in military action where the State Party exercises effective control of an area. Having been more restrictive in *Bankovic*,<sup>45</sup> its jurisprudence in *Issa* again approaches that of the Inter-American Court of Human Rights and the Human Rights Committee. There, the ECtHR held that a state may incur responsibility for violation of the ECHR rights of persons abroad under the 'authority and control' of its agents, thus also focusing on persons rather than territory.<sup>46</sup> Similarly, the regional limitation as spelled out in *Bankovic*<sup>47</sup> is relativized by *Issa*.<sup>48</sup>

Let me apply the approaches of the various HR bodies to contractors' services. For the present inquiry, I am still only interested in the case where the responsibility gap<sup>49</sup> arises, that is where the conduct of contractors is not attributable to the hiring state. Thus, the widest approach to extraterritorial jurisdiction employed by the Inter-American Commission, which allows control to be established by the violation of a negative obligation, cannot found jurisdiction in the cases I am looking at.<sup>50</sup> The requisite control will have to be exercised by the national armed forces or other state agents, including contractors whose conduct is at the time attributable to the hiring state. Territorial control over the area in which the violation happened may exist by virtue of an occupation or other territorial control, for example during an invasion. Physical control on the other hand, putting individuals in the power of the hiring state, exists for example over individuals who are kidnapped or arrested in an impromptu fashion or detained more formally in a detention facility.

Regarding territorial control, both the ICCPR and the regional systems will apply where the hiring state is an occupying power, independent of the service the contractor provides. Outside occupation, the off-duty acts of combat contractors<sup>51</sup> and the *ultra vires* conduct of guarding and protection contractors in an area currently controlled by agents of the hiring state will fall under the ICCPR as interpreted by the Human Rights Committee and the ICJ, and qualify under the Inter-American jurisprudence. With respect to the ECHR, the question will be whether the hiring state exercised effective overall control. Still, this may be the case even for smaller groups of ground troops

<sup>44</sup> App. No. 15318/89, *Loizidou v. Turkey* (preliminary objections) (1995), ECtHR series A No. 310, at para. 62.

<sup>45</sup> *Bankovic v. Belgium*, 2001-XII ECtHR 333, at para. 71 (2001) (holding that the Convention would apply extraterritorially only when the state in question had 'effective control of the relevant territory' and 'exercised all or some of the public powers normally to be exercised by that government').

<sup>46</sup> *Issa v. Turkey* [2004] ECtHR 629, at para. 71 (holding that '[a]ccountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory').

<sup>47</sup> *Bankovic*, *supra* note 46, at para. 80 (holding that the Convention was designed for a 'regional context and notably [to apply] in the legal space (*espace juridique*) of the Contracting States').

<sup>48</sup> *Issa v. Turkey*, *supra* note 47, At paras 73–74 (extending the *espace juridique* of the Convention to northern Iraq, where Turkey exercised effective overall control).

<sup>49</sup> The responsibility gap consisted in the off-duty conduct of combat or interrogation contractors and the *ultra vires* conduct of guarding and protection contractors not being attributable to the hiring state.

<sup>50</sup> *Alejandre v. Cuba*, *supra* note 42.

<sup>51</sup> See *supra* note 21.

controlling the area where the violation occurred.<sup>52</sup> However, where combat contractors are off-duty, or guarding and protection contractors engage in conduct outside their instructed duties, and the area they operate in is not controlled by the hiring state, there will not be a basis for extraterritorial jurisdiction under any of the three systems unless there is physical control over the victims, to which I will turn next.

Power over individuals as a basis for extraterritorial jurisdiction will be most relevant to interrogation contractors,<sup>53</sup> and will often coincide with territorial control of the hiring state. Where the victims at the time of the violation either are under the control of the hiring state or have been handed from hiring state control into contractor control, both the ICCPR as interpreted by the Human Rights Committee and the ICJ as well as the Inter-American jurisprudence will extend jurisdiction. Similarly, the ECtHR will apply jurisdiction extraterritorially under *Ocalan*<sup>54</sup> and *Issa*.<sup>55</sup> However, where the hiring state does not have control over the persons interrogated, for example where it hires contractors to interrogate individuals held at a facility under the control of a third state, off-duty conduct of these contractors will not be within the scope of application of any of the three instruments I discussed.

Having seen that the applicability of HRL will have to be assessed on a case-by-case basis, and keeping in mind the regional limitations in the European and Inter-American systems, I will in what follows assess how far HRL obligations under the different instruments can reach, now assuming they apply.

## 2 *The Duty to Prevent Under the ICCPR*

Most important to the coercive services provided by contractors, and in turn the states that hire them, the Covenant provides that every human being has the inherent right to life of which he or she shall not be arbitrarily deprived;<sup>56</sup> and that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.<sup>57</sup> These provisions are not derogable, even in times of armed conflict.<sup>58</sup> The Human Rights Committee (the Committee) has clarified through its General Comments and jurisprudence that the right to life and the prohibition on torture imply positive obligations extending to the conduct of private actors not attributable to the state. The duty to prevent a violation of Article 6 or 7 thus goes beyond a duty to legislate and the investigation and prosecution of specific violations.

With respect to the right to life, the Human Rights Committee recognizes a due diligence duty of states to prevent violations. The limited duty to protect or physically intervene on behalf of individuals is a specific element of this general duty.<sup>59</sup> Where

<sup>52</sup> *Loizidou*, *supra* note 45 (preliminary objections), at 62; *Issa v. Turkey*, *supra* note 47, at 69–70.

<sup>53</sup> Where combat or guarding and protection contractors obtain access to persons in the power of their hiring state, the same logic applies.

<sup>54</sup> App. No. 46221/99, *Öcalan v. Turkey*, Judgment of 12 May 2005, ECHR 2005-IV 131 (GC).

<sup>55</sup> *Issa v. Turkey*, *supra* note 47.

<sup>56</sup> International Covenant on Civil and Political Rights (ICCPR), GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, UN Doc. A/6316 (1966), 999 UNTS 171, Art. 6.1.

<sup>57</sup> *Ibid.*, Art. 7.

<sup>58</sup> *Ibid.*, Art. 4.2.

<sup>59</sup> General Comment No. 06: The right to life (Art. 6) (1982), UN Doc CCPR/C/21/Rev.1, at 4–6.

there is a credible 'threat to the life of persons under their jurisdiction', the state has to intervene.<sup>60</sup> As we shall see below, the requirement that the target of the threat be also known is much less restrictive than in the jurisprudence of the ECtHR.<sup>61</sup> The state owes this duty to all persons within its territory and to all persons subject to its jurisdiction.<sup>62</sup>

Regarding the prohibition on torture or cruel, inhuman, or degrading treatment or punishment (Article 7), the Committee confirmed a duty to prevent also applying to conduct not attributable to the hiring state.<sup>63</sup> The state party has to take 'legislative and other measures' to protect individuals against acts prohibited by Article 7, even when they are inflicted by persons in their private capacity.<sup>64</sup> Specifically, interrogation personnel have to be trained and interrogations have to be strictly reviewed and supervised to prevent abuse.

I have argued above that interrogation services will be attributable to the hiring state as exercise of governmental authority. This position is supported by the strong elements of state control the Committee mandates. Moreover, it demonstrates that, where the ICCPR applies, even if one should disagree with that position, states will in a given situation either have the requisite control to attribute under ILC Article 8, or will have violated their positive obligation to control such interrogations. The position of the Committee also strengthens the protection of individuals who find themselves in the power of private interrogators or prison guards off-duty in armed conflict. Thus, states have to ensure that contractors are not in a position of control *vis-à-vis* detainees that would put them at risk of being abused. This duty includes specific practices of control, review, and training, and should exclude them from access to detained individuals when they are off duty.

Lastly, the Committee frequently addresses another form of the duty to prevent, namely to prevent recurring violations through 'measures, beyond a victim-specific remedy', for example by changing the party's 'laws or practices'.<sup>65</sup> Hence, specifically where violations have already occurred, the state in question incurs a quasi-heightened duty to prevent recurrence of a similar violation. This is very relevant to the violations of human rights at the hands of contractors, for example in Iraq, where the same types of incidents tended to recur, and the firms in question were

<sup>60</sup> *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, UN Doc. CCPR/C/39/D/195/1985 (1990). For further references see K. Wiesbrock, *Internationaler Schutz der Menschenrechte vor Verletzungen durch Private* (1999), at 137.

<sup>61</sup> See the discussion of the ECHR below.

<sup>62</sup> General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant, (2004) UN Doc CCPR/C/21/Rev.1/Add.13, at para. 7.

<sup>63</sup> See General Comment No. 07: Torture or cruel, inhuman or degrading treatment or punishment (Art. 7), (1982) UN Doc HRI/GEN/1/Rev.1, at 7.

<sup>64</sup> General Comment No. 20: replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), (1992), UN Doc HRI/GEN/1/Rev.1, at 30, paras 2, 10, and 13; see also General Comment No. 31, *supra* note 63, at para. 8.

<sup>65</sup> *Ibid.*, at para. 17. See also, e.g., *Joaquín David Herrera Rubio et al. v. Colombia*, Communication No. 161/1983, UN Doc. CCPR/C/OP/2, at 192 (1990); *Mr. Joseph Semey v. Spain*, Communication No. 986/2001, UN Doc. CCPR/C/78/D/986/2001 (2003); *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000, UN Doc. CCPR/C/78/D/950/2000 (2003); *Karina Arutyunyan v. Uzbekistan*, Communication No. 917/2000, UN Doc. CCPR/C/80/D/917/2000 (2004).

nevertheless not ousted or were re-hired. States may have a duty to scrutinize the conduct of contractors, improve the regulation of contractors, and change the planning of operations. Ultimately a state may have to terminate contract where violations have occurred, even where it did not control the conduct or it was engaged in it off duty. However, where the hiring state acts outside its borders, this duty is still limited by the requirements for extraterritorial jurisdiction. Thus, for example, the recurrent shooting without warning at civilian vehicles in Iraq by contractors would be reached only if the hiring state, e.g. the United States, had either physical control over the victims (unlikely) or territorial control over the area (possible, depending on the area).<sup>66</sup>

### 3 *The Duty to Prevent Under the ACHR*

The American Convention on Human Rights (ACHR) obliges its states parties to respect and ensure the rights contained in it,<sup>67</sup> and to take legislative and other measures necessary to that effect.<sup>68</sup> Article 4.1. contains the basic provision on the right to life, while Article 5.1 and 5.2. protects the integrity of the person and prohibits torture or cruel, inhuman, or degrading treatment or punishment.<sup>69</sup> The jurisprudence relevant to the duty to prevent violations of Articles 4 and 5 of the ACHR stems from the Inter-American Court of Human Rights's (IACHR's) series of cases grappling with the phenomenon of enforced disappearances, most famously the *Velásquez Rodríguez* case.<sup>70</sup>

As was the case with respect to the ICCPR, the ACHR as interpreted by the Inter-American system of human rights also provides for a positive obligation to prevent violations of human rights resulting from acts which are not attributable to a state. This duty is violated where the state fails to exercise due diligence to prevent the violation<sup>71</sup> by taking all reasonable measures.<sup>72</sup> The duty to prevent 'includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts'.<sup>73</sup> It does, however, not encompass a duty of the state to intervene when given a certain level of information about (impending) violations by third parties.<sup>74</sup>

<sup>66</sup> At a minimum the US exercises territorial control over the heavily guarded base areas such as the Green Zone in Baghdad, but also at different times controlled other areas of Iraq, even after the transfer of sovereignty. For example, the US officially returned 'security control' over the Anbar province of Iraq, including Falluja, to the Iraqi government only in September 2008. See Badkhen, 'Lines of control shift like sands in the desert', *San Francisco Chronicle*, 13 Nov. 2005, at A-1; Paley, 'Uncertainty after Anbar Handover', *Washington Post*, 2 Sept. 2008, at A10; see also Cerone, 'The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq', *ASIL Insight*, available at: [www.asil.org/insights/2005/10/insights051025.html](http://www.asil.org/insights/2005/10/insights051025.html).

<sup>67</sup> American Convention on Human Rights, *supra* note 41, Art. 1.1.

<sup>68</sup> *Ibid.*, Art. 2.

<sup>69</sup> *Ibid.*, Arts 4 and 5.

<sup>70</sup> *Velásquez Rodríguez Case*, Judgment of 29 July 1988, Inter-Am Ct. HR (Ser. C) No. 4 (1988).

<sup>71</sup> *Godínez Cruz Case*, Judgment of 20 Jan. 1989, Inter-Am. Ct. HR (Ser. C) No. 5 (1989), para. 182.

<sup>72</sup> For the duty to investigate see *Velásquez Rodríguez*, *supra* note 71, at paras 176–177.

<sup>73</sup> *Ibid.*, at para. 175; *Godínez Cruz*, *supra* note 71, at para. 185 (employing identical language).

<sup>74</sup> However, the language of *Godínez Cruz*, distinguishing prevention and response, leaves this possibility open: *Ibid.*, at para. 182.

Also in the context of enforced disappearance, the IACHR addressed the special situation of individuals in custody, which is very relevant to contactors providing interrogation services. The Court found that states have a very high, albeit not strict, responsibility where initially healthy people die in their custody. Due to the duty to ensure the detainees' rights by preventing them from being harmed, the burden of proof will be on the state to show that it is not responsible, once the petitioner has discharged the burden of proof.<sup>75</sup> This approach closes any possible gap left with respect to uncontrolled or off-duty conduct of detention or interrogation contractors, where the hiring state has custody of the victims.

#### 4 *The Duty to Prevent under the ECHR*

The ECHR's basic provision, Article 1, also contains an obligation couched in positive terms, obliging states parties to 'secure' the rights contained in the convention to individuals within their jurisdiction. The convention rights most likely to be endangered by PMSCs providing combat, guarding and protection, or interrogation services are the right to life (Article 2), which remains applicable in an armed conflict if the state concerned does not derogate from it,<sup>76</sup> and the prohibition on torture (Article 3), which cannot be derogated from under any circumstances. Under Articles 2 and 3 of the ECHR, several specific positive duties have been derived by the judicial and quasi-judicial bodies, including the duty to put in place an effective legal framework;<sup>77</sup> the duty to prevent breaches (also where the direct involvement of the state could not be demonstrated); and the duty to investigate and, where applicable, prosecute.<sup>78</sup> I will again focus on the duty to prevent.

As early as in *W. v. United Kingdom*,<sup>79</sup> the Commission acknowledged that Article 2 not only mandates repressive measures. It also calls for preventive measures by the authorities, which can be conceptualized as entailing the proactive element of planning and the reactive element of intervention in the face of imminent danger to an individual. In *McCann*, addressing an anti-terrorist operation by British special forces against IRA suspects in Gibraltar, the ECtHR held for the first time that the planning of operations which threaten the right to life can fall short of the

<sup>75</sup> *Juan Humberto Sánchez Case*, Judgment of 7 June 2003, Inter-Am. Ct. HR, (Ser. C) No. 99 (2003), at para. 111.

<sup>76</sup> Under the ECHR's Art. 15, states parties can derogate from the treaty in times of emergencies threatening the life of the nation 'to the extent strictly required by the exigencies of the situation'. Deaths resulting from lawful acts of war will then not constitute a violation of the Convention. If a state were to rely on the provision, the result would be that IHL would apply to the conflict at hand, whether international or non-international. So far, however, states have not relied on this provision.

<sup>77</sup> See, e.g., *X and Y v. Netherlands*, 91 ECtHR (ser. A), at para. 23. (1985) (no possibility for a 16-year-old mentally handicapped person to bring a sexual abuse complaint).

<sup>78</sup> E.g., App. No. 90/1997/874/1086, *Assenov and Others v. Bulgaria*, Judgment of 28 Oct. 1998, ECHR 1996-VIII 96, at para 102.

<sup>79</sup> App. No. 9348/81, *W. v. United Kingdom*, Judgment of 28 Feb. 1983, 32 DR 190 (dealing with a case of domestic abuse not halted by the authorities).

requirements of the Convention.<sup>80</sup> In *Andronicou and Constantinou*,<sup>81</sup> addressing a domestic dispute which ended tragically when Greek special forces stormed a flat and killed both kidnapper and victim in a chaotic scene, the Court confirmed its willingness to control the planning and organization of operations of security forces. However, as in both cases the conduct of state organs was at issue, *McCann* and *Andronicou and Constantinou* do not offer reasoning which could directly apply to the conduct of PMSC personnel otherwise not attributable to the hiring state. It would have to be shown that the positive obligation to plan and train was independent of the question of attribution. The *Ergi* case may offer some support for this position. There, the Court clarified that the duty to plan operations includes the aspect of minimizing danger by taking into account the fact that opponents may be less careful in their conduct *vis-à-vis* innocent bystanders than the state forces, and adapt its strategy accordingly.<sup>82</sup> Given that the reach of the duty to prevent by planning extends to factoring in the conduct of third parties without any relationship to the state, such as the targets of security operations, states should *a fortiori* have a duty under the Convention to plan any security operation which risks threatening the right to life, where they hire the third party, even if the risk stems from uncontrolled or off-duty conduct of contractor personnel involved in such operations. Again, where the hiring state acts outside its borders, this duty is limited by the requirements for extraterritorial jurisdiction outlined above, requiring that the hiring state exercise effective overall control in the area.<sup>83</sup>

Let me now turn to the aspect of the duty to prevent by physical interference. In *McCann*, the ECHR stated that states can violate Article 2 where they do not physically impede the efforts of individuals who are suspected of being about to interfere with the right to life.<sup>84</sup> A specific duty to prevent violations of the right to life by specific operational measures was the central issue in the *Osman* case.<sup>85</sup> The Court was presented with a teacher infatuated with one of his pupils, who later attacked the boy and his father. The Court held that, beyond a duty to put in place an effective criminal law to deter the commission of offences and law enforcement to back it up, in limited circumstances a duty to take operational measures to protect individuals whose lives are at risk may arise.<sup>86</sup> The duty is limited to cases where there is a real and tangible risk emanating from a specific person to the life of another specific person,

<sup>80</sup> *McCann v. United Kingdom*, 21 EHRR (1996) 97, at para. 213; the majority of 10 judges was faced with a dissenting opinion from 9 judges who disagreed as to the facts and cautioned against the use of hindsight in the assessment of the state's decisions: *McCann*, Joint Dissenting Opinion, at para. 8.

<sup>81</sup> App. No. 86/1996/705/897, *Andronicou and Constantinou v. Cyprus* (86/1996/705/897), Judgment of 9 Oct. 1997, ECHR 1997-VI 52.

<sup>82</sup> *Ergi v. Turkey* (66/1997/850/1057), Judgment of 28 July 1998; see also Droege, *supra* note 32, at 47–48; A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

<sup>83</sup> See *supra* note 54 and accompanying text.

<sup>84</sup> *McCann*, *supra* note 81, at para. 213.

<sup>85</sup> App. No. 23452/94, *Osman v. UK*, ECHR 1998-VIII 95.

<sup>86</sup> *Ibid.*, at para. 115.

and the authorities knew or should have known of a real and immediate danger to the victim(s).<sup>87</sup> Hence, the question becomes how narrow such identification has to be. In *Osman*, the Court did not find that the facts warranted the responsibility of the UK.

In *Mahmut Kaya*,<sup>88</sup> the applicant's brother, Dr. Hasan Kaya, who had been suspected by the authorities of having treated PKK members in Southern Turkey, and his friend Metin Can disappeared and were later found dead. The Court found applicable a positive obligation on the Turkish authorities to take preventive operational measures to protect Kaya and Can.<sup>89</sup> The Court restated that the threatened individual(s) must be identified, but did not apply the same requirement with regard to the 'third party' posing that threat,<sup>90</sup> and ultimately only referred to the fact that no investigations into the conduct of counter-terrorist groups were made.<sup>91</sup> In its subsequent jurisprudence the Court upheld this approach, and only in dictum hinted at situations in which society at large could be in danger.<sup>92</sup>

The duty to prevent by intervening, as developed by the ECtHR, does not seem to offer much help in filling the regulatory gap I discussed. This is due to the circumstance that in many cases in which the uncontrolled or off-duty conduct of contractors poses a danger to the right to life of individuals or groups, the latter will not be as closely identifiable as the Court had deemed necessary hitherto. There is still no positive obligation on the state elaborated by the Court for the benefit of the population at large. However, if the Court were willing to expand the identification requirement for potential victims to a location, e.g. the passers-by on a crowded market-place, the positive obligation to prevent through intervention could be very relevant to contractors' operations. In fact, considering that the ECtHR began its interpretive journey regarding the duty physically to prevent in the *McCann* case,<sup>93</sup> where the possible victims of the planned bombing were not identified beyond the general geographic location of the bomb, the Court may want in the future to reconsider this requirement. Yet, keeping in mind the limits on extraterritorial application where the hiring state acts abroad, at a minimum the duty already covers situations in which organs of the hiring state, including soldiers who may be in the vicinity of contractors' actions, observe or are otherwise alerted to imminent or ongoing violations of the right to life

<sup>87</sup> *Ibid.*, at para. 116.

<sup>88</sup> *Mahmut Kaya*, ECHR Rep. 2000-III 149, at para 86; See also App. Nos. 22947/93 and 22948/93, *Akkoc v. Turkey*, Judgment of 10 Oct. 2000, 2000-X 389 (presenting a parallel finding with regard to the duty to prevent); see also App. No. 22492/93, *Kilic v. Turkey*, Judgment of 28 Mar. 2000, 2000-III 75.

<sup>89</sup> *Kaya*, *supra* note 89, at para. 85.

<sup>90</sup> *Ibid.*, at para. 85.

<sup>91</sup> *Ibid.*, at para. 100. See Conforti, 'Reflections on State Responsibility for the Breach of Positive Obligations: the Case-law of the European Court of Human Rights', 13 *Italian Ybk Int'l L* (2003) 3.

<sup>92</sup> In App. No. 37703/97, *Mastromatteo v. Italy*, ECHR 2002-VIII 151, a dangerous criminal had committed murder while on leave during his prison term. In its dictum, the Court elaborated that nothing had indicated to the authorities a 'need to take additional measures to ensure that, once released the two [criminals] did not present a danger to society', *ibid.*, at para. 76 (emphasis added); see also App. No. 34056/02, *Gongadze v. Ukraine*, Judgment of 8 Nov. 2005, at paras 164–171.

<sup>93</sup> *McCann*, *supra* note 81.

by contractors, no matter whether they are otherwise under the state's control at the time, or even off duty.<sup>94</sup>

Article 3 ECHR is very relevant to interrogation services. With respect to violations of Article 2, and addressing the specific situation of detained individuals, the ECtHR has stressed their vulnerable position as grounds for more extensive duties of the state to protect their right to life. Here, states decidedly not only are responsible for the actions of their own organs, but also have to ensure that these persons are not subject to potentially lethal attacks at the hands of third parties.<sup>95</sup> The ECtHR held in *A v. UK*, dealing with the abuse of a 10-year-old boy by his stepfather, that Article 1 taken together with Article 3 imposes a positive duty on the state to protect individuals, particularly those who are especially vulnerable, against abuse by third parties.<sup>96</sup> In *Valasinas*, the ECtHR held that every detainee has to be guaranteed conditions that preserve his human dignity.<sup>97</sup> Factors to be assessed include the size of cell area allocated to an individual detainee, hygiene, isolation, strip searches, among others. Certain practices of interrogation preparation by contractors reported from Abu-Ghraib would clearly fall foul of these provisions.<sup>98</sup>

The ECtHR jurisprudence with respect to detainees as vulnerable individuals whose dignity has to be preserved can serve to close the regulatory gap which would materialize if one were of the view that interrogation and detention were not an exercise of governmental authority attributable to the state, or if PMSC personnel could violate detainees' rights when off duty. Outside the hiring states' territory, the hiring state would have to exercise control over the detainees for the convention to apply, as discussed above. The Court has demonstrated its willingness to assess the circumstances under which detainees are kept, irrespective of whether the treatment occurs at the hands of the state or third parties. Hence, the state cannot retreat to the position that any given abuse occurred without its involvement, but has positive duties to check that detainees are guaranteed their Article 3 rights.

As we have seen, the positive obligations of states with respect to the conduct of contractors not attributable to it, which I have discussed here under the heading of the obligation to prevent human rights abuses, constitute obligations of due diligence.<sup>99</sup> Hence, where the state has observed a certain level of diligence in its efforts to comply

<sup>94</sup> Of course, this finding still has to be carefully limited to the situations where the Convention is applicable, as stated in the introduction to this article.

<sup>95</sup> *Gezici v. Turkey*, No. 34594/97 (2005), at paras 49–54.

<sup>96</sup> App. No. 100/1997/884/1096, *A v. United Kingdom*, Judgment of 23 Sept. 1998, ECHR 1998-VI 2692, at para. 22; see also App. No. 47095/99, *Kalashnikov v. Russia*, Judgment of 15 July 2002, ECHR 2002-VI; App. No. 44558/98, *Valasinas v. Lithuania*, Judgment of 24 July 2001, ECHR 2001-VIII.

<sup>97</sup> *Ibid.*, at paras 102–106.

<sup>98</sup> See *Kalashnikov*, *supra* note 97; *Valasinas*, *supra* note 97, at para. 102. See also *Akkoc*, *supra* note 88, at para. 118.

<sup>99</sup> For theoretical and applied assessments of the concept of 'due diligence' see Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States', 35 *German Ybk Int'l L* (1992) 5; Dupuy, 'Due Diligence in the International Law of Liability', in OECD (ed.), *Legal Aspects of Transfrontier Pollution* (1977), at 369; Hessbruegge, 'The Historical Development of the Doctrines of Attribution and due Diligence in International Law', 36 *NYU J Int'l L & Pol* (2004) 265; R.P. Barnidge, Jr., *Non-state Actors and Terrorism* (2008).



with the norm, the norm will not be violated even if the object of the rule is ultimately not achieved. Thus, even if concerns with regard to extraterritorial jurisdiction can be overcome and the burden of proof can be discharged, the hiring state will not be held responsible if it can demonstrate that it exercised due diligence with respect to the contractors' conduct. Adducing positive due diligence obligations under HRL to equalize responsibility for contractors' personnel exercising combat, guarding and protection, or interrogation services with responsibility for the states' own soldiers is thus subject to a twofold limitation. In addition to the limits on extraterritorial application, it will always have to be discounted by the gap remaining between full responsibility for the violation of a negative obligation and that for a positive obligation under HRL which may ultimately not be violated because the hiring state exercised due diligence.

### 3 Back to the Basics: Responsibility for the Armed Forces

Both Article 3 of HC IV and Article 91 of AP I<sup>100</sup> provide that a state which violates the provisions of the respective instruments 'shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'.<sup>101</sup> The norm enshrined in both of these provisions has reached customary status.<sup>102</sup> Moreover, the ICJ considers that it now extends beyond the specific provisions of HC IV and AP I to violations of IHL and HRL alike.<sup>103</sup> Hence, Article 3 of HC IV and Article 91 of AP I could be used as channels to hold states responsible for violations of positive IHL and HRL obligations by their contractors. The critical question in this inquiry is whether the contractors' employees can qualify as persons forming part of the armed forces of the hiring state; otherwise we are left with the general law of state responsibility and its shortcomings, as I outlined at the outset of this article.

#### A The Ordinary Meaning of 'Persons Forming Part of its Armed Forces'

In Article 3 of HC IV<sup>104</sup> the critical language 'persons forming part of' (in the authoritative French text '*personnes faisant partie de sa force armée*') denotes not only a coordinated group of people under arms as in 'an armed force', but, read together, signifies 'a country's military forces, especially army, navy and air force'.<sup>105</sup> The term 'persons forming part of', instead of simply 'soldiers' or 'members', already underscores the inclusive drafting. The 'militia and volunteer forces' category mentioned in Article

<sup>100</sup> HC IV, *supra* note 4; AP I, *supra* note 5. See generally Freeman, 'Responsibility of States for Unlawful Acts of their Armed Forces', II RDC (1955) 267.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Armed activities on the territory of the Congo*, *supra* note 7, at paras 214–220.

<sup>103</sup> *Ibid.*

<sup>104</sup> HC IV, *supra* note 4.

<sup>105</sup> *The New Oxford American Dictionary* (2nd edn, 2005).

1, paragraph 4 interacts with that of ‘persons forming part of the armed forces’ in Article 3 of the Convention, applying the ‘laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps . . . . In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army”.’ So, while there is a distinction between ‘army’ and ‘militia and volunteer corps’, some such militia and volunteer corps fall under the term ‘army’. Thus one arrives at three categories: the national army proper, militia and volunteer forces incorporated (into the army), and other militia and volunteer forces not part of the army, but belonging to the armed forces of a state.<sup>106</sup> Additional Protocol I supports this interpretation.<sup>107</sup>

Moreover, API contains in its Article 43.1. a provision entitled ‘Armed Forces’ that, at least a partial definition for the purposes of AP I:

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

Can contractors’ personnel providing combat, interrogation, or guarding and protection services fall under this provision? The answer is in the negative if states are free to decide entirely subjectively who constitutes or forms part of their national army, *and* this logic extends to all armed forces they employ in an armed conflict. That is to say, the only way for a unit to become part of the *armed forces* of a state would be by formal incorporation.

But could they qualify as militia and volunteer forces or, in the language of AP I, an ‘armed group or unit’? It is admittedly likely that, at least in 1907, the negotiators, mostly military men, would have found it quite startling to qualify otherwise private individuals as forming part of the armed forces of a state – even today that may seem counterintuitive to some. However, it would clearly have been equally counterintuitive to them, and they would be likely to have abhorred the idea that, within a century, states at war would hire contractors in a theatre of conflict to conduct the interrogation of prisoners, protect their high-ranking officials, guard buildings or convoys, or even engage in combat. Hence, a careful interpretation of the relevant provisions in the light of the new reliance on private individuals for coercive services is in order.

## **B The Exclusion of Persons Following or Accompanying the Armed Forces**

Can contractors exercising coercive services constitute militia and volunteer forces or armed groups and units when operating in armed conflict or occupation? A preliminary question is whether they are specifically excluded as ‘individuals who follow an

<sup>106</sup> See Kalshoven, ‘State Responsibility for Warlike Acts of the Armed Forces’, 40 *Int’l & Comp LQ* (1991) 827, at 834.

<sup>107</sup> AP I, Art. 91, *supra* note 5, and accompanying text.

army' (HR 1907), or 'persons who accompany the armed forces' (GC III referred to in AP I), which seems to be the position of the United States independently of the service the contractors offer.<sup>108</sup>

In the section dealing with prisoners of war, the Regulations attached to HC IV refer in their Article 13 to '[i]ndividuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors'. This may give the impression that military contractor personnel were purposely excluded from the scope of the armed forces. Armed contractors could theoretically be accommodated within the Article in two ways: first, by bringing them in under the heading of 'contractors' or, secondly, by adding them to the list, assuming it is not exhaustive. Both approaches should be rejected: First, the term 'contractor' as used in English has only recently acquired a meaning that includes coercive services in a zone of armed conflict. It could thus not have been the intention of the drafters specifically to include such contractors under this heading. Secondly, the authoritative French text of the 1907 Convention confirms that the term 'contractor', or in French '*fournisseur*', applies only to people supplying goods and does not refer to contractors who are expected or instructed to employ coercive force beyond self-defence.<sup>109</sup> Extending the category to include such services does not seem warranted. Additional Protocol I confirms that contractors' personnel exercising coercive functions do not fall into the category of people accompanying the armed forces without belonging to them. Lacking a provision dealing with contractors, AP I in Article 50 negatively defines civilians as anyone not listed in Article 4(A)(1), (2), (3), and (6) of the Third Convention and in Article 43 of the Protocol. Contractors, however, are defined in Article 4A(4) as '[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'.<sup>110</sup>

None of the functions exercised by the examples listed is coercive. Additionally, the translation of '*fournisseurs*' is now 'supply contractors', further clarifying that the functions the drafters had in mind exclude coercive services. Thus contractors' personnel exercising coercive force fall neither under Article 13 of Hague (IV) of 1907, nor under Article 4A(4) of GC III negatively referred to in AP I.

### C *Contractors as Militia or Volunteer Forces or Armed Units?*

The next question is whether any contractors providing combat, interrogation, or guarding and protection services could be considered members of a volunteer force or, as AP I puts it, an armed unit. HR Article 1 uses the expression 'volunteer corps' without providing a definition. The ordinary meaning of 'volunteer' can be expressed as 'a person who

<sup>108</sup> See Department of Defense, Instruction No. 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States. Certain Service Members, and Former Service Members, available at: [www.js.pentagon.mil/whs/directives/corres/pdf/552511p.pdf](http://www.js.pentagon.mil/whs/directives/corres/pdf/552511p.pdf), at 9–10.

<sup>109</sup> In fact, the prevalence in the literature of qualifying the modern-day contractors I discuss here as 'armed contractors' already points to the fact that the unqualified term is usually used to refer to a person not armed for the purposes of conducting his or her business.

<sup>110</sup> GC III Relative to the Treatment of Prisoners of War.

freely enrolls for military service rather than being conscripted, especially a member of a force formed by voluntary enrollment and distinct from the regular army'.<sup>111</sup> A 'force' can in turn be taken to indicate a 'group of people brought together and organized for a particular activity', a 'corps' as a 'body of people engaged in a particular activity'.<sup>112</sup> Oppenheim, writing in 1905, also underscores the notion that volunteers would need to operate 'in bodies, however small'.<sup>12</sup> Similarly, the language of 'organized groups and units' of AP I was purposely drafted very broadly. First, the term 'organized' serves to exclude uncoordinated actions by individuals who may participate in hostilities at the same time and possibly react to the same stimulus, but who do not sufficiently coordinate their attacks to be viewed as a group. Secondly, individuals not reaching a certain number to be viewed as acting independently of the greater armed forces of a party do not meet the definition of Article 43. It emerges thus that the definition of a volunteer force contains three elements: voluntary enrolment as opposed to conscription, the requirement of an organized group, and participation in the military effort beyond the types of activities excluded under the provision dealing with people accompanying the armed forces, by providing a coercive task on behalf of a state in a theatre of conflict. Regarding the first requirement, the contractors providing combat, interrogation, or guarding and protection services all enrolled freely by signing a contract with a PMSC. The second requirement, i.e. whether the contractors constitute a distinct group, needs to be analysed more closely and separately for the different services. In all likelihood, a contractor combat force will meet the group requirement.<sup>113</sup> As regards guarding and protection services, experience from Iraq shows that PMSCs usually provide teams which, for example, drive and protect convoy missions.<sup>114</sup> How about contractors providing interrogation support? One would expect that such sensitive tasks would be likely to be closely integrated with the national military, and that there would as a consequence not be a coordinated group of contractor personnel to speak of. Known examples of interrogation contractors are less clear, and may or may not qualify as a distinct group.<sup>115</sup>

In sum, the proper classification of contractors exercising services on behalf of a state as a volunteer force will depend on their organization as a recognizable group,

<sup>111</sup> *The New Oxford American Dictionary*, *supra* note 106.

<sup>112</sup> *Ibid.*

<sup>113</sup> Sandline's contract with Papua New Guinea specified a 'Strike Force' of 70 people: Agreement for the Provision of Military Assistance Between the Independent State of Papua New Guinea and Sandline International dated 31 Jan. 1997, available at: [www.c-r.org/our-work/accord/png-bougainville/key-texts14.php](http://www.c-r.org/our-work/accord/png-bougainville/key-texts14.php).

<sup>114</sup> For example, Blackwater operated personal motorcade protection in Iraq with security teams consisting of a 'Personal Security Detail' or PSD, and a Combat Assault Team (CAT). A common size for such teams seems to be 4 to 6 people each. Moreover, in general the teams seem to be rather coordinated, with some firms such as Blackwater even operating armed helicopters to support missions: G. Schumacher, *A Bloody Business: America's War Zone Contractors and the Occupation of Iraq* (2006), at 172.

<sup>115</sup> The diary of a contractor employee working at Abu-Ghraib illustrates that contractors were operating in small teams of 2, conducted some interrogations completely independently, and were housed separately, albeit on the premises. See *Diary of Joe Ryan, employee of CACI International at Abu-Ghraib*, available at: [www.sourcewatch.org/index.php?title=Joe\\_Ryan\\_Abu\\_Ghraib\\_diary\\_April\\_2004](http://www.sourcewatch.org/index.php?title=Joe_Ryan_Abu_Ghraib_diary_April_2004).

whether they operate in close coordination with, or more independently from, the national armed forces. A further factor will be how coercive the nature of the task they exercise on behalf of the government is, especially taking into account the nature of the zone they operate in. If it is expected that they exercise coercive means beyond self-defence on a routine basis, they can qualify. Hence, the clearest case will be combat contractors, while certain convoy or personal protection contractors may qualify when they operate their missions as a recognizable independent group. The interrogation example seems most doubtful, especially where the situation resembles more the close integration of a small number of individuals into an operation run by the national armed forces.<sup>116</sup>

#### D 'Under a command responsible'

Article 43.1. of AP I further requires that, for a group or unit to become considered part of the armed forces of a state, it needs to be under a command responsible to a party to the conflict for the conduct of its subordinates. There is not much guidance to be had from the Commentaries, let alone the *travaux préparatoires* of Additional Protocol I. Yet, the ordinary meaning of being 'responsible to', which can be defined as 'having to report to (a superior or someone in authority) and be answerable to them for one's actions',<sup>117</sup> provides a starting point. Actual contracts do specify oversight by a specific government official. Control was ascribed to the relevant Regional Security Officer (RSO) of the US State Department (in the personal protection examples from Iraq), and the CIA (Abu-Ghraib) respectively.<sup>118</sup> Note that AP I does not specify that this need necessarily be a 'military command', leaving open the possibility that a civilian agency or its designated official could command such an armed unit.

Responsibility of the unit to the party should be broadly construed. *Unlike* the general law of state responsibility, Article 43.1. merely seeks to establish a factual link between the group or unit and the state. Where a state inserts a unit into an armed conflict by contracting with it for the provision of coercive services, or for services that are expected to entail the use of coercive measures beyond self-defence and the other elements I discussed are fulfilled, this link will be *prima facie* established. After all, the contractor will be expected to write reports, submit receipts, and otherwise fulfil the terms of the contract, subject to the cancellation of the contract if performance is unsatisfactory.

Thus, the contractors' personnel can be considered members of the armed forces of the hiring state under Article 3 HC IV and Article 91 AP I for the duration of the contract and the armed conflict. This need not open the floodgates of international responsibility: a state that hired contractor personnel to perform a coercive service

<sup>116</sup> Of course they will still be likely to qualify for the exercise of governmental authority or *de facto* organ status.

<sup>117</sup> *The New Oxford American Dictionary*, *supra* note 106.

<sup>118</sup> Taguba, 'Article 15-6 Investigation of The 800th Military Police Brigade (Secret/No Foreign Dissemination)' (The Taguba Report) (Washington, DC, Department of Defense, 2004).

can avoid responsibility by demonstrating that the contract in question was neither for the provision of coercive services nor for services entailing the use of coercive force beyond self-defence in a zone of armed conflict, or show that the contractual relationship had ended. A party could similarly demonstrate that the group otherwise lost the connection to the state – in an extreme situation, the contractor firm may itself become a party to the conflict.

### *E Can the Requirements for POW Status Exclude Responsibility?*

A second question is whether the provisions of Article 1 of the Regulations and Article 43 of AP I put additional limitations on the kind of units that can give rise to state responsibility for the armed forces. I will discuss the two provisions in turn. Article 1 of the Hague Regulations extends the ‘rights, laws, and duties of war’ to certain militia and volunteer forces, ‘commanded by a person responsible for his subordinates’; ‘have a fixed distinctive emblem recognizable at a distance’; ‘carry arms openly’; and ‘conduct their operations in accordance with the laws and customs of war’. Article 1 of the Regulations, while illustrating the scope of the armed forces of a state, does not in all its provisions impact on the responsibility of the state. First, the provision specifically addresses the rights and duties of the militia and volunteer forces, not of the state they belong to.<sup>119</sup> State responsibility, however, is concerned with the rights and duties of the state to which the conduct may be attributable. Secondly, understanding the requirements of Article 1 as factual limitations on the kinds of volunteer units and militia for which the state could be responsible would yield nonsensical results. Consider that a state could not incur responsibility for a violation of IHL committed by a volunteer who failed to carry his arms openly, or for the conduct of a militiaman whose unit regularly violated the laws of war. While the unit in question may lose certain privileges and rights if it does not comply with the requirements of Article 1, this has no impact on the responsibility of the state of whose armed forces it may form part. Similarly, Article 43 of AP I imposes the requirement of being ‘subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict’ as a requirement for combatant status.<sup>120</sup> However, this question should be clearly distinguished from the definition of armed forces for the purposes of attribution under IHL. Otherwise contractors performing coercive services who meet the definition of armed forces and possess a factual link to a party would not be people forming part of the armed forces under Article 91 of AP I if they did not display an internal discipline system, and/or the

<sup>119</sup> L.F.L. Oppenheim, *International Law – A Treatise* (1905), at 90, discussing the factors (on the basis of the 1899 Convention) decisive for whether a unit would be afforded the ‘privileges of belligerency’.

<sup>120</sup> See, e.g., Schmitt, ‘War, International Law and Sovereignty: Reevaluating the Rules of the Game in a New Century – Humanitarian Law and Direct Participation in Hostilities by Military Contractors or Civilian Employees’, 5 *Chicago J Int’l L* 511, at 523ff; Cameron, ‘Private Military Companies: their Status under International Humanitarian Law and its Impact on their Regulation’, 88 *Int’l Rev of the Red Cross* (2005) No. 863, at 585 (focusing on combatant status but noting that the intent of a state to outsource in itself would render it illogical to consider the unit so hired as a paramilitary force).

hiring state failed (effectively) to enforce 'compliance with the rules of international law applicable in armed conflict' against the contractors' personnel. However, the very wording of Article 43 hints that this is not the appropriate construction of the provision. The first sentence of Article 43.1 employs a definition stating that 'the armed forces' 'consist of' and then supplying the different components. The second sentence, however, takes the 'armed forces' already as a given, and specifies rules *operating on* the armed forces. This interpretation is confirmed by the use of the word 'such' at the beginning of the clause, indicating that 'armed forces' composed in the way described in the first sentence trigger other obligations. The addressees of these obligations are not expressly mentioned, which may be due to the desire of the drafters to ensure their applicability both for states, which thus have a duty to ensure an internal discipline system and enforce compliance with IHL, but also for armed forces acting independently of recognized states, in which case they or the movement they represent will be the addressees of the obligations as parties to the conflict.

As was the case in my analysis of Article 1 HR above, failure by the hiring state to 'subject [its contracted unit] to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict' surely could not result in the consequence that such state could in turn not be held responsible for violations of IHL or HRL by the personnel of that unit under the customary rule of attribution in the laws of war. If a state were free to structure the content of this responsibility in a way that would circumvent Article 43 by not imposing obligations on a contractor unit, the provision would be rendered absurd. An examination of the *travaux préparatoires* of AP I confirms that a failure to meet the criteria of being 'subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict' does not exclude a unit from the armed forces.<sup>121</sup>

As we have seen, contractors exercising coercive services under a contract with a state can be considered persons forming part of the armed forces of a state under Articles 3 of Hague IV, and 91 and 43 of AP I. Contractors providing such services are not excluded from the armed forces as 'persons following the armed forces'. As regards their inclusion under Article 43 as groups and units 'responsible to a Party', I have argued that contractors can meet the three key requirements: as regards organization, coordinated groups of contracted employees working together to provide a service may well qualify. With respect to a command responsible to a party, again a group of contractors who report to an officer of the hiring state should meet the requirements. Lastly, the further elements set out in Article 43 dealing with enforcement of IHL will not shield a state from responsibility for contracted personnel that meets the

<sup>121</sup> See Swiss Federal Council, Official records of the Diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts, Geneva, 1974–1977 (1978), Vol. XV, at 414, CDDH/236/Rev.1; XV, Report on the Articles adopted by the Committee 390, CDDH/236/Rev.1; Vol XIV, at 294, CDDH/III/SR.30; Vol XIV, at 296, CDDH/III/SR.30; Vol XIV, at 297, CDDH/III/SR.30; Vol XIV, at 296, CDDH/III/SR.30; Vol XIV, at 297, CDDH/III/SR.30; but see Vol. VI, at 116, CDDH/SR.39.

other requirements, as the provisions set out obligations of the units and the party they belong to. A failure properly to exercise these obligations will not sever a link between the contractor unit and the state hiring it if the other elements supporting responsibility are established.

## 4 Conclusion

In comparing responsibility of a state for a classical soldier to all the options for attribution of private conduct, a responsibility gap becomes evident: unless a state outright incorporates the contracted personnel into its armed forces, or the contractors can be regarded as completely dependent on the state (a tough burden of proof to meet), the state will always face less responsibility for acts of those persons than for acts of soldiers, and its responsibility will be harder to prove. The gap remaining between responsibility of the hiring state for attributable contractor and soldiers' conduct consists in the lack of responsibility of the hiring state for the off-duty conduct of contractors not part of the armed forces, or for exercising elements of governmental authority, such as interrogation and combat contractors, and the *ultra vires* or uncontrolled conduct of other contractors exercising coercive services, such as those providing guarding and protection services. Faced with this gap and the danger that states will strategically exploit it to minimize their international responsibility, authors have emphasized the role that positive obligations of states with respect to contractors' conduct may play to close it.

By analysing these obligations, I have shown that positive obligations of the state under IHL narrow this gap to some degree. The gap closes in international armed conflict with respect to interrogation contractors in POW camps, but the off-duty conduct of combat and guarding and protection contractors would still be checked only by the general duties to vet, train, instruct, and report, and possibly to prevent known ongoing violations. In occupation, the off-duty conduct of contractors providing coercive services may give rise to responsibility of the hiring state where it failed to exercise due diligence in supervising them. In non-international armed conflict, only the general duties to vet, train, instruct, and report could narrow the gap, exposing the state to a substantially lower responsibility risk as compared to the conduct of its national soldiers.

Adducing positive due diligence obligations under HRL to equalize responsibility for contracted personnel exercising combat, guarding and protection, or interrogation services with responsibility for the states' own soldiers is subject to a twofold limitation: first, limits on the extraterritorial application of the HRL instruments and, secondly, the due diligence nature of the obligations.

Extraterritorial applicability will have to be tested on a case-by-case basis. In the case where the responsibility gap arises, that is where the conduct of contractors is not attributable to the hiring state, the requisite control will have to be exercised by the national armed forces or other state agents, including contractors whose conduct *is* at the time attributable to the hiring state. Territorial control over the area in which the violation happened may exist by virtue of an occupation or other territorial



control, for example during an invasion. Physical control on the other hand, putting individuals in the power of the hiring state, exists for example over individuals who are kidnapped or arrested in an impromptu fashion or detained more formally in a detention facility. All three instruments discussed will apply where the hiring state is an occupying power, or where the violations occur in an area controlled by agents of the hiring state. However, where combat contractors are off duty, or guarding and protection contractors engage in conduct outside their instructed duties, and the area they operate in is not controlled by the hiring state, there will not be a basis for extra-territorial jurisdiction unless there is physical control over the victims. Where the victims at the time of the violation either are under the control of the hiring state or have been handed from hiring state control into contractor control, jurisdiction can also be established under all three systems. However, where the hiring state does not have control over the persons interrogated, the off-duty conduct of these contractors will not be within the reach of any of the three instruments I discussed.

If applicable, the reach of the duty to prevent under the different instruments varies. The Human Rights Committee recognizes a due diligence duty of states to intervene where there is a credible threat to the lives of people under their jurisdiction and, regarding the prohibition on torture or cruel, inhuman, or degrading treatment or punishment, a duty to prevent abuse by third parties by *inter alia* training interrogation personnel and reviewing and supervising interrogations. Where the ICCPR applies, states will in a given situation be likely either to have the requisite control to attribute under ILC Article 8, or to have violated their positive obligation to control such interrogations. The state also incurs a quasi-heightened duty to prevent recurrence of similar violations.

The American Convention on Human Rights as interpreted provides for a very high, albeit not strict, responsibility where initially healthy people die in custody, closing any possible gap left with respect to uncontrolled or off-duty conduct of detention or interrogation contractors.

Where applicable, the ECHR, under Articles 2 and 3, may establish a duty on hiring states to plan any security operation which risks threatening the right to life, where they hire the third party, even if the risk stems from uncontrolled or off-duty conduct of contractors' personnel involved in such operations. On the other hand, the duty to prevent by intervening does not seem to offer much help in filling the regulatory gap unless the Court would be willing to expand the identification requirement for potential victims to a location. Then the duty could be more helpful. Under Article 3 ECHR states have to ensure that detainees are not subject to potentially lethal attacks at the hands of third persons; thus, where applicable, closing the regulatory gap that would materialize if one were of the view that interrogation and detention are not the exercise of governmental authority, or if PMSC personnel violate detainees' rights when off duty.

As we have seen, the positive obligations of states with respect to the conduct not attributable to them that I have discussed here under the heading of the obligation to prevent human rights abuses constitute obligations of due diligence. Thus, even if extraterritorial jurisdiction can be established, the hiring state will not be held

responsible if it can demonstrate that it exercised due diligence with respect to the contractors' conduct. Positive obligations of hiring states with respect to conduct not attributable to them are of course important, and may in the specific situations where they are applicable contribute to ensuring that a hiring state will not effectively circumvent responsibility it would incur for soldiers by relying on contractors. Yet, bringing responsibility to bear will be much more difficult due to a multitude of factors, including the limited reach of positive IHL obligations in non-international armed conflict, the uncertainty inherent in the concept of due diligence, and the complex questions extraterritorial application poses in the HRL systems. Thus responsibility *qua* positive obligations is very far from the simple and effective responsibility rule that states envisaged for armed conflict when they first codified state responsibility for violations of IHL by state forces in 1907.

The present article suggests that certain contractors exercising coercive functions do not fall into the category of persons accompanying the armed forces, and can indeed be attributed to the hiring state as members of the armed forces. Where they are organized as a recognizable group and are expected to 'shoot back' beyond self-defence on a routine basis, the hiring state will be responsible under Article 3 of HC IV and Article 91 of AP I. Hence, the clearest case will be that of combat contractors, while certain convoy or personal protection contractors may qualify provided they operate as a recognizable independent group. The interrogation example seems most doubtful, especially where the situations resembles more the close integration of a small number of individuals into an operation run by the national armed forces. I have furthermore shown that neither the requirements that they be under a command responsible to a party, nor the often adduced criteria for obtaining POW status, ultimately exclude this classification.

At present, states are free under international law to outsource functions in armed conflict, such as guarding and protection, interrogation, or even combat, which formerly were in the exclusive domain of soldiers. However, while they may spend the money, they are not free to 'pass the buck' with respect to responsibility. Where contractors function as armed groups and are responsible to the party through their obligations under a contract, responsibility for all their acts, as first envisaged by states in 1907, will lie.