

PRIVATE MILITARY COMPANIES
and the Interrelationship of
TREATY LAW and CUSTOMARY INTERNATIONAL LAW:
How to Determine the Applicable Law?

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ACRONYMS

AP I	the Additional Protocol I of 1977 to the Geneva Conventions of 1949
GC III	the Third Geneva Convention of 1949
ICJ	the International Court of Justice
ICRC	the International Committee of the Red Cross
IHL	International Humanitarian Law
ILA	the International Law Association
NGO	Non-Governmental Organization
PCIJ	the Permanent Court of Justice
PMC	Private Military Company
PMSC	Private Military and Security Company
POW	Prisoner Of War
UN	the United Nations
UNGA	the United Nations General Assembly
VCLT	the Vienna Convention on the Law of Treaties

1 INTRODUCTION

1.1 Background

During the last two decades, the methods of warfare have undergone significant changes as a consequence of (inter alia) the end of the Cold War. These changes relate both to *how* and *by whom* armed conflicts are fought. In general, conflicts today do not often resemble traditional¹ grand battles between state armies. New kinds of threats, technologies, and interests have led to more interstate conflicts, and to a rapid growth of participating private actors. The “privatization” of warfare occurs both at the bottom-up level, e.g. local warlords and guerilla bands, and top-down, i.e., the outsourcing of state army functions to private entities.

The outsourcing of military tasks to private actors is not an entirely unfamiliar occurrence; historically it has often been undertaken in different forms and scopes, sometimes even the whole of a state’s armed force has been constituted by these type of actors and not only forming a part thereof.² However, in the present time the outsourcing of military services is not uncontroversial. Under international humanitarian law, the direct participation of civilians in conflicts is illegal.³ And yet, the use of contractors by states is vast; for instance, in the armed conflicts in Afghanistan and Iraq, the use of private contractors has been so vast that some commentators have termed the conflicts as “privatized wars”.⁴ These modern contractors operate within corporate structures, in companies specializing in the provision of military services. The contracts are assigned to and fulfilled by companies, not individuals.⁵

The use of these private military companies⁶ (PMC) by states seems to be perceived as an increasingly accepted practice, not least suggested by its widespread use and that PMCs are increasingly participating directly in conflicts.⁷ Hence, seemingly there is a discrepancy between the written law on the one hand, and state practice on the other.

¹ By “traditional” I mean warfare that is conducted accordingly to the Westphalian paradigm by standing national armed forces; see further section 2.1.1, and Singer, *Corporate Warriors. The Rise of the Privatized Military Industry and Its Ramifications for International Security* (2001/02), p. 195.

² Holmqvist, *Private Security Companies. The Case for Regulation*, (2005), p. 1.

³ Civilians participating directly in hostilities are sometimes referred to as “unprivileged” or “illegal”/“unlawful” combatants; these notions are not accurate to IHL since a civilian will not be labeled a combatant due to the participation, and because only the acts carried out by the civilian can be determined as illegal/unlawful, and not the individual as such. Doswald-Beck, *Private military companies under international humanitarian law*, (2007), p. 125. The notion of “direct participation in hostilities” is not clear cut: see the definition in section 1.4, and the ICRC *Interpretive Guidance* (2009), in particular part 2.B, p. 41.

⁴ Holmqvist, (2005), p. 1.

⁵ Kinsey (2006), pp. 152, 158.

⁶ See the definition in section 1.4.

⁷ Faite, *Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law*, (2004), p. 3. The notion of “direct participation in hostilities” is not clear cut: see the definition in section 1.4, and the ICRC *Interpretive Guidance* (2009), in particular part 2.B, p. 41.

PMCs and the participation in conflict by their employees⁸ prompt the question of how one should determine which rules to apply. The dichotomy of treaty law and custom – which may or may not become customary law – comes into the fore.

1.2 Purpose and disposition

The purpose of this paper is to explore some aspects of the complexity of international law, both in its written and unwritten forms, against the backdrop of a changing international order and the emergence of a previously unknown subject in its sphere, the PMC. The core of the paper centers around the issue of how one determines the content of treaty and general international customary rules, and how one determines which law is the applicable law, both in a general sense and a specific one concerning the employees of PMCs.

The paper is divided into six parts. The content of them may easiest be described by these guiding questions:

1. What is a PMC, and why did the private military industry emerge?
2. What is the interrelationship between treaties and customary law, and how can a conflict of norms be solved?
3. What are the significant traits of a treaty and its existence as a written law?
4. How is conventional IHL structured, and how has the issue of PMCs been regulated in other documents?
5. What is meant by general international customary law, and how can one determine its rules?
6. How does one determine the applicable law concerning the status of PMC employees?

1.3 Material and problems encountered during research

To gather information about PMCs, I have mostly relied on articles and books written by academics, and studies made by legal advisers at the ICRC. Also, several internet sites with databases with information about PMC contracts, both as to quantity and substance, and home pages of the companies themselves have provided an overview of the industry.

Sources theory and treaty theory build on scholar books and articles, as well as Reports of the ILC and the Vienna Convention on the Law of Treaties. The part on IHL builds mainly on the text of

⁸ IHL does not address legal persons, so issues of status and obligations can only be voiced in relation to the physical persons operating within the corporate structure; see Gillard, *Business goes to war: private military/security companies and international humanitarian law*, (2006), p. 430.

conventions and other international instruments, and some doctrine on the current status of conventional IHL.

The chapter on customary international law is a study of several cases from the ICJ and the PCIJ, various doctrines, the ILA report on the formation of customary international law, and the ICRC study on customary rules of IHL.

I encountered several problems during the research on PMCs. First and foremost – there is no uniformity in the terminology applied. The companies have been called Private Security Companies, Private Military Companies, Private Military Firms, Private Military and Security Companies, as well as Mercenary Companies, without an unambiguous meaning attached to any of these notions. This means that one generally has to read quite a bit of all material encountered before determining whether it is relevant or not. Furthermore, there are no official statistics on how many companies operate where and which kind of tasks they perform. Thirdly, there are vast amounts of material written on PMCs from all kinds of aspects, which made it even more difficult to maneuver through the information.

The vast amount of material applies to the subject of customary international law as well. I have strived to bring forth opposite and varying interpretations, yet knowing that the scope of this paper does not leave room to convey them all thoroughly.

1.4 Definitions

For the purpose of this paper, the following working definitions are used:

Contractor: A civilian person hired on a short-term contract to perform military services for a state.

Direct participation: To perform an act with the purpose of adversely affecting military operations of a party to an armed conflict and the act is likely to cause such an effect.

Mercenary: A person who takes a direct participation in hostilities with the motivation of financial gain and without being a member of the armed forces or a national of a party to the conflict.

Outsourcing/Privatization: When a state institution submits to a private entity the task of performing a service that falls within the public sphere of the state in question. The two words are used interchangeably in this paper with no intended difference in their meaning.

Prisoner of War: A person who may not be prosecuted for participating in hostilities when captured by a state during an international armed conflict.

Private military company: A company that sells military services amounting to direct participation in hostilities to a state; the determining part is the nexus to the outcome of the conflict, and not the specific type of the tasks performed.

2 PRIVATE MILITARY COMPANIES

In this section, I will give an overview of the underlying reasons for the emergence of the PMC industry, as well as outline its characteristic nature – both as to how it is organized and how it is used.

2.1 Background

Several different factors are often commonly referred to as contributing to the emergence of the private military industry. Before sketching them out, a few words about the political order of the international society in the 20th century prior to the 1990's are warranted.

The aim with this short introductory backdrop is not to give an elaborate analysis on the matter or dwell over any particulars; the purpose is rather only to highlight some elements that can be claimed to have transformed during this period in a manner that made way for the spread of PMCs.

2.1.1 The nation-state, its monopoly on legitimate violence, and the Cold War

By the Westphalian theory of the international system, the Peace of Westphalia in 1648 established the concept of equal sovereignty between states, meaning that no state (or any other subject) could exercise any authority over another state without its consent.⁹ This principle strengthened the further development of the nation state which had begun to “assume the typical features of a modern State” in the 15th century. These features were, inter alia, permanent institutions that gathered authority over several functions and vested the power over them in the state, together with a centralized bureaucracy.¹⁰ The state became an entity with which the citizens could identify themselves, and with rising nationalism and patriotism the state apparatus grew ever stronger.

Some functions encompassed by the public sector came to be a part of “the nation-state’s defining characteristics”, such as the government of schools, welfare programs, prisons, and defense manufacturing.¹¹ The most significant function exercised by the modern nation state was the use of violence. Weber held in his definition of state sovereignty that the state holds a monopoly on the use of violence, meaning that violence can only be legitimate when exercised by public institutions.¹² This understanding of a division between “public” and “private” violence, the latter being exercised by

⁹ Cassese, *International Law* (2001), pp. 20f. Arguably, equal sovereignty between states is rather a more theoretical concept than real. Nonetheless, its influence and importance for the structure of the international society can hardly be overestimated.

¹⁰ Ibid.

¹¹ Singer (2001/02), p. 198.

¹² Weber, *The Vocation Lectures: “Science as a Vocation”; “Politics as a Vocation”*, (2004, original speech given in 1918), p. 33.

private subjects and hence illegal, was the ideal that left a distinct footprint on international humanitarian law.¹³

By this token, warfare was considered as the business of the state and that the military should comprise citizens as soldiers, fighting for their nation and the protection of moral values. To hire private providers of force, such as mercenaries, is considered in this paradigm as inherently immoral.¹⁴ War between states was fought by large battalions clashing on battlefields, leaving huge numbers of casualties behind.¹⁵

With the beginning of the Cold War, the international society entered into a period of “hypermilitarization”.¹⁶ Strong standing armies were created, and the occupation of the professional soldier became much more common. Apart from keeping substantial forces in stand-by at home ground, significant numbers were sent by the great powers to weak states of strategic interest.¹⁷ The end of the Cold War brought major changes to the world order, making it possible for PMCs to fully emerge.

2.1.2 National and international political changes and the rise of the private military market

With the change of political structures in the beginning of the 1990s, the threat level of violence on a global scale was no longer regarded as constantly high and imminent. Interstate conflicts became less common and states were less inclined to intervene in domestic conflicts of other states. Moreover, the military commitment in proxy states was gradually terminated. Consequently, there was no need to maintain the same level of militarization and many states downsized their national armed forces quite rapidly.¹⁸ An estimated 6-10 million soldiers were dismissed worldwide, creating an immense pool of unemployed people whose greatest asset was their highly specialized military skills acquired from the army.¹⁹ At the same time, a huge surplus of cheap weapons (especially from the Soviet Union) became easy to acquire, and together these two factors laid the ground for a flourishing private military industry.²⁰

When the need for military skills began to rise again, states chose not to re-hire soldiers to their armed forces; instead, various military tasks were outsourced to private companies. This solution was, and still is, actually in line with prevailing political ideals (in Western countries) in the post-Cold

¹³ See section 3.1 on IHL.

¹⁴ Baker, *Of ‘Mercenaries’ and Prostitutes. Can Private Warriors Be Ethical?* (2008), p. 30.

¹⁵ The ICRC *Interpretive Guidance* (2009), p. 4.

¹⁶ Singer (2001/02), p. 193.

¹⁷ Gillard, (2006), p. 526.

¹⁸ *Ibid.*; Holmqvist, (2005) p. 2.

¹⁹ Singer (2001/02), p. 193; Alexandra, *Mars meets Mammon* (2008), pp. 89f.

²⁰ Alexandra, *ibid.*

War world.²¹ Neoliberal theories propagate a limitation of state powers to the benefit of the free market. Outsourcing of public functions to the private market is perceived as a positive evolution of society.²² Regarded as a contrast to centralized state systems in communist states, “privatization has been touted as a testament to the superiority of the marketplace over government”.²³ The basic idea is that competition and comparative advantage makes the free market more efficient and more effective than the state.²⁴

The scope of outsourcing grew to encompass those functions that previously had been considered as belonging to the core of the nation-state’s government.²⁵ On the domestic level, security and policing forces are nowadays often provided by private corporations and is generally a rather accepted practice.²⁶ The development on the national plane is arguably a parallel to the international field; O’Brien argues that private military operations on an international level “should not be seen as being different” from private security and policing on the national level.²⁷

Another motive for governments of industrialized democracies to hire PMCs is to keep the official number of deployed military personnel down. Private contractors are easier to keep out of the statistics of casualties in an armed conflict, an aspect that gives a government at least two reasons to use them: Firstly, the state’s own citizens will not be aware of the true and significantly higher cost – both in money and in blood – of a military operation, making it easier to maintain an engagement in an armed conflict for which public support is lacking.²⁸ Secondly, a government can avoid institutional limitations on decisions of deploying military personnel and exceeding the allocated budget.²⁹ A clear example of this issue is the US led “War on Terror”, and the armed conflicts in Afghanistan and Iraq. Neither of these conflicts could have been sustained for such a long period of time were it not for the contractors involved.³⁰

Furthermore, even if a state did not wish to employ PMCs, it might still find itself without the choice not to do so. Computerized weapons systems are becoming ever more complex and usually require special knowledge of how to run them. This is a knowledge that soldiers in the armed forces often do not possess, and therefore private contractors have to be hired for the task.³¹

²¹ Gillard, (2006), p. 526.

²² Kinsey (2006), p. 3.

²³ Singer (2001/02), p. 197.

²⁴ Ibid.; Kinsey, (2006), p. 3.

²⁵ Singer, *ibid.*, p. 198; Holmqvist, (2005), p. 2. See also section 2.1.1.

²⁶ O’Brien, *PMCs, Myths and Mercenaries: The Debate on Private Military Companies*, (2000),p. 61. Singer points out that in some states (e.g. the United States, the United Kingdom, and Russia) the number and budget of private security forces are significantly higher than those of the public ones, Singer, *ibid.*

²⁷ O’Brien, *ibid.*

²⁸ Percy, *Regulating the Private Security Industry* (2006), p. 17; Wulf, *Privatization of security, international interventions and the democratic control of armed forces* (2008), pp. 193f.

²⁹ Percy, *ibid.* p. 16.

³⁰ Avant, *The emerging market for private military services and the problems of regulation*, (2007), p. 184.

³¹ Kinsey (2006), p. 96, 100f; Wulf (2008), pp. 193f.

Developing states, on the other hand, make use of PMCs due to the insufficient capacity of their own armed forces to protect the state and citizens. Powerful states are nowadays rather unwilling to intervene in conflicts which do not affect their interests directly, at the same time as their strategic interest to support the militaries of certain weak states has diminished.³²

The outsourcing of security and military tasks undoubtedly challenge the concept of state monopoly on violence. Maybe it is feasible to speak of an erosion of the monopoly, that the state no longer holds a monopoly and is losing ground to the private market.³³ Another possible interpretation is that it is not a question of erosion, but rather of transformation. The state itself as an institution is being transformed and maybe that process does not make it weaker, only different to the previous definition of the state. Its function is developing from government to governance, where the responsibility is not to carry out certain tasks itself but to allocate them to a proper subject on the private market.³⁴

To a certain extent, the evolvement of political structures in the international society can be regarded as a cyclical process. In the past, when states have downsized their militaries for various reasons, the supply of private military forces increased significantly as unemployed soldiers joined the mercenary occupation.³⁵ However, the crux of this change in our time is the challenge it poses against the image of the state as a solid institution, gradually built up for hundreds of years with a strong hold of certain functions as a part of its very defining characteristics. Wulf expresses concisely that the progression of privatization (in combination with globalization) “can give rise to a process that is almost the reverse of the process through which modern states were constructed”.³⁶

Altogether, it would seem that the step (back) from maintaining a standing army with professional soldiers to hiring mercenary units has been taken with a giant leap. However, would they have been perceived as no different to former types of mercenaries, the use of PMCs would probably have met with greater opposition and not spread so quickly throughout the world.³⁷ An explanation given by Alexandra is that private military companies

“are, in a straightforward sense mercenary organizations – they provide services, including the provision of coercive force, for a fee. But if they are mercenaries, they

³² Chesterman and Lehnardt, *Introduction* (2007), p. 1; Shearer, *Private Armies and Military Intervention*, (1998), p. 27.

³³ O’Brien, Kevin A O’Brien, *What should and what should not be regulated?* (2007), p. 33, stating that “Much of this ‘monopoly’ no longer resides with the state – especially in the developing world – but with agents which it has brought in”; Brayton (2002), p. 303.

³⁴ Alexandra (2008), p. 90.

³⁵ Avant (2007), p. 182, footnote 4; Shearer compares the post Cold War-period to Europe in the mid-fourteenth century when mercenary activity prospered; both periods are marked by a change in the world order and an end to a long period of conflict, Shearer, (1998), p. 13.

³⁶ Wulf (2008), p. 196.

³⁷ There has not been a lack of opposition: “The rise of these corporations in the 1990s, with their view of armed conflict as legitimate business opportunity, has provoked outrage and prompted calls to outlaw such organizations”, Brayton (2002), p. 304. Nonetheless, the industry has still prospered.

differ in important, perhaps fundamental ways from military mercenaries as they have traditionally been understood and operated”.³⁸

This difference is found in their corporate structure – by hiring a company, the state is not using mercenaries but merely outsourcing a task.³⁹ In this way, the outsourcing can be fit neatly into the neoliberal paradigm in the post Cold War-era: the private military company is a company like any other performing a service on behalf of the state. Hence, a private military service provider may avoid the label of being “intrinsically, politically and ethically unacceptable” by being put into a context that is “not generally considered to be inherently problematic”, i.e., the outsourcing of state functions.⁴⁰

2.2 *The Structure of the Corporate Organization*

In short, PMCs can be defined as “profit-driven organizations that trade in professional services intricately linked to warfare”.⁴¹ They may “in a straightforwardly technical sense be considered mercenary organizations” which “have, of course, long been seen as morally and legally illegitimate”.⁴² Yet, the corporate structure has been repeatedly invoked as a legitimizing feature of an otherwise illegal undertaking.⁴³ O’Brien describes PMCs as the “ultimate evolution” of four other types of private military and security actors: mercenaries, private armies/militias, warlords, and private security companies.⁴⁴ For Spicer, a PMC “is the official military transformed into a private sector in a business guise”.⁴⁵

The basics of a private military company’s structure are similar to other corporations: the company has an office; is established as a permanent entity with a regular staff, a board of directors and shareholdings;⁴⁶ it advertises its services and often competes openly for contracts,⁴⁷ it even has a website.⁴⁸

³⁸ Alexandra (2008), p. 90.

³⁹ Ibid.

⁴⁰ Baker (2008), p. 30.

⁴¹ Singer (2001/02), p. 186.

⁴² Alexandra et al, *Introduction. The ethics and governance of private military and security companies*, (2008), p. 2.

⁴³ Ibid.; Kinsey (2006), p. 67; Singer (2001/02), p. 191.

⁴⁴ O’Brien (2000), p. 62.

⁴⁵ As cited in Kinsey (2006), p. 67 (citation from Tim Spicer, ‘Interview’, *Cambridge Review of International Relations*, Cambridge: 1999, vol. XIII, No. 1, p. 166). Spicer founded Sandline, one of the first and most controversial PMCs that mainly participated in combat.

⁴⁶ O’Brien (2000), p. 62.

⁴⁷ Brayton (2002), p. 306.

⁴⁸ Some examples among many others: <http://www.mpri.com/web/>, <http://www.aegisworld.com/>, <http://www.caci.com/>.

The permanent staff of a PMC is kept rather small; instead, they keep vast databases with names of potential recruits. When the company signs a contract it can quickly build an appropriate team for the specific mission.⁴⁹ The teams can consist of personnel from several different countries, and many of them have a background from the Special Forces in their country.⁵⁰ The employees are not exclusive to one particular PMC – the same databases are used by several companies, and the employee can work for quite a few different firms within a short span of time.⁵¹ This kind of setup enables a PMC to offer a wide range of services to many buying states (or to whoever that wishes to pay for it).⁵² Usually a contract signed between a state and a PMC does not specify the exact tasks to be carried out; instead, an open wording is used to enable a flexible fulfillment of the mission, also making it possible for the PMC to subcontract other PMCs.⁵³

The system of using databases with voluminous lists of prospective employees is likely to pose an obstruct for a thorough vetting of each individual; detailed information about their conduct, such as adherence to IHL rules and work ethics, in previous employments is often wanting. This is partly due to the inherent difficulty in overseeing each employee in this type of work, and partly because PMCs themselves are not overly inclined to report any wrongs committed by their employees in fear of tarnishing the company name and losing customers.⁵⁴ The vetting procedure is left to the discretion of each PMC as there are no binding rules regulating this matter. On a regular basis, PMCs do not have adequate knowledge of the background of their employees.⁵⁵

Composing teams in this patchwork manner inhibits the employees from developing a collective group identity. They work on short-term contracts with little time for joint preparation before a specific mission,⁵⁶ and usually there are great disparities between the employees in language, culture, ideology, and nationality etc.⁵⁷ The lowest common denominator will in most cases probably be the financial motive,⁵⁸ which is why PMCs still can be considered as morally problematic. Even if individual employees would share traits and motives with the armed forces of the contracting state, the *raison d'être* of the industry as such is to regard armed conflicts as a business opportunity.

Nonetheless, the corporate structure is still claimed to distinguish PMCs from mercenary organizations,⁵⁹ even though the company can practically be regarded as an empty shell with most personnel employed on an ad hoc basis. Alexandra et al state that as corporations “they are at least notionally capable of being constrained by various forms of national and international regulations

⁴⁹ Percy (2006), p. 20; Holmqvist, (2005), p. 6.

⁵⁰ Brayton (2002), p. 309.

⁵¹ Holmqvist, (2005), p. 6.

⁵² Singer (2001/02), p. 191.

⁵³ Holmqvist (2005), p. 31; Wulf (2008), p. 188.

⁵⁴ Singer (2001/02), p. 215.

⁵⁵ Percy (2006), p. 20; Holmqvist (2005), p. 29.

⁵⁶ Krahmman (2008), p. 256.

⁵⁷ Venter, *War Dog. Fighting Other People's Wars: The Modern Mercenary in Combat* (2006), pp. 20f.

⁵⁸ *Ibid.*, p. 5.

⁵⁹ Singer (2001/02), p. 192.

and accountable to the interests of stockholders and other interested parties”.⁶⁰ However, even if supposing that the company and its executives would be held responsible in practice too, it would not automatically mean that such accountability would in any way affect the behavior of the employees so as to distinguish them from individuals operating within other mercenary organizations.

2.3 State usage of PMC:s in international armed conflicts

In this subsection I will give a general description of how the PMCs are used by states in international armed conflicts, as well as an exemplification of such cases. The point is only to make a short illustration, as an attempt to thoroughly survey the industry falls beyond the scope and space limits of this paper.

The fact that PMCs have flourished and significantly affect the outcome of conflicts is often referred to as a common knowledge in the discourse. However, it is actually quite difficult to obtain exact information regarding the numbers of contractors used as well as the tasks they have been assigned.⁶¹ This circumstance is not very surprising given that much of the industry is veiled in secrecy since one of the major reasons for a state to hire a PMC is to avoid public oversight. Therefore, most analyses are based on estimations only.

By far, the largest use of PMCs in any conflict has been by the US in the armed conflicts in Iraq and Afghanistan. Estimations for Iraq placed the number of contractors on a 1:1 ratio compared to US troops in August 2007; 127,000 private military contractors were employed by the US Department of Defense alone, while the number of US troops was 145,000. About 25,000 contractors were armed and worked with personnel, transport and site protection, outnumbering the British contingent of 8,500 troops and, consequently, private contractors actually constituted the second largest contingent of the operation.⁶² In Afghanistan, the number of contractors used “is difficult, if not impossible, to estimate”.⁶³ Percy aptly observes that “[i]t is surprising, and ought to be unacceptable for governments and the public, that an industry with the power to affect the course of conflict around the world is so difficult to quantify”.⁶⁴

Any determination of the concrete influence that PMCs have in an armed conflict hinges on the notion of *direct participation*. Only if performing tasks that amount to taking a direct participation in

⁶⁰ Alexandra et al (2008), p. 2.

⁶¹ Gillard, (2006), p. 526. Some attempts have been made at gathering information about the specifics of contracts, see for instance <http://projects.publicintegrity.org/wow/> and <http://www.defense.gov/contracts/>

⁶² Krahnmann (2008), p. 254.

⁶³ Percy (2006), p. 21.

⁶⁴ Ibid.

the conflict will the status of the employees be unclear under conventional IHL.⁶⁵ The crux here is of course the inherent difficulty in defining exactly which acts count and which do not; the requirement of a sufficient nexus between the act and damage caused to the adversary leaves room for a considerable grey zone.⁶⁶ Important to bear in mind is that it is irrelevant to distinguish between offensive and defensive acts in this question.⁶⁷ Neither is it relevant to consider the proximity between the protagonist and the target; a considerably greater damage may very well be caused to an opponent by a contractor sitting in an office building mapping out military objectives than by an armed soldier on the battlefield.⁶⁸

PMCs are regularly performing tasks “normally” or “traditionally” carried out by national armed forces, i.e., operational and tactical support, the participation of which is classificatory for combatant status.⁶⁹ This includes participation in combat operations, operation and support of weapons systems, protection and defense of military objectives, and the interrogation of prisoners.⁷⁰ According to Alexandra, PMC employees are “[I]ncreasingly... in fact displacing enlisted members of the armed forces in carrying out those functions, either within the organizational structure of national armies, or alongside that structure, or even instead of it”.⁷¹

Some illustrative examples from Iraq and Afghanistan are as follows:

- PMC personnel operated and maintained the weapon systems of unmanned Predator drones and B-2 stealth bombers during the US invasion of Iraq in 1991,⁷² and during *Operation Enduring Freedom* in 2003 they also operated missile guidance systems on US ships;⁷³
- Employees of the now infamous PMC CACI (California Analysis Center Incorporated) worked as interrogators of detainees at the Abu Ghraib prison in Iraq,⁷⁴ where one employee

⁶⁵ See section 3.1.

⁶⁶ This matter is, however, not exclusive to the discussion on PMCs as the same would apply to any other civilian participating in the conflict; see further Gillard, *Private military/security companies. The status of their staff and their obligations under international humanitarian law and the responsibilities of states in relation to their operations*, (2008), p. 164. Therefore, there is no need to dwell excessively over the concept of direct participation as such here. For an elaborate discussion, see the ICRC *Interpretive Guidance* (2009).

⁶⁷ Gillard (2008), p. 165.

⁶⁸ Singer explains that because of new sophisticated technology, the nature of warfare is changing – the so called revolution in military affairs; “Fewer individuals are doing the actual fighting, while massive support systems are required to maintain the world’s modern forces”, (2001/02), p. 195.

⁶⁹ Alexandra (2008), p. 92; Percy (2006), p. 12.

⁷⁰ Percy, *ibid.*; Gillard, (2006), p. 526.

⁷¹ Alexandra (2008), p. 92.

⁷² Alexandra (2008), p. 91. A predator drone, a so called Unmanned Aerial Vehicle (UAV), is “a long-endurance, medium-altitude unmanned aircraft system for surveillance and reconnaissance”. The B-2 stealth bomber is “a low-observable, strategic, long-range, heavy bomber capable of penetrating sophisticated and dense air-defence shields”, with “the ability to fly to any point in the world within hours” and can carry up to 40,000 lb of weapons including nuclear weapons. See <http://www.airforce-technology.com/projects/predator/> and <http://www.airforce-technology.com/projects/b2/> respectively.

⁷³ Percy (2006), p. 12; David Isenberg, *A Government in Search of Cover. Private Military Companies in Iraq* (2007), p. 83.

⁷⁴ Dickinson, *Contract as a Tool for Regulating Private Military Companies* (2007), p. 223.

allegedly directed the use of dogs, while another one “directed military personnel to conduct torture during interrogation of a prisoner”;⁷⁵

- In Iraq, PMCs have guarded the Green Zone, military personnel and convoys, and the head of the Coalition Provisional Authority Paul Bremer;⁷⁶
- In Afghanistan, the protection of Hamid Karzai was provided by a PMC.⁷⁷

A distinction between soldiers of national armed forces and employees of PMCs is often difficult to perceive, and in some cases they can even be almost interchangeable.⁷⁸ An oft expressed forecasting is that this trend is most likely to continue, since the circumstances that fueled the emergence of the industry in the first place have not changed and are not likely to do so in any near future.⁷⁹ Therefore, it does seem warranted to claim that “the industry is distinctively representative of the changed global security environment at the start of the twenty-first century”.⁸⁰

2.4 Concluding remarks

The perception of military services as sellable/buyable goods by a simple economic transaction is quite problematic for several reasons. For one, outsourcing generates a democratic deficit since it enables a government to sustain a military operation without constitutional support. This undermines the people’s possibility to affect the public use of force.⁸¹ Furthermore, PMCs operate without the military chain of command which impedes the exercise of a high degree of control; PMC employees may evade the accountability for committed atrocities much easier than soldiers.

The assumption of higher efficiency and lower costs of services provided by the private market instead of the state is wholly unsubstantiated in the case of PMCs – the numbers are not really accessible or verifiable. Moreover, many contractors have received training in the national army to become soldiers and shortly thereafter they quit the military to work for a PMC with a much higher salary.⁸² Hence, the army is being drained on soldiers whose education it has paid for and the state is still left with a higher bill for the services provided by the former soldiers now working as private contractors instead.

Lastly, Singer presents a very important point:

⁷⁵ Mathieu and Dearden, *Corporate Mercenaries. The threat of private military and security companies*, pp. 13f.

⁷⁶ Kinsey (2006), p. 106.

⁷⁷ Holmqvist (2005), p. 26.

⁷⁸ Wulf, *Internationalizing and Privatizing War and Peace* (2005), p. 62.

⁷⁹ See for instance Percy (2006), p. 23; Wulf (2008), 195; Kinsey (2006), p. 106.

⁸⁰ Singer (2001/02), p. 193.

⁸¹ Percy *Morality and regulation*, (2007), pp. 20f; Krahmman (2008), p. 257.

⁸² Percy (2006), p. 22.

”modern liberalism tends to assume only what is positive about the profit motive. It views the spread of capitalism and globalism as diminishing the incentives for violent conflict and the rise of global civil society as an immutable good thing. The emergence of a new type of private transnational firm that relies instead on the existence of conflict for its profits counters the assumption that non-state actors are generally peace orientated”.⁸³

I have attempted to show that PMCs and their employees are subjects that are not readily familiar within the international political and legal structures associated with the concept of nation states. They are neither part of the military, nor perceived as mercenaries or regular civilians – yet they are engaged in conflict on a regular basis by states. Throughout the rest of this paper, I will discuss the concept of international law and how to determine which source – treaties or customary law – is applicable in regard to the employees of PMCs.

⁸³ Singer (2001/02), p. 209f.

3 SOURCES THEORY

In this section I will outline some aspects of international sources theory, i.e., about the “system” of international law. By the system I mean how international law comes into being, how its applicability is determined, and the interrelationship of different rules. The text is confined to treaties and customary law.

3.1 The concept of a “source” of international law

Even though lacking a clearly established framework, international law and its creation, application and interpretation can still be perceived as a system of law. In the words of Kelsen,

“The constitution of the international community is the set of rules of international law which regulate the creation of international law, or, in other terms, which determine the ‘sources’ of international law”.⁸⁴

The most authoritative statement on what exactly the different “sources” of international law are is found in article 38 of the ICJ statute. Here we find that both treaties and customary law are enumerated as sources. Even though technically only binding for the Court, article 38 is often referred to as a valid depiction in general.⁸⁵

A fundamental characteristic of international law is its horizontal creation and application, i.e., it is a system created by sovereign, and theoretically equal, states. No subject, e.g. a state or an organization, may exercise authority over a state unless the state in question has given its consent. Such consent can be understood as a means for states to further or govern their own interests: “international law emerges as a normative solution to the clash of national interests in the relations among states”.⁸⁶ Basically then, the law is what states have consented to consider as law. However, the consent has to *become* law; it must become something more – something other – than mere consent.

International legal norms are for certain based on consent, but in order for the rules to be normative their continued existence cannot be fully determined solely by the momentary presence or absence of consent by particular states. Legal norms must therefore, to qualify as law, emanate from the

⁸⁴ Kelsen, *Principles of International Law* (1967), p. 437.

⁸⁵ Detter, *The international legal order* (1994), p. 149; Pauwelyn, *Conflict of Norms in Public International Law* (2003), p. 90.

⁸⁶ Teson, *A Philosophy of International Law* (1998), p. 73. Koskeniemi offers an illustrative explanation, that “[I]n a sense, all legal norms are merely descriptions of what it is for each state to be sovereign”, *From Apology to Utopia. The Structure of International Legal Argument*, (1989), p. 264.

consent of states and yet at the same time exist independently from it. The doctrine of sources in international law can be understood as “an attempt to reconcile” these two positions.⁸⁷ Essentially, it becomes a question of what is actually meant by “sources” of international law. The notion can be understood so as to encompass both a formal meaning – the processes by which law comes into being – and a material – the content of the law.⁸⁸ In reconciling these two meanings within the doctrine of sources, we can accept that “it contains a theory of legislation and a theory of adjudication within itself”.⁸⁹ The method of creation of the law becomes at the same time the method of its application.⁹⁰

3.2 *Interrelationship of treaties and CIL*

3.2.1 *Independency and equality*

Treaties and customary law may very well simultaneously contain rules on the same subject-matter and prescribing the same behavior for the same subjects; nonetheless, the sources exist independently of each other.⁹¹ Their autonomous character implies that “the conditions for their formation, existence and termination are such that the rules of one source do not *depend* for their formation on the rules of the other source”.⁹² The autonomy is accompanied by a lack of an *a priori* hierarchy in-between the two types of sources, meaning that treaties and customary law imposes an equal binding force upon states.⁹³ Pauwelyn explains that

“The absence of a formal hierarchy in international law is a direct consequence of the assumption that all international norms, in one way or another, derive from state consent. Since, therefore, all norms essentially derive from the same source (state consent), it is presumed that they have the same binding value”.⁹⁴

This equality means that, in case of a conflict of norms,⁹⁵ one of the sources cannot prevail over the other by virtue of its type; the conflict must be resolved by reference to other criteria on a case-by-

⁸⁷ Koskenniemi, *ibid.*

⁸⁸ Jia, *The Relations Between Treaty and Custom*, (2010), p. 84.

⁸⁹ Koskenniemi (1989), p. 266f.

⁹⁰ Kelsen, (1967), p. 437.

⁹¹ Institut de Droit International, *Resolution on Problems from a Succession of Codification Conventions on a Particular Subject*, (Lisbonne, 1995), Conclusion 10; Villiger, *Customary International Law and Treatises* (1997), p. 130.

⁹² Villiger (1997), p. 58, emphasis added.

⁹³ Detter (1994), p. 150; Villiger (1997), p. 58f. The one notable exception is *jus cogens* and its power to overrule any other type of norm.

⁹⁴ Pauwelyn (2003), p. 95.

⁹⁵ For the purpose of this paper, a “conflict of norms” occurs when two norms are incompatible and mutually exclusive; hence, by abiding by one of the norms, the other is breached.

case basis.⁹⁶ Consequently, the applicability of a treaty in a concrete case may be determined by customary law, and vice versa.

3.2.2 Two different sources, one common system, and the evolution of law

Unavoidable as change might be in a spacious perspective of time, it must always be accompanied by considerations of stability and predictability of the law. Lauterpacht expresses the dichotomy of stability and change as “one of the principal problems of the philosophy of international law”.⁹⁷ Change might not always occur because “stability and security are in themselves a powerful constituent element of justice. There is ... a limit to the possible sacrifice of security to progress”.⁹⁸ Nonetheless, recalling the balancing act between normativity and concreteness,⁹⁹ a law that no longer corresponds to the realities of the international society is perhaps not really a good expression for the grounds of justice. Striving for that balance, treaties and customary law must be allowed to affect change in the applicability of the other.¹⁰⁰

To change an existing treaty rule through the emergence of a new customary law will usually require that the former has been breached to the benefit of the latter. The controversy of such a breach will depend much on how it is perceived by other states:

“the violative character loses much of its significance if the circumstances and conditions surrounding the original rule have changed, or if the practice serves the new interests of the State community”.¹⁰¹

The cross-over of the two sources should be regarded as mutually beneficial and their different natures as complementing each other. They are but two different tools to use to achieve an international legal system, “[F]or a treaty always displays rigidity in the face of fast-changing conditions of this globalizing world; whereas custom has flexibility and responsiveness to such changing conditions”.¹⁰²

Article 31.3 (c) of the Vienna Convention on the Law of Treaties (VCLT) states that in the interpretation of a treaty, one shall take into account “[A]ny relevant rules of international law applicable in the relations between the parties”. Sands argues that if “any relevant rules” is

⁹⁶ Ibid.; Villiger (1997), p. 58.

⁹⁷ Lauterpacht, *The Function of Law in the International Community* (1933), p. 266.

⁹⁸ Lauterpacht, (1933), p. 256.

⁹⁹ See section 3.1 and the related text to note 87, and section 6.1.

¹⁰⁰ Villiger, (1997), p. 221.

¹⁰¹ Ibid., p. 212.

¹⁰² Jia (2010), p. 109.

understood as encompassing customary international law, the international legal system is perceived as a more coherent whole within which rules of a certain kind do not exist in isolation from other ones.¹⁰³ The ICJ expressed a concurrent view even before the VCLT had entered into force, stating that “an international legal instrument has to be interpreted and *applied* within the framework of the *entire* legal system prevailing at the time of its interpretation”.¹⁰⁴

This understanding of the interrelationship between treaties and customary law facilitates the determination of applicable law in concrete cases. Since both sources emanate from the same subjects, the determination becomes the answer to the question of which norm portrays the “current expression of state consent”.¹⁰⁵ Two implications can be drawn from this: i) Clearly, the conflicting norms must fulfill the formal criteria of each source so as to ascertain a change of law – as opposed to mere politics; ii) Since the sources are equal, the “current expression of state consent” must be determined by rules of precedence, i.e., the principles of *lex posterior* and *lex specialis*.¹⁰⁶

3.2.3 *Lex posterior* and *lex specialis*

The principles of *lex posterior* and *lex specialis* relate to the issue of precedence, i.e., which of the conflicting norms shall prevail over the other. This means that the superseded rule continues to exist; however, it is not applied due to the prevalence of the other rule.¹⁰⁷

In international law, the old maxim *Lex posterior derogat legi priori* (later law overrules earlier law) is related to each state’s sovereign expression of its own will. Given that all international norms emanate from state will, “a later expression of state will must logically prevail over an earlier one”, regardless of it being a treaty rule or a customary rule.¹⁰⁸ However, a potential problem in applying the *lex posterior* principle in international law is that more often than not, a dating of treaties and customary rules is not very straightforward. For instance, a treaty may have been adopted many years before its entry into force, and customary law is rather (self evidently) difficult to pinpoint exactly in time since it is comprised of several acts.

The meaning of *Lex specialis derogat legi generali* (special law overrules general law) is that out of two (or more) rules regulating the same subject-matter, the more specific and detailed one shall prevail.¹⁰⁹ Pauwelyn lists two reasons for why the principle should be applied: Firstly, “the special norm is the more effective or precise norm, allowing for fewer exceptions”; secondly, “the special

¹⁰³ Sands, *Treaty, Custom and the Cross-fertilization of International Law*, (1999), p. 95.

¹⁰⁴ Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, p. 31, (emphasis added).

¹⁰⁵ Pauwelyn (2003), p. 388.

¹⁰⁶ *Ibid.*; Detter (1994), p. 150.

¹⁰⁷ Pauwelyn (2003), p. 327.

¹⁰⁸ Pauwelyn (2003), p. 96.

¹⁰⁹ Villiger (1997), p. 59.

norm reflects most closely, precisely and/or strongly the consent or expression of will of the states in question”.¹¹⁰

There are three possible applications of *lex specialis* in conjunction with *lex posterior* to resolve a conflict between a treaty rule and a customary rule:¹¹¹

1. *The earlier treaty norm is special, the later customary norm is general.* In this case, the question is which principle is the more important one. Should the special norm overrule the later, or vice versa? If the special is given preponderance, the *latest* expression of state consent will be set aside and hence the older rule will be given the meaning of the *current* consent. Villiger proposes that the later rule is simultaneously accompanied by a customary obligation not to apply the earlier treaty rule; hence, the customary negation of the special rule is equally special in its character. Therefore, the later rule must prevail.¹¹² The prevalence of the later rule should thus be considered as the main principle; anyone claiming that the earlier special rule should prevail in a concrete case should have to prove that the intention of states was not to overrule it by establishing the new rule, but rather to grant it a continuous prevalence.¹¹³

2. *The earlier treaty norm is general, the later customary norm is special.* Here, the *lex specialis* principle may in fact be regarded as redundant, as the conflict is resolved already by the *lex posterior*.

3. *The two conflicting norms coincide in time, or cannot be adequately dated.* In this case, the *lex posterior* cannot give guidance, and resort must be taken to the *lex specialis*, and, if needed, other various acts or statements that can offer support for the intent of states.¹¹⁴ If it cannot be clearly established which of the norms is more special, there is “a lacuna in the field of conflict rules”, i.e., the conflict of norms cannot be resolved because there is no applicable rule in the law as to how to do it.¹¹⁵

Lastly, Pauwelyn compellingly argues that the two principles of precedence should not be seen as “absolute and self-standing norms”, but as “practical methods in the search for the ‘current expression of state consent’”. They deduce logical consequences from the fact that a norm is later in time or more specific so as to determine the ‘current expression of state consent’”.¹¹⁶

¹¹⁰ Pauwelyn (2003), p. 387.

¹¹¹ Recall that the scope of this section is limited to the impact of customary law on treaties.

¹¹² Villiger (1997), p. 207.

¹¹³ Pauwelyn (2003), p. 408.

¹¹⁴ *Ibid.*, p. 438.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, p. 388.

3.2.4 Modification and termination of a treaty rule

The principles of precedence are useful tools to determine which source shall *prevail* over another one. According to a related view, the prevalence of a customary rule can be taken a step further and even *change* the subordinated treaty rule. The latter may become modified or even terminated.¹¹⁷ According to Villiger, this means that the contracting parties are not only bound by the customary international rule towards all other states, but also that the parties “are *dissatisfied with a conventional rule* and regard a new rule ... on the same subject-matter as the more convincing one”.¹¹⁸ If the new customary rule will differ only partially from the treaty rule, the latter will become modified so as to coincide with the former; if the rules are entirely incompatible, the treaty rule is passed out of use and hence terminated.¹¹⁹ Villiger considers that “the *formation of a new customary rule implies desuetude of the original conventional rule*” – otherwise a customary rule could not have emerged.¹²⁰

The principle of modification has been confirmed by the ILC. In the preparatory work for the VCLT, the ILC first proposed to include the following article concerning treaty modification by a subsequent customary rule:

“The operation of a treaty may also be modified:

(c) By the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties”.¹²¹

The ILC elaborated that a treaty rule “has at any given date to be applied in the light of the law in force at that date. ... account must at any given time be taken of the ‘evolution of the law’”.¹²² The Commission concluded that

“the present article formulates the *general rule* under which a treaty may be modified by the emergence of a new rule of customary law affecting the *scope or operation* of its provisions”.¹²³

¹¹⁷ Villiger (1997), p. 195.

¹¹⁸ Villiger (1997), p. 204, (emphasis in the original). He gives three examples of reasons for such dissatisfaction and subsequent change of law: “technological development, changes in the structure of the international community, and new perceptions of which values should be the ruling ones”.

¹¹⁹ Villiger (1997), p. 205f.

¹²⁰ Villiger (1997), p. 206.

¹²¹ Yearbook of the International Law Commission, 1964 vol. II, p. 198 (Article 68).

¹²² *Ibid.*

¹²³ *Ibid.*, p. 198f (emphasis added).

Among the submitted comments by governments upon this Draft Article, two are relevant and deserve mentioning. The United States acknowledged the principle as such, yet considered that it should be left out due to the general uncertainty in the definition of what constitutes customary law.¹²⁴ The United Kingdom proposed a deletion of the paragraph because of the difficulties of dating a customary rule, and also considered that treaties “ought not to be modified without the consent of the parties”.¹²⁵

The Special Rapporteur Sir Waldock considered that (potential) problems related to the definition and dating of customary law comprised no reason to sweep the paragraph under a carpet by deleting it, because:

“whatever its uncertainties, customary law is a phenomenon which looms large in international law, and the problem of how it may affect the application of treaties at any given time unquestionably exists”.¹²⁶

However, the Special Rapporteur did acknowledge that the UK had a valid point in its second argument when considered for bilateral treaties, or treaties between “a small group of States”. Often the purpose with such treaties is to establish a “special legal régime”, which in some cases is even meant to derogate from existing customary law.¹²⁷ Hence, if allowing subsequent customary law to modify such a treaty its very object and purpose might be quashed. However, this conclusion does not contradict the possibility that multilateral treaties may very well be modified by subsequent customary law.

In the end, the ILC decided to omit the paragraph on the grounds that modification is subject to the particular circumstances of each case, and the intentions of the treaty parties.¹²⁸ Thus, the existence of the principle as such was consistently acknowledged by the ILC even though it did not make the final version of the Convention on the Law of Treaties.

3.2.5 Concluding remarks

The principles of *lex posterior*, *lex specialis*, and modification/termination all boils down to the same objective: to determine the current intention and will of states, yet at the same time uphold a certain threshold of legal certainty. I consider that an exception for bilateral treaties or treaties with only a few parties is at its place, since such treaties should not be regarded as hindering the evolution or

¹²⁴ Yearbook of the International Law Commission, 1966 vol. II, p. 88

¹²⁵ Ibid.

¹²⁶ Ibid., p. 90

¹²⁷ Ibid., p. 91

¹²⁸ Ibid., p. 236

application of a subsequent customary law. Rather, they should be compared to the concept of the persistent objector: if a state is allowed to opt out from the application of a customary rule towards the entire international society, it should be even more allowed to maintain a special legal regime with some states only (a sort of gathering of several persistent objectors) and apply the customary rule in relation to all other states. As for multilateral treaties with many parties, the same is not really possible: if too many states would hold on to the old treaty rule and persistently act thereafter, a customary rule could by definition not emerge.

Treaties and customary law work as complements to each other, they must be allowed to be mutually affectable to promote a more coherent structure of the international legal system.

4 TREATY LAW

In this part I will only deal with (the basics of) those aspects of treaty law and theory that concern the act of adopting a treaty, and the nature of the instrument itself.¹²⁹

A treaty is an explicit agreement between two or more states in written form to abide by certain rules.¹³⁰ By this agreement “the expression of their common consent concerning a mutual behavior is established”.¹³¹ The emergence of a treaty can be understood as a process of negotiation between governments, until an understanding of mutual rights and obligations is reached. The understanding is then cemented in writing, signed by the participating states.¹³² Upon the treaty’s entry into force, it is binding on all the parties – and no other than the parties – by virtue of their consent as sovereign states to so be bound, as well as the principle *pacta sunt servanda*.¹³³ A state is able to withdraw its consent to be bound if the particular conditions pertaining to the specific treaty in question so allow.¹³⁴ The entire life cycle of a treaty has largely been codified in the VCLT. However, even though much guidance can be drawn from it, since the VCLT is a treaty itself – a treaty on treaties – one should recall that the provisions laid down therein are by no means more or less stable than other international rules.

Multilateral treaties often take a significant amount of time to conclude, given that many states are pushing for their own interests. Not only is it a question of the time required to put down a text of mutual consent, but the period of time required for a treaty to actually come into force might also be substantial. On the other hand, once a treaty is adopted its written form makes for a rather certain source of the content of the law. Written law expresses clarity and stability, two important features for the predictability of law.¹³⁵ However, these traits also carry potentially negative effects with them, as written codification “freezes” law in a certain shape.¹³⁶ In a drastic expression, von Savigny

¹²⁹ I will hence not discuss theories of why states participate in a treaty-making process in the first place, or why they choose to follow (or violate) treaty provisions. The sufficient point of departure is hence the act of consent, omitting the possible reasons for why that consent is given.

¹³⁰ The VCLT, Article 2.1(a).

¹³¹ Kelsen (1967), p. 446.

¹³² Teson (1998), p. 81.

¹³³ The dichotomy of these two approaches – the subjective consent, and the objective *pacta sunt servanda* (or in other words, considerations of justice, good faith etc.) – is again one of balance: “The history of the doctrine of treaty interpretation is the history of the contrast between these two approaches”, Koskenniemi (1989), p. 291. *Pacta sunt servanda* is not an entirely undisputed principle. For instance, Kelsen (1967), p. 446, considers it to be “the reason for the validity of treaties, and hence the ‘source’ of all the law created by treaties”, and Detter (1994), p. 159, that without it “no legal order can subsist”. A contrasting opinion is presented by Lauterpacht (1933), p. 278, in considering that there really is no binding force in international law since the interests of states “cannot be subjected to an obligation existing independent of their own free will”.

¹³⁴ If the treaty from which a state party wishes to withdraw does not contain any provisions on the matter, Articles 54 and 56 of the VCLT should be consulted.

¹³⁵ Villiger (1997), p. 111f.

¹³⁶ Villiger (1997), p. 281.

considered that written law “would cast in perpetuity legal norms and, hence, necessarily deprive the law of its topicality and relevance”.¹³⁷

Due to the slow pace of the process, and the rather rigid nature of the written law, treaties are potentially vulnerable to effects of changes in the international political environment for at least two reasons. For one, the political framework within which a treaty emerged might change to such a degree that the basic conditions for its adaptation no longer exist, making it difficult to fit the treaty provisions into the new paradigm. Secondly, even if the treaty in question still is applicable, the new political environment might entail elements that were not envisaged during the drafting process and which are therefore not clearly covered by the treaty provisions. Both of these effects are, as we shall see, present with regard to PMCs – a circumstance that justifies the questioning of an unconfined application of the treaty rules on IHL.

¹³⁷ As referred in Villiger (1997), p. 281, (from F.C. von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*).

5 INTERNATIONAL HUMANITARIAN LAW AND THE CATEGORIZATION OF INDIVIDUALS

The status of individuals, i.e. their rights and obligations, in international armed conflicts is laid down in the Third Geneva Convention of 1949¹³⁸ (GC III), and the First Additional Protocol of 1977¹³⁹ (AP I). I will begin this section with an outline of how individuals are categorized in these instruments, followed by some words on the (questioned) relevance of conventional IHL in modern warfare, and end with talking about recent attempts at addressing issues related to the use of PMCs in new international instruments.

5.1 *Combatants, civilians, and mercenaries*

By the conventional approach, all individuals present in an international armed conflict are categorized either as combatants or as civilians. The distinction between these two groups is fundamental to this body of law, defining who may or may not lawfully participate in hostilities as well as what level of protection each individual is entitled to.¹⁴⁰ Within this classificatory system the status of the private contractors is determined on a case-by-case basis and, depending on circumstances, may be labeled as combatants, mercenaries, or civilians accompanying the armed forces.¹⁴¹ The consequences of direct participation in conflict are different for each of these.

Only combatants are entitled to participate in hostilities, meaning that they can legally attack military targets of the opponent and, upon capture, have the right to POW status and cannot be tried for said participation. However, this also means that combatants may themselves be targeted at any time and have no right to protection from attack (unless they are wounded and/or have laid down their weapons). The definitions of combatants entitled to POW status are stated in article 4.A (1) and (2) of GC III, and in article 43.1 in AP I.¹⁴² Basically, individuals encompassed by these combatant definitions

¹³⁸ Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

¹³⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. AP I has not been ratified by several states, among the most significant are India, Iran, Israel, Sri Lanka, Turkey, and the United States (as of 5 May 2011), http://www.icrc.org/eng/assets/files/other/ihl_and_other_related_treaties.pdf

¹⁴⁰ Faite, (2004), p. 3.

¹⁴¹ For thorough discussions on how the corporate structure and the contract between the company and a state may affect this determination, see the *Report of the Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions* (2005); Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, (2004-2005); Doswald-Beck, (2007).

¹⁴² The wording in GC III, article 4.A is:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

are those who belong to a group fighting for the cause of a state party to the conflict, e.g. the armed forces or organized resistance movements. The use of force by these actors is related to the public use of force, by the state as an institution.

All other individuals are categorized as civilians, regardless of if they participate in the hostilities. A civilian who takes a direct part in the conflict will retain this label and, if captured, will not have the right to POW status and may consequently be prosecuted merely for participating.¹⁴³ For civilian contractors accompanying the armed forces there is a particular clause on their status; article 4.A (4) in GC III grants them a right to POW status.¹⁴⁴ However, the article applies to *civilian* contractors, that is, only to individuals contracted to perform tasks that do not by themselves have an impact on the conflict. They are no more entitled to participate directly in the conflict than other civilians.

The case of civilians being contracted by a state specifically to participate in the conflict is addressed in AP I article 47 (2) which contains the definition of a mercenary.¹⁴⁵ The concept of mercenarism encompasses an assumption that the individual is fighting for financial gain and not for the cause of the state, and is related to the private use of force. Therefore, they do not have the right to POW status as their use of force is regarded as illegitimate. Moreover, even though limited in their scope due to few state parties, the UN and the Organization of African Unity Conventions on mercenarism state it as a specific crime for which individuals can be prosecuted.¹⁴⁶ Granted, the definition of being a mercenary is seldom fulfilled by anyone since the prerequisites are cumulative, making it quite easy to find loopholes; however, if an individual contracted to participate in the conflict would escape the

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

Article 43 of AP I:

1. 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.

¹⁴³ See Gillard, (2006), p. 531, and article 50 (1) of AP I. An exception to this rule is the concept of *levée en masse* in GC III article 4.A (6), i.e. incidents when the civilian population spontaneously takes up arms on the approach of the enemy.

¹⁴⁴ The wording of article 4.A (4) is:

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

¹⁴⁵ The definition reads:

A mercenary is any person who:

(a) is specifically recruited abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

¹⁴⁶ Article 3 of The International Convention Against the Recruitment, Use, Financing and Training of Mercenaries of 1989, UN doc A/RES/44/34, and article 4 of the Organisation of African Unity Convention for the Elimination of Mercenarism in Africa of 1977.

purview of the mercenary definition, the effect would still be that the participation is illegal and the person would not be entitled to POW status.

In sum, the framework of conventional IHL does not permit the use of force by private actors. To lawfully participate in hostilities, the employees of PMCs would have to become a part of the public armed forces. However, they are a part of the private market and therefore civilians. As Leander puts it:

“Even if most of the staff of PMCs are trained in the public armed forces, even if the market for military services is profoundly shaped by public policies, and even if governments and public institutions remain key buyers of PMC services, PMCs are, as they adamantly insist, private companies”.¹⁴⁷

Yet, as I have stressed earlier, employees of PMCs often do participate in hostilities. Hence, a divergence from the express prohibition seems to have arisen. There is a difference between PMCs and other types of mercenary actors in what seems to be a sanctioning of the activities of the former; “States hire, licence, or permit the activities of PMCs, as these entities augment or even replace functions that have traditionally been performed by states”.¹⁴⁸ This circumstance warrants a questioning of the classification of groups within IHL.

5.2 *The Geneva Conventions then and now*

The Four Geneva Conventions were written in 1949, and AP I in 1977, when the idea of the nation-state as the only holder of the right to use force prevailed in the world and warfare was generally perceived as the clashing of standing armies on a battlefield. At that time, the established distinction between combatants and civilians corresponded to the political state of the international society. As the structure of the global order and the methods of warfare have changed quite drastically since then, it is not always a straightforward task to apply those rules today. In the case of PMCs, Singer considers that

“their employees are integral, inherent parts of military operation. But, at the end of the day, they are not part of military. The old legal codes, which seek to create a sharp delineation between civilians and soldiers, are not readily useful”.¹⁴⁹

Percy is more outspoken, stating that IHL has become out of date since it no longer corresponds to the reality on the battlefield.¹⁵⁰ New types of actors such as PMCs are increasingly involved in

¹⁴⁷ Leander, *Regulating the Role of PMCs in Shaping Security and Politics* (2007), p. 57.

¹⁴⁸ Lehnardt, *Private Military Companies and State Responsibility* (2007), p. 139.

¹⁴⁹ Singer (2004), pp. 11f.

¹⁵⁰ Percy (2006), p. 51.

warfare, rendering the framework on which conventional IHL was structured obsolete.¹⁵¹ It may indeed prove difficult to maintain a categorization that emanated from the concept of the state's monopoly on violence in a time when that monopoly is no longer absolute.¹⁵² The participation in conflict by civilian PMC employees is increasingly being accepted, changing the understanding of which tasks may be considered as exclusive to the category of combatants. Kinsey writes:

“The transformation of the legal status of any activity could be said to occur when the legal position of the activity changes, either moving outside the law or moving within the law. For PMCs, this transformation has to do more with society's perception of the type of activity acceptable for PMCs to undertake. That such a transformation is occurring is not in doubt”.¹⁵³

This kind of transformation is not an unusual occurrence in the history of the international society, dynamic as it is. In a somewhat cyclical pattern, warfare is sometimes conducted with more public forces, sometimes with private; “Like ethics, the organization of warfare continuously evolves in response to changes in the environment”.¹⁵⁴

5.3 Recently drafted international instruments on PMCs

5.3.1 The Montreux document

In September 2008, the *Montreux document: On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict* was finalized.¹⁵⁵ It is an “intergovernmental statement”, initiated by the Swiss Government and the ICRC, and drafted with the participation of 17 states.¹⁵⁶ The document is open for all states and international organizations to support it, and so far 19 other countries have done so.¹⁵⁷

The Montreux document is not a legally binding instrument, and “should therefore not be interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law”.¹⁵⁸ However,

¹⁵¹ Ibid., p 46; Kinsey (2006), p. 94.

¹⁵² Brayton (2002), p. 329.

¹⁵³ Kinsey (2006), p. 89.

¹⁵⁴ Brauer, *Private military companies. Markets, ethics and economics*, (2008), p. 111.

¹⁵⁵ Accessible at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/\\$FILE/ICRC_002_0996.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/ICRC_002_0996.pdf)

¹⁵⁶ These are: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom and the USA, <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html>

¹⁵⁷ Albania, Bosnia and Herzegovina, Chile, Cyprus, Denmark, Ecuador, Georgia, Greece, Hungary, Italy, Jordan, Liechtenstein, Macedonia, the Netherlands, Portugal, Qatar, Spain, Uganda, and Uruguay, *ibid.*

¹⁵⁸ The Montreux document p. 9, paras 3 and 4.

it may be regarded as indicative of the opinions of the supporting states. For the purpose of this paper, the relevant parts express the following:

- “Contracting States¹⁵⁹ have an obligation not to contract PMSCs to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner-of-war camps or places of internment of civilians in accordance with the Geneva Conventions”;¹⁶⁰
- “The personnel of PMSCs:
 - b) are protected as civilians under international humanitarian law, unless they are incorporated into the regular armed forces of a State or are members of organized armed forces, groups or units under a command responsible to the State; or otherwise lose their protection as determined by international humanitarian law;
 - c) are entitled to prisoner-of-war status in international armed conflict if they are persons accompanying the armed forces meeting the requirements of article 4A(4) of the Third Geneva Convention”;¹⁶¹
- “in determining which services may not be contracted out, Contracting States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities”;¹⁶² the same applies for Territorial States and Home States;¹⁶³
- Employees of PMCs have the right to use force and firearms “only when necessary in self-defence or defence of third persons”;¹⁶⁴ they are not entitled to POW status if they participate directly in hostilities.¹⁶⁵

At large, the document outlines a “good practice” guideline for authorizing PMCs to operate. What can be concluded from this document is basically that PMC employees are allowed to carry weapons and still retain their status as civilians, i.e., a protection against attacks, and that states cannot outsource functions that IHL explicitly assigns to the State. Basically, the Montreux document is a restatement of the existing rules of IHL.

¹⁵⁹ A contracting state is a state that has contracted a PMC to undertake military services.

¹⁶⁰ The Montreux document p. 11, para A.2.

¹⁶¹ Ibid., p. 14f, para 26.

¹⁶² Ibid., p. 16, para 1.

¹⁶³ A territorial state is the state where the PMC operates during the term of the contract in question; a home state is where the PMC is registered.

¹⁶⁴ The Montreux document, p. 19, para 18.

¹⁶⁵ Ibid., p. 39.

5.3.2 The draft Convention on Private Military and Security Companies

The Working Group on the use of mercenaries¹⁶⁶ issued a report in July 2010 with a draft of a possible convention on private military and security companies (PMSC).¹⁶⁷ The proposed text aims at *inter alia*, establishing “minimum international standards” for state regulation of PMSCs, and not an “outright banning” of PMSCs. However, the Working Group proposes a prohibition of “the outsourcing of inherently State functions to PMSCs in accordance with the principle of the State monopoly on the legitimate use of force”.¹⁶⁸ “Inherently State functions” are “functions that cannot be outsourced to PMSCs in any circumstances”, such as direct participation in hostilities, waging war and/or combat operations, taking prisoners, intelligence, knowledge transfer with military, and interrogation of detainees.¹⁶⁹

The draft Convention has practically gained no support amongst states. Many states have “expressed strong reservations” against it, and the US has held that there is “no need for such a convention”.¹⁷⁰

5.4 Summary and concluding remarks

In the second chapter of this paper, I presented different aspects of and related to the private military industry. In a nutshell, my points made were: i) PMCs are perceived as a new subject in the international sphere, that is, new – or, perhaps it is more correct to term it as alien – in the context of political and legal structures and ideas that are closely related to the concept of the nation-state; ii) the business company structure is the bearing point of difference between employees of PMCs and mercenaries; iii) PMCs are extensively contracted by states, a circumstance that emits an image that states are increasingly sanctioning the participation in conflict by these private actors; iv) the emergence and use of PMCs follows the paradigm shift in the international society, both regarding the post Cold War-order and the spread of neoliberal ideas, where the previously extensive part played by the nation-state and its institutions has been increasingly reduced in favor of the outsourcing of functions to private market actors.

If straightforwardly applying the conventional rules on IHL, employees of PMCs could be categorized as civilians without a right to POW status and hence be liable for prosecution for the mere participation in conflict as well as risking the additional charge of mercenarism. When comparing

¹⁶⁶ The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, established in 2005.

¹⁶⁷ UN doc. A/HRC/15/25. The definition of a PMSC in the convention is “a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities”; 12, para 50 in the report, and article 2 (a) in the draft Convention.

¹⁶⁸ The Report, p. 10, para 39; article 9 in the draft Convention.

¹⁶⁹ The Report, p. 12, para 51, and article 2 (i) in the draft Convention.

¹⁷⁰ The International Service for Human Rights, *Human Rights Council: Little Support for Proposed Convention Regulating Private Security Companies*, available at <http://www.ishr.ch/archive-council/909-human-rights-council-little-support-for-new-convention-regulating-private-security-companies>

these rules to the reality of a widespread presence of PMCs in armed conflicts, a discrepancy becomes clear. It seems as though the written law has indeed “frozen” in a certain point of time, and is now perhaps too deviating from both the will of states and the realities of modern warfare to still be considered as truly normative. Moreover, neither the Montreux document nor the proposed Convention illuminates us with a different answer to if employees of PMCs may participate directly in hostilities than given by conventional IHL.

Having all this in mind, we may turn our focus to the sources theory as presented above. There I concluded that since treaty and customary law are equal in hierarchy, they must also be able to supersede one another if certain circumstances are fulfilled. Further, the application of a treaty has to be conducted within the boundaries of the *entire* framework of international law, customary law included. Now, I maintain that the use of PMCs in conflicts indicates at least a presumption that a customary rule is either emerging or already formed, a rule that – if in conflict with the treaty rules – may impair the applicability of GC III and AP I. Therefore, the presumption of an existing (or still only emerging) customary rule implies that one must first establish its potential (non-)existence before being able to determine whether the treaties are applicable or not.

In the following chapter I will discuss the concept of general customary international law, and how a process of finding that potential customary rule of IHL should be conducted. In essence, it is an attempt to answer how to find out if there is a customary rule and what behavior it prescribes.

6 GENERAL CUSTOMARY INTERNATIONAL LAW

To find if there is a rule, or if a rule is emerging, of customary international law one must first (make an attempt to) determine what exactly this type of law really is. Though the basic principles of it might be grasped quickly enough, a more profound understanding of its workings requires a more comprehensive study. After discussing different aspects of the concept of customary international law and the process of determination of rules, I will end with a summarizing conclusion of how one should go about in order to find if there is a new rule of general customary international law.

6.1 Introduction

Customary international law is a curious phenomenon, the concept of it being well known and yet at the same time its workings and origins are in many ways obscure. In Kelsen's opinion,

“The basis of customary law is the general principle that we ought to behave in the way our fellow men usually behave and during a certain period of time used to behave. If this principle assumes the character of a norm, custom becomes a law-creating fact”.¹⁷¹

This definition expresses in a way the core of customary law, that a standardized kind of behavior can generate a requirement to behave in the same manner. However, it leaves many questions to be answered regarding the process and the content of customary law. Given that customary law is not a written source of law it is inherently ambiguous as to the exact substance of it at any given time.¹⁷² The content of general¹⁷³ customary law is therefore a matter of continuous evaluation since, even though a rule has once been acknowledged as binding customary international law, its status is potentially challenged when subsequent practice is not adhering to the rule in question. Sur describes the nature of the customary process as “a process of permanent negotiation”,¹⁷⁴ and the process is never interrupted.¹⁷⁵

¹⁷¹ Kelsen, (1967), p. 441.

¹⁷² Granted, from time to time the task to document current customary law in written form is undertaken. For instance, the ICRC has, after ten years of extensive research, published a volume containing rules of IHL considered as customary, complete with practice supporting the customary status. This does not, however, make these rules written in the same sense as treaty law. Henckaerts and Doswald-Beck, *Customary International Law. Volume I: Rules, and Volume II: Practice*, (2005), hereinafter “the ICRC study”. The text of the ICRC study can be accessed at <http://www.icrc.org/customary-ihl/eng/docs/home>

¹⁷³ In this paper, only general customary law (law that applies to all states but which still acknowledges objection to it) is considered, meaning that other types of customary international law, such as particular (e.g. regional) or universal (*ius cogens*, from which no derogation is allowed) customary law, will not be discussed unless necessary for the sake of explaining a specific point related to general customary law.

¹⁷⁴ Sur, *International Custom: Its Life, Its Craft* (2010), p. 175.

¹⁷⁵ Wolfke, *Custom in Present International Law*, (1993a), p. 54, stating that not even “the most authoritative ascertainment of a customary rule completely interrupts the evolution of custom”. Tunkin emphasizes that the

The process of formation of customary law is surrounded by differing opinions regarding the exact requirements for a new rule to be accepted within the system and hence to be binding on all states.¹⁷⁶ The idea of customary law is, naturally, not isolated from the impact of legal theories and ideologies, and the importance of the diverse elements of custom are thus differently perceived depending on the chosen viewpoint. As a result, a range of norms of different types and substance have been labeled as customary law, making it difficult to perceive it as a coherent whole. Jennings even claims that many of the norms that have been termed as customary law “is not only not customary law: it does not even faintly resemble a customary law”.¹⁷⁷

A potential consequence of the fact that the customary process is not autonomous is that it is easy to fall into the paths of treaty law making. Hence, one may want to pack it into an agreed pattern, while no such pattern exists. In the words of Mendelson, if we try “to fit wild custom into the formalistic clothing of ‘civilized’ lawmaking, we may deform its nature”.¹⁷⁸ One cannot simply point and prove its existence, as custom “always appears via superimposition or as an element appearing only between the lines”.¹⁷⁹

Generally, customary law (and other forms of law) may sometimes be difficult to separate from politics. Indeed, they both emanate from the same subjects, and may to a great extent convey the same purposes. The separation is however crucial for the law to (purport to) be genuinely normative. Law cannot, if it is not to lose its legal character, be changed due to momentary political considerations of a state.¹⁸⁰ Law, even though it can impossibly exist in a vacuum from politics, needs a more formal structure – the question is though how it is to be achieved.

Koskenniemi expresses this problem as a need to achieve a balance between normativity and concreteness. The normativity refers to the law’s status distanced from the behavior, will, or interests of states, i.e., that its regulatory mechanism will have effect independently of the states. At the same time, however, the law requires concreteness, meaning that it can be proved by state behavior so that it is not created in the abstract.¹⁸¹ Thus, to prove the existence of a norm, one has to demonstrate that it appears as both normative and concrete at the same time. Given that the concepts are, in his view, opposite, this is actually not quite possible. This leads to a constant

creation of a norm is indeed a *process*, i.e., the elements are built up gradually; *Theory of International Law* (1970), p. 133.

¹⁷⁶ Kammerhofer draws a parallel to the (nonexistent) structure of international law: “international law does not seem to have a constitution which regulates the nature, foundation and interrelation of sources. It is an all-pervading problem... It threatens to cripple the whole endeavour of ‘finding the law’. There is no (perceptible) constitution of international law: we can neither adequately know the rules of custom-formation nor how those rules come about”: *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems* (2004) p. 536.

¹⁷⁷ As cited in Koskenniemi, (1989), p. 362 (Robert Jennings, *The Identification of International Law*, in Cheng (ed.), *International Law; Teaching and Practice*, 1982, pp. 3-9, p. 5).

¹⁷⁸ Mendelson, *The Subjective Element in Customary International Law*, (1995), p. 179.

¹⁷⁹ Sur (2010), p. 172.

¹⁸⁰ Koskenniemi (1989), pp. 2-4.

¹⁸¹ *Ibid*, p. 2.

movement between the positions.¹⁸²

In the following I will discuss how the existence of a customary rule is determined. Customary law can be claimed to exist by two different patterns; the deductive approach or the inductive approach. The former presupposes the existence of a higher norm, from which one can deduce how states should behave, whilst the latter departs from the states behavior which is considered to formulate the content of the norm.¹⁸³ Of course, both approaches have merits, as well as problems. For one, the inductive approach “violates the duality of norm and fact: law is precisely not facts, it is not (necessarily) a description of reality – unless everybody obeys the law – but a prescription for future behaviour”.¹⁸⁴ On the other hand, the deductive approach “is improvable. Its arguments are based on anything but the law...and it must remain a fiction”.¹⁸⁵

6.2 *The deductive approach and the relation between customary law and general principles of law*

The deductive way of reasoning is commonly associated with naturalism, and the belief that there exists a legal order based on higher moral principles to which state behavior should adhere. This order is independent of the will of states, and presupposes that all states entered into a pre-existing legal order.¹⁸⁶ The ICJ has used a deductive way of reasoning in a couple of cases, some of which are related in short here.

In the *Corfu Channel* case, the ICJ found that Albania had obligations to notify “for the benefit of shipping in general” the presence of mines in the channel, and to warn approaching British ships of this danger. These obligations were derived from

“certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.¹⁸⁷

The Court did not give any further explanation of the status of these principles, nor is it clear how specific rules of obligations can be derived from them. In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* the ICJ referred to its statement in the *Corfu Channel* case about elementary considerations of humanity, and stated that “these fundamental rules are to be observed

¹⁸² Ibid, p. 49.

¹⁸³ Birgit Schlütter, *Developments in Customary International Law. Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*, (2010), p 39; Koskeniemi (1989), p. 41.

¹⁸⁴ Kammerhofer (2004), p. 537.

¹⁸⁵ Ibid.

¹⁸⁶ Schlütter (2010), pp 39, 46.

¹⁸⁷ *Corfu Channel* case, (1949), p. 22.

by all States...because they constitute intransgressible principles of international customary law".¹⁸⁸
This sentence blurs the line between principles and customary law.

In the *Nicaragua* case, the ICJ made a statement about the customary status of Article 51 of the UN Charter,¹⁸⁹ that it "is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature".¹⁹⁰ Such a declaration of a natural right leaves questions open regarding which other rights (or obligations) may be declared by the same virtue. The difficulties posed by relying on "natural" or "intrinsic" values emanate from that very uncertainty: "the most contradictory principles have been deduced from nature as rules of 'natural law', which, in truth, are nothing but maxims, differing according to the moral-political creed of their author".¹⁹¹

This type of norms are viewed as "particularly fundamental" and, as Kolb explains, they are derived from what is perceived as the constitutional foundation of the international community.¹⁹² He finds that such norms are not customary rules but rather principles:

"There is a category of constitutional norms containing supreme principles of law and public order considerations which are either axiomatic or in any case of a superior legality. In this area, the reasoning is more deductive than inductive and consequently the shape of applicable custom has to be moulded to it. Custom is here close to what is generally considered to be socially necessary at the moment the interpretation is performed. We are here confronted more with 'principles' than with ordinary 'customary rules'".¹⁹³

As already pointed out, the deductive approach has been criticized as of being in fact more political than normative. Even if for some norms it is perhaps not exceedingly controversial to allow them an axiomatic status, it is difficult to claim that there could be objective values or goals. States do not share the same values and hence deduced norms could be in line with the subjective perception of some states, and contrary to that of others.¹⁹⁴ Who is then empowered to claim knowledge as to which values have a higher dignity, and, further, how is it that certain rules can be derived from these values and be binding upon all states? Certainly, a weighing between opposable values is a rather precarious task. Kammerhofer considers the deductive approach as a way of creating "hypothetical

¹⁸⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996), para 79, emphasis added. The Court also recalled this statement about elementary considerations of humanity in the Advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004), at para 157.

¹⁸⁹ The relevant part of Article 51 of the UN Charter reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs".

¹⁹⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, (1986) at para 176.

¹⁹¹ Kelsen (1967), p. 443.

¹⁹² Robert Kolb, *Selected Problems in the Theory of Customary International Law*, (2003), pp. 125f.

¹⁹³ *Ibid*, p. 129.

¹⁹⁴ Schlütter (2010), p 49; Koskenniemi (1989), p 30.

norms; if one were less diplomatic one might call them ‘imagined’ norms existing only in the mind of the proponent”.¹⁹⁵

6.3 *The inductive approach and the common two-elemental definition*

The most common starting-point for defining customary international law is the list of sources of international law in Article 38 of the ICJ Statute. Article 38 (1) (b) states as one of the sources for the Court to apply, “international custom, as evidence of general practice accepted as law”.¹⁹⁶ The wording refers to two elements that build up customary law: the term ‘general practice’, that is, state practice or *usus*, denotes the objective element, while ‘accepted as law’ refers to the subjective element, known as *opinio juris*. The ICJ confirmed this reading of article 38 in the *Continental Shelf (Libya v Malta)* case, stating that “[I]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States”.¹⁹⁷ The definition does not by itself take us very far though, since it “has failed to clearly define either one [of the elements] or provide guidance on how they relate to one another”.¹⁹⁸

Some enlightenment on the matter was provided by the ICJ in the *North Sea Continental Shelf* cases:

“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty”.¹⁹⁹

Thus, in a “classic”²⁰⁰ two-element approach, the subjective element can basically be claimed to mark the difference between practice related to law and “regular” practice. Practice can be regarded as “the raw material of custom”, whilst the acceptance of it as law “gives it the mark of law”.²⁰¹

The process hence involves an evaluation of the presence of both elements, and if one of them is

¹⁹⁵ Kammerhofer (2004), p. 542.

¹⁹⁶ For some, this article is by itself regarded as customary, Schlütter, (2010), p. 10. However, as she furthermore points out, this definition can hardly be seen as containing all possible factors that contribute to the formation of customary norms, p. 13.

¹⁹⁷ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, (1985) at para 27.

¹⁹⁸ Guzman, *How International Law Works. A Rational Choice Theory*, (2008), p. 186.

¹⁹⁹ *North Sea Continental Shelf*, Judgment, (1969), para 77.

²⁰⁰ This is how the ICRC refers to the two-element approach in its study (2005, see section 4.1), p. xxxviii.

²⁰¹ Wolfke (1993a), p. 44.

lacking there can be no customary norm.²⁰² However, the requirements of proof of the elements and their interrelationship is not clear cut. There are also inductive approaches that emphasize one of the elements only as being the constitutive part of custom, and therefore diminishing the part played by the other. I will return to these matters later on.

6.4 The notion of “state practice”

6.4.1 (In)separability of the elements

Apprehensions about what kind of acts may or may not constitute state practice range from covering only physical acts conducted by a state, to pretty much any statement made by any subject when the act in some way can be attributed to a state, or even to an NGO.

The opinion that only physical acts constitute practice seems closely related to an understanding that the objective and subjective elements are manifested separately and that the same act cannot express both. Wolfke considers that physical acts are state practice for the purpose of establishing the objective element, whilst verbal acts express the subjective one.²⁰³ To blend verbal acts into the element of state practice only causes confusion, and such a merging

“neglects the very essence of every kind of custom, which for centuries has been based upon material deeds and not words. Or, to put it otherwise, customs arise from acts of conduct and not from promises of such acts... True, repeated verbal acts are also acts of conduct in their broad meaning and can give rise to international customs, but only to customs of making such declarations, etc., and not to customs of the conduct described in the content of the verbal acts”.²⁰⁴

Mendelson accepts that verbal acts can be regarded as practice, however, in his view the same act cannot be counted as manifestations of both the subjective and the objective element.²⁰⁵

Both these apprehensions seem counterproductive. For one, not all states have the possibility or the inclination to undertake physical acts, and thus act in other ways. Physical intervention in some areas, such as IHL, may also be particularly contentious and difficult to undertake due to political restraints. Secondly, they imply that acts of states could be “counted” for the purpose of custom in

²⁰² Schlütter (2010) refers to the *Asylum* case (Colombia v. Peru, 1950) as “a classic example of a two-element approach by the Court”, since it had denied the first element of custom, there was no need to further examine the second one, p. 128.

²⁰³ Wolfke (1993a), pp. 43, 45.

²⁰⁴ *Ibid*, p. 41f.

²⁰⁵ Cited in Kammerhofer (2004), p. 526 (Maurice Mendelson, *The Formation of Customary International Law*, 272 *RdC*, 1999), p. 206.

the meaning that it is easy to categorize acts in a prima facie manner. Thirdly, physical acts of states cannot really be devoid of any subjective element.

A more feasible approach is to not make such a distinction, and consider all types of acts as part of state practice. The same act can then serve as proof of both elements. This approach was taken by the ICRC in the study on customary IHL, stating that “it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. More often than not, one and the same act reflects practice and legal conviction”.²⁰⁶ The International Law Association (ILA) has also taken this position, referring to Haggemacher’s view that customary law is built up by one complex element which contains both material and subjective aspects.²⁰⁷ Furthermore, the ILA considered that an exclusion of verbal acts is groundless, for it found “no inherent reason why verbal acts should not count as practice, whilst physical acts (such as arresting individuals or ships) should”.²⁰⁸

Müllerson is also of the opinion that the objective and subjective elements cannot exist independently, and that the distinction fills an analytical function:

“Whatever states do in international relations is state practice which has two facets or aspects to it: a visible, manifest, observable behaviour of states (or other subjects of international law) and their subjective attitude to this behaviour which may be implicitly present in the very act of behaviour or which may be conveyed to other states through different acts of behaviour constituting, in turn, state practice of a different kind... Hence, it is always state practice which is on the basis of the formation of [customary international law]. However, this practice necessarily contains objective and subjective elements (aspects) which both play an important role in custom formation”.²⁰⁹

An illustrative comparison to criminal law trials is drawn by Kammerhofer, in that the intent of the defendant must be determined by analyzing external acts. Any crime is composed by objective and subjective prerequisites, and one has to “work with the factual for the determination of the non-factual”. The same holds for the relationship in-between the elements of customary international law.²¹⁰

6.4.2 Conditions for attributing acts to a state as part of its practice

²⁰⁶ ICRC study (2005), p. xlvi.

²⁰⁷ The ILA report *Statement of Principles Applicable to the Formation of General Customary International Law* (2000; hereinafter the ILA report), p. 7. The citation from Haggemacher reads: “un seul 'élément' complexe, fait d'aspects 'matériels' et 'psychologiques’”.

²⁰⁸ The ILA report (2000), p. 14.

²⁰⁹ Müllerson, *On the Nature and Scope of Customary International Law*, (1997), p. 344.

²¹⁰ Kammerhofer (2004), p. 538.

The ICRC has relied on extensive and varying kinds of state practice, allowing for a very unrestricted interpretation of the notion. In a sense this is an understandable approach – if to determine what a state really considers as legally permissible, why put up any restrictions? One could indeed claim that “there is no reason to exclude any category of acts or statements because *anything*, including silence and abstention, may manifest what a State wills or believes to be customary law”.²¹¹ However, I consider that some restrictions are called for, in the light of regarding customary rules as evolving through a dynamic process in the international community *as a whole*.

For instance, in its study, the ICRC considered that verbal acts by states were relevant if only they were either publicized generally (such as through legislation, or press statements), or communicated to another state or to the ICRC itself.²¹² The ILA also holds the view that communication to one other state suffices for the act to be considered as made public, and that it does not need to be “communicated to all of the world”.²¹³ In my opinion, this apprehension is not entirely conceivable within the concept of general customary international law. If presupposing that it emerges through interaction between states and with the force of binding all states, a precondition should definitely be that a general knowledge about the practice can be, if not shown, at least presumed.²¹⁴ This would often not be the case for communications made solely to one other state, being rather more a bilateral communication than general and public.

The undertaken acts must also be attributable to the state, meaning that they have to be performed by someone having the capacity to speak or act on behalf of it. The ILA states that

“As a matter of comparative constitutional law and of legal theory, the State comprises the constituent, legislative, and judicial branches as well as the executive. It is certainly the case that the activities of organs of the State other than the executive can also engage its international responsibility”.²¹⁵

This is the position taken by the ICRC as well.²¹⁶ Furthermore, the ILA considers that an act undertaken by a private subject, such as individuals or corporations, is state practice if the state concerned accepts it as such.²¹⁷ This understanding of which subjects can perform acts on the part of a state is viable. However, here too, the requirement would be that the act is made public and can be considered to be known to other states. A sufficient nexus to the state’s position regarding a specific

²¹¹ Koskenniemi (1989), p. 384.

²¹² The ICRC study (2005), p. xl.

²¹³ The ILA report (2000), p. 15.

²¹⁴ In the Report on *Ways and means for making the evidence of customary international law more readily available* (1950), the International Law Commission elaborates upon the inherent difficulty in gathering and spreading evidence of state practice. The Commission drew up a substantial list of possible sources for finding evidence, and makes the recommendation that “the widest possible distribution be made of publications relating to international law” in order to facilitate the process of proving customary rules, p. 373.

²¹⁵ *Ibid.*, p. 17.

²¹⁶ The ICRC study (2005), p. xl.

²¹⁷ The ILA report (2000), p. 16.

practice within the ambit of its international relations should be shown. This is a deliberation probably best considered with the specifics of each case.

For the case of omissions, i.e. abstention from performing a positive acts, it must be shown that the abstention depends on a conscious decision based on what the state perceives as legally relevant (as opposed to refraining from acting based on other considerations, such as political or economical). This was pronounced by the PCIJ in the *Lotus* case, stating that abstention could only count as state practice if the state was “conscious of having a duty to abstain”.²¹⁸ In the Advisory Opinion *On the Legality of the Threat or Use of Nuclear Weapons*, the ICJ found no unanimity among states regarding if non-recourse to nuclear weapons was an expression of a common *opinio juris*, and hence could not conclude that the abstention was based on a customary rule specifically prohibiting the threat or use of nuclear weapons.²¹⁹ Abstentions may at large be treated as positive acts, since the determinant agent of whether they are relevant or not for the purpose of customary law is basically the same – that of being carried out by a sense of having a legal duty (or right).

6.4.3 Acts undertaken by states within the framework of international organizations

States often interact with each other by the means of international organizations, acting as forums for discussion and issuing of various policy documents. Such documents are often not of a binding character, as for instance UN General Assembly resolutions, yet may nonetheless be used as a means for determining the position of states towards a practice. This issue was discussed in the Advisory Opinion *On the Legality of the Threat or Use of Nuclear Weapons*.

For some states, the series of UN GA resolutions regarding nuclear weapons “signify the existence of a rule of international customary law which prohibits recourse to those weapons”. An opposing view of other states was that “the resolutions in question have no binding character on their own account and are not declaratory of any customary rule of prohibition of nuclear weapons”.²²⁰ The ICJ then observed that

“General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”.²²¹

²¹⁸ *The Case of the S.S. Lotus*, Judgment (1927), page 28.

²¹⁹ Advisory Opinion *On the Legality of the Threat or Use of Nuclear Weapons* (1996), paras 67 and 74.

²²⁰ *Ibid*, para 68 (emphasis added in both citations).

²²¹ Advisory Opinion *On the Legality of the Threat or Use of Nuclear Weapons* (1996), para 70.

Thus, UN GA resolutions may provide proof of the *opinio juris* of states, however, additional support by other kinds of practice is needed.²²² The ILA considers that the adoption of a resolution “is probably best regarded as a series of verbal acts by the individual member States participating”.²²³ The same reasoning can be applied to resolutions (and other acts) adopted by other international organizations, i.e., that they are not conclusive evidence but may be interpreted together with other acts.²²⁴ This is quite a viable approach, and basically it actually does not differ much from how other kinds of statements and acts are treated – they too must be analyzed and interpreted against all other circumstances particular to each case.²²⁵ It should also be extended to the negotiation process of treaties and their drafts. However, regarding treaties, care should be taken not to confuse obligations emanating from that express agreement in-between the signatories on one hand, and the apprehension that the obligation is grounded in a customary international rule on the other.²²⁶

A benefit of considering statements made by states at meetings of international organizations or at negotiations of treaties is that the opinions of many states can be overlooked at the same time, which is not the most straightforward task to accomplish otherwise. Furthermore, Guzman points out that often a lot of states will not have any relevant practice at all, or even if they do they have no documentation of it available. Additional difficulties are posed by language barriers, and different legal systems. As a result, “the evaluation of state practice is fairly ad hoc and heavily favors powerful countries with easily accessible records in a commonly spoken language”.²²⁷ The forums discussed here at least offer weak states a relatively accessible way of making their voice heard.

In the view of both the ILA and the ICRC, international organizations have independent legal personality and their practice can be considered as formative of customary rules. The ILA consider this to be possible for intergovernmental organizations, whilst the ICRC extend it so far as to include non-governmental organizations including the practice and statements of the ICRC itself.²²⁸ Admittedly, some organizations do have significant influence on international politics and relations. However, their practice should perhaps not be considered as equivalent to that of states, and rather regarded as an auxiliary means for interpretation of state practice.

²²² Schlütter (2010), p.60. Thirlway finds that this statement by the Court means that resolutions themselves do not constitute practice – they may only be evidence of the existence of a customary norm; *The Law and Procedure of the International Court of Justice 1960-1989*, (2005), p. 99.

²²³ The ILA report (2000), p. 19

²²⁴ Akehurst, *A Modern Introduction to International Law*, (1982), p 27; the ILA report (2000) p. 65f. The ICRC has considered, inter alia, the amount of support given for a specific resolution and explanations of vote when determining the weight of it, (2005), p. xli-xlii.

²²⁵ Guzman considers that “practice is best considered as evidence of *opinio juris*, and to the extent that UN resolutions (or any other form of speech) provide evidence of *opinio juris*, it too can be used as evidence”, (2008) p. 199.

²²⁶ See the discussion regarding the relation between treaties and customary law in the ILA Report (2000), pp. 46ff.

²²⁷ Guzman, (2008), p. 185f.

²²⁸ The ILA report (2000), p. 19; the ICRC study (2005), p. xli.

6.5 The notion of “general practice”

6.5.1 Elements for assessment of a practice

In Article 38 (1)(b) of the ICJ Statute, the wording “general practice” is used. Some judgments of the Court can be used as a starting-point to understand the meaning of this phrase. In the *North Sea Continental Shelf* cases, an “indispensable requirement” for a customary rule to be formed was that:

“State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved”.²²⁹ (emphasis added)

“Extensive” practice has been interpreted by the ICRC as not requiring universal practice, “a ‘general’ practice suffices”. The ICRC considers that one cannot state any precise number or percentage of all states whose participation is required.²³⁰ The view of the ILA is concurrent, and the Committee further claims that “specially affected states” have a particularly important part to play:

“The criterion of representativeness has in fact a dual aspect - negative and positive. The *positive* aspect is that, if all major interests (“specially affected States”) are represented, it is not essential for a majority of States to have participated (still less a great majority, or all of them). The *negative* aspect is that if important actors do *not* accept the practice, it cannot mature into a rule of general customary law”.²³¹

Kelsen also reckons that not all states have to participate, and that a “long-established practice of a great number of states, including the states which, with respect to their power, their culture, and so on, are of certain importance, is sufficient”.²³² This apprehension about a generality of participating states, of which some are “specially affected”, is not entirely straightforward.

Guzman stresses that the amount of states participating in a certain practice is “clearly not terribly large” for a customary rule to be formed. Citing the opinion of Schacter, that “States with navies – perhaps 3 or 4 – made most of the law of the sea”, Guzman finds that even though “this may be an extreme claim, it remains the case that...a modest number of powerful states have been responsible for much of the formation of [customary international law]”.²³³

²²⁹ *North Sea Continental Shelf* cases (1969), para 74.

²³⁰ ICRC study (2005), p. xlv.

²³¹ The ILA report (2000), p. 26

²³² Kelsen (1967), p. 445.

²³³ Guzman (2008), p. 188.

Kolb states that an understanding of generality as a requirement of enough states participating in the practice is “intrinsically misconceived”. Rather, the prerequisite of generality must be understood as how many states

“tolerate or do not protest a practice initiated by some states... What counts is precisely not how many do something, but how that is received at large. Those who do something will in most cases be a slight minority; a practice then becomes customary by non-opposition, not by action... There is hardly any exaggeration in saying that custom is mainly silence and inaction, not action”.²³⁴

Furthermore, the concept of “specially affected states” is problematic, since in many areas, if not most, of international relations all states can be said to have interests. For example, within the ambit of IHL, it is implausible to claim that only some states could be affected, for how could that be assessed?²³⁵ On the basis of which states that are involved in an armed conflict during the formation of a customary rule? That would be absurd, considering that all states could potentially become involved at any moment in a conflict, and that – even if not becoming actively involved – its citizens could be affected in a variety of ways, e.g. by travelling in a country where a conflict suddenly erupts and thus accidentally happen to be caught up in an area of conflict, or by accompanying the ICRC as medical personnel.

It is sometimes claimed that for some areas, such as maritime law, only coastal states could easily be said to be affected, while landlocked are not.²³⁶ I disagree with such a view; for the purpose of general customary international law, all states must be seen as having an interest in the matter, since it is a question of applicability of a rule against every state.²³⁷ States may very well choose not to, or not be able for different reasons to participate in the formation of a customary rule. Nonetheless, one should be careful in claiming that a state’s inaction is equivalent to it not being affected by a practice that has the potential of imposing an obligation against the state in question.

The meaning of “virtually uniform” is that, regarding a particular practice, deviations may not have been of such a nature that one particular and consistent practice is difficult to discern. This was at issue in the *Asylum* case, where the ICJ stated that:

“The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy... that it is not possible to discern in all this any constant and uniform usage, accepted as law”.²³⁸

²³⁴ Kolb (2003), p. 136. Emphasis in the original.

²³⁵ The ICRC refrained from using this concept precisely because of this reason, ICRC study (2005), pp. xlv-xlv.

²³⁶ Henckaerts, *Customary International Humanitarian Law: a response to US comments*, (2007), p. 482.

²³⁷ For the purpose of particular customary international law, only some states may very well be seen as the only ones affected, but that is a question outside the scope of this paper.

²³⁸ *Asylum* case (1950), p. 277.

Nonetheless, “virtually uniform” still allows for some deviating practice without it being a bar to the formation of a customary norm. In the *Fisheries* case, the ICJ stated that “too much importance need not be attached to a few uncertainties or contradictions, real or apparent”, as long as the practice is sufficiently similar.²³⁹

When a practice is generally uniform but not identical, i.e., it manifests the same values but differs in particular details, it is still possible to speak of a customary rule. The main principles may then evolve into a customary rule, leaving room for different interpretations of detailed regulation. For instance, in the *Continental Shelf (Libya/Malta)* case, the ICJ stated that the concept of the Exclusive Economic Zone at sea was customary, even though practice differed as to the specifics of its delimitation.²⁴⁰

In the *Nicaragua* case, the Court elaborated that state practice conducted in breach of a customary rule may in fact strengthen the rule.²⁴¹ This is the case when the state in question tries to justify the behavior, or, according to the ICRC, when other states condemn it. Within the field of IHL, breaches of a rule are quite common at the same time as the status of the rule is acknowledged verbally by other states.²⁴²

Thirlway highlights that it is actually a rather ordinary occurrence that, when the ICJ has to determine the existence of a customary rule, practice is usually “sufficiently varied to permit of differing interpretations” regarding the content of the rule.²⁴³ In fact, most customary rules have probably encountered opposing practice during its formation.²⁴⁴ In the opinion of Wolfke, when one is to determine the existence of a customary rule the gathered material is often incomplete and ambiguous to such an extent that “the decision as to whether a rule is binding often amounts to choosing the less doubtful alternative”.²⁴⁵

Akehurst proposes that when there are “major inconsistencies”, a rule cannot evolve. In the case of “minor inconsistencies”, a customary rule can emerge, but that the rule would probably need a “large amount of practice” to support it. If no conflicting practice exists, a “small amount of practice” suffices for the rule to be created, and that it would not matter if only a few states had participated in the practice.²⁴⁶

In sum, the determination of whether a practice amounts to a customary rule will depend on the specific circumstances of each case, for “there are no binding, precise, pre-established conditions for

²³⁹ *Fisheries* case, Judgment, (1951), p. 138.

²⁴⁰ *Continental Shelf (Libya/Malta)* case (1985), para 34.

²⁴¹ *Nicaragua* case (1986), para 186.

²⁴² ICRC study (2005), p. xlv.

²⁴³ Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989*, (1990), p 106.

²⁴⁴ Tunkin (1970), p. 115.

²⁴⁵ Wolfke (1993a), p. 72.

²⁴⁶ Michael Akehurst, *Custom as a Source of International Law*, pp. 1, 12-21.

custom-creating practice”.²⁴⁷ The reaction against a practice by other states has a significantly decisive part in the determination.²⁴⁸

6.5.2 The status of “persistently objecting” states

A related issue is the relationship between a state and a customary rule when the state in question has persistently objected to the rule but nonetheless not succeeded in preventing its formation. If a practice is met with substantial opposition, it will most probably be barred from developing into a customary rule. Even a few opposing states, if sufficiently powerful, could prevent the formation given that they are in power to exert significant influence. However, a relatively weak state would not have that authority, and could find itself bound by a rule to which it had opposed. The question is if an opposing state could exclude itself from the applicability of a rule. The ICJ expressed a view in the *North Sea Continental Shelf* cases that such a possibility is in contradiction with the concept of customary law:

“it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;- whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour”.²⁴⁹

Another argument for an absolute applicability of a rule is that states have accepted the process of customary international law, and therefore they cannot avoid the binding force of a particular rule.²⁵⁰

However, not to allow a state the possibility to protect itself from the applicability of a general customary international rule is to accept legislation by majority and an overriding of the sovereignty and equality of all states.²⁵¹ Villiger makes a good point that denying such a possibility would only aggravate ideological and socio-economic gaps.²⁵²

The concept of persistent objection permits a state to avoid the application of a rule against it, the condition being that the state has openly and persistently objected to the development of a customary rule.²⁵³ The principle is held by several authors as accepted both by states and

²⁴⁷ Wolfke (1993a), p. 44; Brownlie agrees that a court does indeed have significant freedom of interpretation regarding the existence of a customary rule; *Principles of Public International Law*, (2003), p. 7.

²⁴⁸ In Kolb's view, “everything depends on the reaction of the other states”, (2003), p. 139.

²⁴⁹ *North Sea Continental Shelf* cases (1969), para 63.

²⁵⁰ Byers, *Custom, Power and the Power of Rules. International Relations and Customary International Law*, (1999), p. 180.

²⁵¹ Akehurst (1974-75), p. 26; Koskenniemi (1989), p. 394.

²⁵² Villiger, M. E, cited in Wolfke (1993a), p. 66.

²⁵³ Sur (2010), p. 175; Byers (1999), p. 180.

international tribunals.²⁵⁴ It is not to be regarded as potentially undermining the normativity of custom since the objecting state does not prevent the formation of the rule, only the application of it against the state in question.²⁵⁵

6.6 The subjective element of customary law

6.6.1 The approach to *opinio juris* as a belief and its complementary view

The subjective element of a customary rule is surrounded by a vast discourse in the literature as to what exactly it is composed of. Opinions on the matter differ depending on, *inter alia*, how the interpreter understands the entire process of formation and sustention of a customary international rule. Quite commonly, the subjective element is referred to as the *opinio juris sive necessitatis*, or *opinio juris* for short, which, in the words of Kammerhofer, “is the most disputed, least comprehended component of the workings of customary international law”.²⁵⁶

In a literal sense, the phrase means “belief of law or of necessity”, meaning that a state performs an act because it believes that it is required or permitted by law.²⁵⁷ However, it is not at all clear what this actually means, what it is composed of, or if it even is really necessary for a customary rule to be formed.²⁵⁸

The literal sense of *opinio juris* is perhaps feasible when a rule is already clearly existing, but is perhaps difficult to apply for the sake of explaining the process of formation of a new rule – to claim a belief in the legally obligatory or permissible character of a certain conduct in the very initial stage and before it has gained the status of a legal norm is not really possible.²⁵⁹ Therefore, other approaches try to explain the essence of the subjective element before a rule has formulated and gained its generally binding character. This dichotomy can be explained by an inherent conflict in the concept of customary international law, which is in a way indirect and unintentional, whilst the creation of law “normally requires some form of intentional activity, an act of will”.²⁶⁰

Thus, as a first general distinction between different interpretations of the subjective element, they can be regarded as divided into those concerning the formation stage of a rule, and those concerning an already established rule. These two approaches are sometimes referred to as the constitutive

²⁵⁴ Brownlie (2003), p. 11; Thirlway (1990), p 106; Sur (2010), p 169; Wolfke (1993a), p. 66.

²⁵⁵ Koskenniemi (1989), p. 394.

²⁵⁶ Kammerhofer (2004), p. 532.

²⁵⁷ Akehurst (1982), p. 29; ILA report (2000) p. 32 f.

²⁵⁸ Müllerson puts it eloquently that “*Opinio juris* has several meanings and many more nuances”, (1997), p. 348.

²⁵⁹ ILA report (2000) p. 30f. However, the ILA also points out that “it is not entirely possible or desirable” to distinguish clearly between the stages, see p9, footnote 21.

²⁶⁰ Kammerhofer (2004), p. 532.

view, and the declaratory view.²⁶¹ The former regards the subjective element as an active part in the formation, such as the will or consent of states that a certain conduct should be a rule of customary international law, whilst the latter regards it as the belief of states in the binding character of the (already existing) rule.

Under the declaratory view, the *opinio juris* can explain why a rule is binding upon states. States believe in the legal status of the rule, and therefore, it is a rule of law. But this belief does not explain how the rule comes into being in the first place, whilst the constitutive view tries to resolve this very question. Koskenniemi states that the approaches are “mutually exclusive and defined by this exclusion”.²⁶²

6.6.2 The subjective element as consent or will

Voluntarism regards the formation of customary international law as an act of will by states that a particular practice should be tantamount to a rule of law. This approach supposes that every state in the international community has agreed to the rule in question, since the theory of equal sovereignty of states precludes the possibility of applying obligations against them without their consent.²⁶³ The will or consent of states can be manifested in different ways, for some states it can be an express statement, for others it will be a matter of acquiescence, or something else.

The PCIJ made a statement in the *Lotus case* that can be regarded as a quite strong confirmation of the voluntarist perception of international law:²⁶⁴

“International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities... Restrictions upon the independence of States cannot therefore be presumed”.²⁶⁵ (emphasis added)

For Tunkin, the sovereign will of states was the very essence of how customary international law came into being and an indispensable requirement for its binding character vis-à-vis every single state. The existence of a customary rule was the result of an agreement, a “concordance of the wills of

²⁶¹ Elias, *The Nature of the Subjective Element in Customary International Law*, (1995), p. 502.

²⁶² Koskenniemi (1989), p. 370.

²⁶³ Mendelson, (1995), p. 185.

²⁶⁴ Schlütter (2010), p. 19.

²⁶⁵ *Lotus case* (1927), p 18.

states”.²⁶⁶ In his opinion, a rule of customary international law came into being in the following way: first, a certain practice amongst states evolved to the degree of becoming a customary course of conduct. After that, the customary conduct turns into customary law when states recognize its status as such. This recognition is a *sine qua non* for the rule’s status as a legal norm, being an expression of the will or the consent of a state to regard the rule as binding upon it.²⁶⁷

There is no need for the practice to be general, but the recognition of the legal status must be so for it to become a part of general customary international law. In the perception of Tunkin, the “operative sphere” of a rule expands as more and more states recognize its legal status, and it is in this sense that the rule becomes general. He did not acknowledge the possibility that a majority of states could, by their recognition of a customary rule, create obligations opposable against other states – a theory with “wide support in contemporary bourgeois legal literature” – since such a model “is in blatant contradiction to the fundamental principles of international law, especially the principle of equality of states”.²⁶⁸

This view equates customary law to treaty law, the only difference being that of form, of how the consent is given. The agreement between states is express in the case of treaties, while tacit in the case of customary law. Acceptance must be proven in the case of every state, and silence on the part of a state can only be regarded as tacit recognition if its interests are affected and without it raising any objections during a certain period of time.²⁶⁹

Tunkin’s theory is not really a workable tool for general customary international law, since it does not actually acknowledge the concept as such that not all states participate actively in the creation of customary rules. Granted, the point that major powers should not be able to dictate terms for weak states has merits, however, this is really not a (potential) problem specific for the creation of customary law, but rather an inherent feature in the entire system of international law and relations.

Kelsen did not agree with an absolute consent theory of customary law. He maintained that there is no need to prove consent on the part of every state for it to be bound, and that “customary law cannot be interpreted as created by the common consent of the members of the international community”.²⁷⁰ However, a general consent is needed for custom to evolve.²⁷¹

Müllerson rejects the idea that the will of states is the only constitutive part of the creation of

²⁶⁶ Tunkin (1970), p. 133.

²⁶⁷ *Ibid.*, pp. 117f, 124.

²⁶⁸ *Ibid.*, pp. 119, 124, 127. Schlütter writes that in the communist ideology, customary law was a part of the period of the “white man’s burden”, i.e. when powerful states could neglect the sovereignty of weak states, (2010), p. 21.

²⁶⁹ Tunkin, *ibid.*, p. 129.

²⁷⁰ Kelsen (1967), p. 444f. The ILA puts the consent theory about customary law in relation to the international legal system as a whole, and states that “it is a fallacy to reason that, just because international law *as a system* is based on consent, and just because the identification of the *processes* by which the law is created (i.e. the sources) depends also on the will of States, it necessarily follows that any given process (and, in the present context, customary law) has consent as its sole or indispensable ingredient”, the ILA report (2000) p. 38.

²⁷¹ Kelsen (1967), p. 454.

customary international law, and that the will or consent of every state is the precondition for its binding character.²⁷² He criticizes Tunkin for over-simplifying the sources of international law, and states that Tunkin had to create legal fictions to maintain his theory.²⁷³ Indeed, to compare the structure of customary international law to that of treaty law as if its emergence and effects were basically the same is to deprive the former of any specific traits of its own. Koskenniemi expresses a view similar to Müllerson's, in that custom differs from treaties precisely because it is not based solely on consent, it is "something other ('more') than agreement". The subjective will cannot be the answer to why customary law is binding upon all states; rather, it must "refer to history, legitimate expectations, social justice, necessity or whatever", i.e., something "beyond simple consent".²⁷⁴

Moreover, to require that consent be proved on behalf of every state lacks support in both international jurisprudence and state practice.²⁷⁵ Considering the fact that there are nearly 200 states to take into account, Wolfke is quite right in stating that such a requirement "would be certainly over-exacting and even impossible" to meet.²⁷⁶ And, as Guzman points out, the other side of the coin would be that a state could simply avoid being bound by a rule by providing evidence that it had not consented to it (which is not the same as showing that it had persistently objected to the rule).²⁷⁷ The problem is thus how one can argue that a rule can be applicable against all the states that have not participated actively in its formation. To solve this resort is often sought in means enabling at least a presumption that a general consent exists.

6.6.3 The subjective element as inferred consent or acquiescence

In order to enable the claim that non-participating states, i.e. states that have not been actively engaged in a practice counting towards the formation of a customary rule, still are bound by the rule, the theory of inferred consent can be called upon. For Byers, inferred consent constitutes the principal distinguishing characteristic between customary international law and treaties.²⁷⁸ The concept comes with different names depending on the author, sometimes referred to as implied consent, tacit recognition, or acquiescence. However, the meanings of these notions are basically the same and are used interchangeably.

The idea is to interpret silence or abstention from protesting as if the state in question has given its consent to the practice. If a state does not object, it may be said to have acquiesced to the rule, the inaction then being regarded as "an admission or recognition of the legality of the practice in

²⁷² Müllerson (1997), p. 359.

²⁷³ *Ibid*, p. 356.

²⁷⁴ Koskenniemi (1989), p. 351.

²⁷⁵ Mendelson (1995), p. 191f. He also maintains that neither is there any requirement to prove the consent of the state against which a rule of general customary international law is invoked.

²⁷⁶ Wolfke (1993a), p. 131f.

²⁷⁷ Guzman (2008), p. 186f.

²⁷⁸ Byers (1999), p. 143.

question” or as “validating a practice which was originally illegal”.²⁷⁹ The ICJ stated in the *Gulf of Maine* case that the notion of acquiescence emanates from “the fundamental principles of good faith and equity”.²⁸⁰ MacGibbon considers that acquiescence plays a particularly important role when applying a rule pertaining to controversial matters or when the rule is still just developing, since the content and authority of the rule certainly can be questioned in such cases.²⁸¹

To be able to infer consent from a state’s non-reaction an important feature is that the state must have known or should have known about the practice, and that it could or should have objected but nonetheless refrained from taking any action.²⁸² If a practice has been notified or become “generally known”, such knowledge can be presumed and subsequent non-objection regarded as an abandonment of the right to make any claims by the state.²⁸³

Koskenniemi suggests that to infer consent from acts (or abstentions from acting, which is an act when undertaken consciously) of states is to make subjectivity and objectivity work together: “Law is still *justified subjectively* but, it seems, now capable of *objective ascertainment*”.²⁸⁴ However, several authors have expressed that the doctrine of acquiescence must be used with caution. Silence and abstention from any action can be caused by many different reasons, and one should not hastily equate silence to consent. All relevant circumstances must be taken into account, and one has to carefully consider whether the inaction can be evidence of the will of a state.²⁸⁵ Byers is of the opinion that the word consent cannot be used to describe what the meaning of acquiescence is. He finds that acquiescence “often signifies ambivalence or even apathy to the rule in question rather than a conscious support for the rule on the part of the acquiescing State”.²⁸⁶

A potential problem is that a state can find itself bound by a rule even though not approving of it, simply because the state failed to protest for whatever reason. States have to act if they do not wish to be bound.²⁸⁷ Mendelson opposes the concept of inferred consent altogether, saying that “It is simply not true that all of those who failed to protest can reasonably be taken to have acquiesced”.²⁸⁸ While it may very well be true that not all states can be said to have consented, albeit tacitly, to a certain customary rule, it is possible to regard the formation of particular rules not as entirely isolated

²⁷⁹ MacGibbon, *The Scope of Acquiescence in International Law*, (1954), p. 182.

²⁸⁰ *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, (1984) para 130. The Court also held that the related concept of estoppel – i.e., that a state is precluded from subsequent objections if it has had the opportunity to protest and refrained from doing so – derives from the same principles.

²⁸¹ MacGibbon (1954), p. 182.

²⁸² Byers (1999), p. 142f. Kammerhofer refers to the knowledge requirement for the possibility of inferring consent as “qualified silence”, (2004), p. 533.

²⁸³ MacGibbon (1954), p. 170.

²⁸⁴ Koskenniemi (1989), p. 378f.

²⁸⁵ Schlütter (2010), p. 24; Kammerhofer (2004), p. 533; MacGibbon (1954), pp. 168-170; The ILA calls the presumption of consent on the part of states that in fact have not participated actively in practice “a mere fiction”, (2000) p. 39.

²⁸⁶ Byers (1999), p. 106.

²⁸⁷ Schlütter (2010), p. 24; Byers (1999), p. 143.

²⁸⁸ Mendelson (1995), p. 187.

occurrences but rather as a part of the entire system of customary international law. By accepting the system, states consent to the process of custom-formation in general and thus do not have to explicitly consent to each individual rule.²⁸⁹ Moreover, each state always has the option of persistently objecting to individual rules.

In Wolfke's opinion, at the present time one can assume that knowledge about practice of states is spread quite rapidly and easily throughout the international community and hence making presumptions about consent through acquiescence is justified. If a state does not protest against a practice it therefore equals consent and "the reasons for which states abstain from protesting...cannot, except in drastic cases, be taken into account, because of legal security".²⁹⁰ In sum, his view is that:

"At present, toleration of a practice by other states, considering all relevant circumstances, justifies the presumption of its acceptance as law, which in turn leads to the formation of a new customary rule of international law".²⁹¹

Perhaps some proof that information about a practice has been spread is warranted, but generally Wolfke does make a good point that one should be able to infer consent from the inaction of states without having to examine the reasons for their silence. If general knowledge can be presumed, I think that Fitzmaurice is quite right in stating that

"consent is latent in the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law".²⁹²

6.6.4 The dynamic evolution of the subjective element from necessity to will to belief

The dichotomy between the declaratory and constitutive approaches can be phased out by regarding the subjective element as capable of undergoing a gradual transformation. Depending on the current stage in the process of custom-formation, the element will have different traits.

At an early, initial stage of the practice, one can talk about a motivation based on political or social needs or other interests without it necessarily being related at all to considerations about the legal

²⁸⁹ Byers, saying that "Consent to customary rules may therefore come in the form of a diffuse consensus, or general consent to the process of customary international law, rather than as an explicit and necessarily represent consent ... and is but one of the ways in which States may participate in the development, maintenance or change of rules of customary international law", (1999), p. 144.

²⁹⁰ Wolfke (1993a), p. 136f.

²⁹¹ Ibid, p. 48.

²⁹² Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, (1953), p. 68.

character of the practice. This motivation is referred to as *opinio necessitatis*.²⁹³

The view of MacGibbon is that at this initial stage, the practice is mere “usage”, that – provided that the practice is general, recurrent and “more or less uniform” – “at least serves to indicate that the practice is not illegal”.²⁹⁴ For this practice to achieve the status of customary law it has to be performed with a claim of right, whilst a generality of states at the same time also acknowledge the correspondent obligation. The subjective element transforms from acquiescence by inactive states, to an *opinio juris* about their obligation as a matter of law: “The *opinio juris* is thus distinct from acquiescence, but it is the logical consequence of the previous acquiescence which enabled the right correlative to the obligation to be perfected”.²⁹⁵

Thirlway’s opinion is similar, letting *belief* represent both what states consider as required by law, and what they believe should be law.²⁹⁶ However, in this way, the customary rule is actually already formed at the initial stage: “The *opinio necessitatis* in the early stages is sufficient to create a rule of law, but its continued existence is dependent on the subsequent practice accompanied by *opinio juris*”.²⁹⁷ Koskenniemi agrees that the rule is established at the initial stage, and proposes that the theory about *opinio juris* (as a belief in what the law is) should be rejected and let it become “a matter of will, not of knowledge”.²⁹⁸

Kammerhofer considers the “smudging” of the line between consent and belief as generating more uncertainty rather than clarification:

“can one say that a belief, especially if formulated as ‘belief that the practice becomes or ought to be law’, is not an act of will? On the other hand, is the ‘belief that something is law’ really an act of will?”.²⁹⁹

The question is whether the distinction between will, consent and belief, as well as between different stages of custom-formation and sustention, is more theoretical than actually possible to apply easily in reality. For how to distinguish between what a state wills – and especially, for which reasons it wills something – and what it believes when both are inferred from acts? And how to actually separate between the different stages when practice is not coordinated and comprised of acts by nearly 200 states? Wolfke expresses that it is actually not possible to distinguish between these stages, and makes a convincing conclusion:

“the moment of formation of a custom – and hence the moment in which a

²⁹³ Koskenniemi (1989), p. 372.

²⁹⁴ MacGibbon (1954), p. 117.

²⁹⁵ Ibid, p. 151, footnote 5.

²⁹⁶ Thirlway (1990), p. 43.

²⁹⁷ As cited in Koskenniemi (1989), p. 373 (Hugh Thirlway, *International Customary Law and Codification*, 1972, p. 56).

²⁹⁸ Koskenniemi (1989), p. 373.

²⁹⁹ Kammerhofer (2004), p. 535.

customary rule begins to have a binding effect – cannot be ascertained, since it is practically speaking intangible. We can ascertain only whether at a precise moment the custom exists, and at most, upon analysis of practice, make certain anticipations concerning the evolution of a particular custom”.³⁰⁰

Furthermore, at the initial stage it is quite likely that contradicting practice exists, making it difficult to make any statements about which practice reflects an already established rule. Thus, even though it may already be “created” at the initial stage, the rule can probably (in most cases) only be ascertained at a later stage. Wolfke therefore makes a compelling point that anticipations are probably the best we can get.

6.6.5 Legitimate expectations – the International Law Association report and the ICRC Study

The International Law Association established a Committee on Formation of Customary (General) International Law in 1985, which issued its final report on the formation of general customary international law in the year 2000.³⁰¹ The Committee claims to have used an inductive approach in its work to establish the preconditions for a customary rule to be formed, because it considered that rules about how sources of international law come into being should be found in the practice of States, and not in an “*a priori* way of reasoning”. The ILA has also relied to a great extent on pronouncements of the ICJ, whilst considering opinions of authors only insofar as they could provide evidence of practice and arguments “supported by the evidence and otherwise well reasoned” concerning methods of interpretation.³⁰²

The ILA report contains the following definition:

“a rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future”³⁰³
(emphasis added)

³⁰⁰ Wolfke (1993a), p. 54.

³⁰¹ The ILA report *Statement of Principles Applicable to the Formation of General Customary International Law* can be accessed at <http://www.ila-hq.org/en/committees/index.cfm/cid/30>

³⁰² ILA report (2000), p. 4f. The Committee seems to have relied basically on the opinions of one author, those of Mendelson, who also, coincidentally, was the Chairman of the Committee. For instance, the definition of a customary international rule was adapted from his *Collected Courses*, whilst the entire section about the subjective element “with some amendments, forms Chapter III of Mendelson’s Hague lectures”, see p. 8 footnote 19, and p. 29 footnote 75.

³⁰³ *Ibid.*, p. 8.

Thus, in the view of the ILA, the constitutive element that has to be proved is the objective one – it is the constant and uniform practice of states that creates customary law. The existence of the subjective element, regardless of how it is defined, is usually not required to be proved. If it is present, be it will, belief or consent or something else, it is sufficient for a particular state to be bound, but it is still not necessary to prove it. Neither is it required that a general consent of states exists, as customary international law is not to be regarded simply as tacit treaty law. The ILA does, however, acknowledge that some subjective will needs to exist to initiate a formation of customary law, but that it still does not have to be proved.³⁰⁴

Rather, for the ILA, the role played by the subjective element in the formation of a customary rule is to serve as an indicator to which acts of practice shall or shall not count as custom-creating acts. It works in a way to identify customary practice which for different reasons is not meant to build up to a customary rule, and in that sense is a sort of *opinio non juris*. As examples of such practice the ILA refers to the sending of condolences on the death of a head of state, or the universally accepted practice that the importation of goods for the personal use of diplomats is exempted from customs duties.³⁰⁵

For the case of some ambiguous conduct, the ILA however gives the subjective element a decisive part to play, stating that “the conduct will only count if there is positive evidence that the State or States concerned intended, understood or accepted that a customary rule could result from, or lay behind, the conduct in question”. Referring to the *Lotus case*³⁰⁶, the Committee states that omissions must indeed be (un)performed knowingly by the state. Further, whilst citing the *North Sea Continental Shelf cases*³⁰⁷ regarding conduct which could have been performed for other reasons than for a sense of legal obligation, the ILA stated that there must be an accompanying *opinio juris* for the conduct to count as a precedent to a customary rule.

A problem with the ILA’s understanding of the process is, as I see it, that it could be difficult to maintain a clear cut distinction for when there is a need to prove a subjective element, and when there is not. What is the criteria by which to tell that a certain practice could have been performed for other reasons than a sense of legal obligation, and hence that an *opinio non juris* must be proved? Further, we still know very little about the role of the subjective element before the formation of a rule, since the ILA seems to somewhat overlook any part of initiation in the process. All we know is that a rule of customary international law is one that gives rise to a “legitimate expectation”, but we do not know how this expectation can mature during an initiation stage.

In sum, the legitimate expectation in the definition used by the ILA seems to be based on a constant and uniform practice of states, and that the legal status of the rule is unchallenged unless the

³⁰⁴ Ibid, 30f, 38.

³⁰⁵ Ibid, p. 35. See also Mendelson (1995), p 197f.

³⁰⁶ *Lotus case* (1927), p. 28.

³⁰⁷ *North Sea Continental Shelf cases* (1969), paras 76-77.

practice is accompanied by an *opinio non juris*, or by the protests of enough states to overthrow the constancy of the practice, or by an ambiguous purpose of the practice. The ILA does not differentiate between the stages of formation and sustention.

The ICRC study³⁰⁸ contains a surprisingly short description of *opinio juris*, only stating that it “relates to the need for the practice to be carried out *as of right*”.³⁰⁹ After giving some examples of how state practice and *opinio juris* may manifest themselves depending on if the particular rule concerns a prohibition, an obligation or a right (a division which by itself is not straightforward, since these concepts often are just different sides of the same coin), the ICRC adopts the same view as the ILA that it is not necessary to prove the existence of *opinio juris* if only the practice is sufficiently dense. The *opinio juris* is only necessary as the *opinio non juris* in the same type of situations as claimed in the ILA report. Regarding IHL rules that require abstention from certain acts, it has to be proved that a state’s abstention “is not a coincidence but based on a legitimate expectation”, which in ICRC’s view means that the abstention was based on “a sense of legal obligation”.³¹⁰

For the purpose of the study, legitimate expectations that give rise to a customary rule seem to be based primarily on consistent practice without much uncertainty of the legal status. The study would therefore not support the existence of a customary international rule at any earlier stage than where it can be forcefully ascertained, by means of consistent practice.

A problem related to not considering that a subjective element needs to be proved, is that it makes it difficult to distinguish between “regular” practice and practice based on legal rights or obligations. It becomes a matter of relying on a conduct because states have once chosen a certain path. Koskenniemi considers that this concept “does away with general custom altogether”, making custom simply into bilateral relations. This leads to the problem that

“this approach must either rely on a naturalist theory about the kinds of expectations created by a form of conduct ... or base itself on the scrutiny of the subjective attitudes of the *other* State (in which case it would combine a psychological element within itself)”.³¹¹

Thus, the psychological element is needed to be proved, otherwise the result will be either “an inability to distinguish fact and law or pure naturalism”.³¹²

³⁰⁸ See section 4.1; Considering the massive scope of the study, it serves as a profound example of a way to establish customary rules. Irrespective of if one shares the view taken by the ICRC as to how the existence of customary rules should be determined, the rules acknowledged by the study will most probably also be acknowledged by many others, and the method used must be considered as of some weight for the purpose of finding customary rules within the field of IHL.

³⁰⁹ ICRC Study (2005), p. xlv.

³¹⁰ *Ibid.*, p. xlvi-xlvii.

³¹¹ Koskenniemi (1989), p. 365.

³¹² *Ibid.*, p. 366.

Byers defines legitimate expectations as a legally justified reliance in-between states to behave accordingly to previous behavior or assurances, provided that they are “of a type, and takes place within a context, such that it is considered legally relevant by most if not all States”.³¹³ Such a definition would also require proof of a subjective element – how could one otherwise claim that the behavior is “considered legally relevant”, and not just “relevant”?

Wolfke underlines that the process of custom-formation cannot be described *in abstracto*, and that all relevant circumstances must be taken into account for each specific case.³¹⁴ He provides an explanation of the process, also with a reference to a kind of legitimate expectation:

“An international custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law. At that moment the custom may be regarded as formed and the corresponding customary rule of international law, which can at any time be formulated, begins to have binding effect”.³¹⁵ (emphasis added)

Such a presumption must be made in relation to some proof of the subjective element. Because, again, it relates to the apprehension that the conduct is required by law in the opinion of other states.

Another explanation of the nature of customary international law as a product of legitimate expectations is offered by Guzman. By his theory, the difference between customary law and other norms is that a violation of the former generates higher costs (such as reputational damage, sanctions) than a violation of the latter. Both affect the expectations of actions and reactions undertaken by states, but for customary rules these expectations are based on a belief that the conduct is required by a legal obligation, whilst for other kind of normative behavior (that is, “mere” usage) “expectations about ‘compliance’ are modest”.³¹⁶ Guzman claims that states do not comply with customary rules because they feel an obligation to do so; they do so out of consideration for the costs that otherwise could follow. The determining element for how a state chooses to act is thus what it considers that other states expect.³¹⁷

In Guzman’s view, *opinio juris* is “the belief of other states that the acting state has a legal obligation. (...) Consent is not relevant to the existence or effectiveness of the rule”.³¹⁸ This definition does explain why a state would follow a certain conduct, however, it does not clarify how the belief and hence the legitimate expectation comes into being in the first place.

³¹³ Byers (1999), p. 107.

³¹⁴ Wolfke, *Some Persistent Controversies Regarding Customary International Law* (1993b), p 7.

³¹⁵ Wolfke (1993a), p. 53.

³¹⁶ Guzman (2008), p. 192f.

³¹⁷ *Ibid*, p. 194.

³¹⁸ *Ibid*, p. 195.

6.6.6 The nature of the subjective element as a concurrent presence of its different forms of manifestation

As we have seen, there are a number of understandings of the subjective element in the formation and sustention of customary international rules. Most likely, just as in the theory, in reality different states have different perceptions of how to relate to a certain practice at any given moment. Thus, the subjective element may exist in several forms at the same time, and furthermore, it may be difficult to distinguish between them in reality. Müllerson summarizes the meaning of the approaches quite well:

“What all these definitions have in common is that they are different manifestations of subjective attitude ... to various patterns of..behavior.. in the light of [states] understanding of what international law is or ought to be. Depending on a context such an attitude may be expressed in the form of will, consent, consensus, belief, acquiescence, protest, estoppel or may be even something else. Some states may will that a pattern of behavior become a norm of customary law, other may consent or acquiesce, while some states may believe that it has already become binding as a customary norm”.³¹⁹

When assessing if a subjective element is present, specific circumstances of each case will determine how it manifests itself. Sur has proposed that *opinio juris* should be regarded as an element of reasoning, rather than as a distinct element contained within a rule.³²⁰ Support for that approach can to some extent be found in the *Gulf of Maine* case, where the ICJ stated that the presence of customary rules “in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas”.³²¹ Nonetheless, the effect of such an understanding is probably the same as weighing different perceptions of the subjective element together and reaching a general conclusion of whether it is present or not.

6.7 Shifting emphasis of the objective and subjective elements

Even though the two elements may be expressed by the same act, the importance of each of them may be emphasized at the expense of the other. Kirgis has proposed that the significance of the respective elements is changeable along a “sliding scale”, depending on if the rule in question relates

³¹⁹ Müllerson (1997), p. 349.

³²⁰ As referred in Byers (1999), p. 138f (Serge Sur, *La coutume internationale*, 2e cahier, 1990, p. 1f).

³²¹ *Gulf of Maine* case (1984), para. 111.

to a value-loaded or a more value-neutral occurrence.

His point of departure is the *Nicaragua* case, where the ICJ stated that a customary international rule exists which coincides with Article 2 (4) of the UN Charter regarding the prohibition of the threat or use of force.³²² Kirgis finds that the Court relied only on the element of *opinio juris*, support for which it primarily drew from resolutions of the UN, and “without any reference whatsoever to the ways in which governments actually behave”.³²³ When important norms are involved, Kirgis concludes that the Court relies on verbally expressed *opinio juris*. In other cases, an opposite approach has been used – if practice is sufficiently consistent, it has been acknowledged as a customary rule without actually proving a presence of *opinio juris*.³²⁴ This difference is what Kirgis has termed as custom on a sliding scale:

“On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an *opinio juris* is required. At the other end of the scale, a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule”.³²⁵

The position to be used on the scale is determined by the importance of the particular rule, and must be determined on a case-by-case basis.

At the first extreme of the scale, we find the practice-based approach. This is basically the view advanced by the ILA discussed earlier, that consistent practice suffices for the purpose of showing a customary rule unless it is shown that the practice has “non-normative intent”. The ICRC has used this approach, stating that an *opinio juris* is contained within “sufficiently dense practice” and hence does not have to be proved in any additional way.³²⁶ In the jurisprudence of international courts, as well as in the practice of states themselves, a customary rule is quite commonly claimed to exist on the basis of sufficient practice, without specifically showing a presence of a subjective element.³²⁷ The *opinio juris* is hence assumed, and not proved.

A problem with this approach, as already discussed, is that it makes it difficult to distinguish between law-creating practice and other practice because it sort of reverses the function of *opinio juris*. Kolb discusses yet another important aspect: in order to find that there is a sufficiently consistent practice, first one has to determine which acts should count at all. This cannot be made by some pre-

³²² *Nicaragua* case (1986) paras. 191-192.

³²³ Kirgis, *Custom on a Sliding Scale*, (1987), p. 147.

³²⁴ *Ibid*, p. 149

³²⁵ *Ibid*.

³²⁶ ICRC Study (2005), p. xlvi.

³²⁷ Mendelson (1995), p. 206; Kelsen (1967), p. 450.

established pattern, but already here at this stage the choices made by the interpreter will determine the outcome: “Custom is a legal and intellectual construct, developed through a complex process of analogical reasoning reducing to an ‘artificial’ unity a series of unconnected facts and acts”.³²⁸ Therefore, it is not a question of a direct induction from precedents, but rather of a subjective creation of a pattern. The objective element is not really objective after all:

“in the formation of customary law perceptions about social needs, particular interests, legal values, general convenience or reasonableness, outweigh the so often stressed objective aspect of induction from precedents. In slightly exaggerated terms one could say that custom is not an objective reality emerging from a bundled set of facts, but a subjective projection of beliefs grounded in values to the extent these are not contradicted by practice. The element of practice often serves more as limit to the establishment of a rule than as its basis”.³²⁹

If one does not prove that the practice – i.e., the selection of practice that has been made – is rooted in a legal conviction, it may become difficult to separate it from other subjective values.

The opposing side of the scale is the *opinio juris*-based approach. It is often used when assessing norms considered as important, i.e., related to certain values. Schlütter finds that “there is a direct relationship between the importance attributed by the international community to particular norms and the readiness to lower the burden of proof required to establish custom”. However, the problem of finding a customary rule based on a value-driven assessment of *opinio juris* is that the values in the international community are not coherent.³³⁰ It may become a thin line to balance on, and could fall into the same problematic paths as those posed by the deductive approach.

Another aspect of purely *opinio juris*-driven evaluations is that sometimes the ascertained rule resembles more an act of agreement between states than custom. The argument goes that if it can be shown that states have agreed unanimously or at least nearly so to the normative value of a rule in a resolution or declaration, it amounts to a customary rule.³³¹ This concept of possible “instant customary law” was introduced by Cheng in relation to the (then) new legal topic of outer space.³³² It may very well be the case that if an unequivocal *opinio juris* can be shown, states have an obligation to adhere to the rule in question. However, its binding force is perhaps rather best described as emanating from an “(instant) agreement’ of an informal nature”.³³³

In sum, consistent practice may give rise to a kind of standardized conduct that states choose to follow, and widespread agreement may impose requirements on states to adapt its practice to the

³²⁸ Kolb (2003), p. 131.

³²⁹ Ibid, p. 133.

³³⁰ Schlütter (2010), p. 43f.

³³¹ The ILA report (2000), pp. 63ff.

³³² Cheng, *United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law?*, (1965). He found that this was not the case after analyzing the relevant resolutions, nonetheless the concept by itself remains.

³³³ Kolb (2003), p. 145.

rule in question; in my opinion, however, for the purpose of customary law, both types of elements must be present, otherwise it is not a question of customary law (but of other types of normative rules). To justify the selection of practice shown, one must prove that there exists a conviction that this very practice follows from a legal rule. To not end up in a value-centered discussion or an agreement, the alleged *opinio juris* must have support in a variety of acts, and not merely verbal acts pertaining to the very question at issue.

6.8 Conclusions on how to assess whether a general customary international rule exists

In my opinion, the inductive method to use for finding customary rules in the field of IHL should take the following remarks in account:

1. Gathered material must show a presence of both an objective and a subjective element. The same act can manifest both – it is matter of analysis.
2. The subjective element can manifest itself in different forms, depending on the circumstances and may differ between states – the common ground is an acceptance of the practice as law.
3. A generality of practice or acceptance must be shown. This does not mean that a participation of each state has to be evaluated, but it must be required that a general knowledge of the practice may at least be presumed. Only then can acceptance be inferred from a state's inaction. To some extent states have to be considered as having a responsibility of looking after its interests in the international sphere, and hence the demand of proving a presumed knowledge should not be exaggerated. However, verbal acts do need to be communicated in a manner that enables a general knowledge.
4. In the field of IHL, it may be difficult to gather evidence of certain physical acts. Therefore, reactions by other states towards that practice may provide evidence of the physical act in question.
5. If it cannot be shown that a practice is accepted as law, i.e., that a customary rule exists, it is most probable that one can only make certain anticipations of a possible emergence of a rule.

7 CONCLUSIONS

To determine the applicable law regarding the legality of participation in an armed conflict by employees of PMCs, I found that an assessment of the possible existence of a customary rule on the matter is necessary to carry out. As the scope of this paper does not allow for such an assessment, I will limit the discussion to the possible outcomes and consequences of it.

1) *The existence of a customary rule cannot be proved.* It may very well be the case that a rule cannot be shown, given that the process of proving a rule may often be rather cumbersome. Since the process of determining the existence of a new customary rule requires that the practice has been accepted as law, it is not sufficient that the practice of using PMCs is widespread and that some aspects of the structure of the international society and of the state have changed. If these changes can be linked only to political and not legal convictions (difficult as it may be to separate the notions from each other), the practice will not become law no matter how extensively PMCs are used. Furthermore, one cannot certainly consider that the use of PMCs would be equally accepted in all cases: so long as it is in the interest of powerful states to allow PMC employees to participate directly in hostilities, and as long as they are used by “legitimate governments” or for a “legitimate cause”, the practice may very well be accepted. However, legitimacy in this sense is always in the eye of the beholder.

If existence of a new rule cannot be proved, one can only put forward one’s own anticipations that it will emerge. The effect of not finding a new rule is a *status quo*: the rules of GC III and AP I remain applicable.

2) *The customary rule is compatible with the treaty rules.* If both sources stipulate the same obligations and rights, there is no conflict of law. The rules will then coexist, yet differ in the formal aspects of the sources.

3) *The customary rule is incompatible with the treaty rules.* Recalling that the treaties prescribe that the participation in conflict by civilians is illegal, with regard to employees of PMCs the incompatible customary rule would be that they may lawfully participate directly in conflict, and are entitled to POW status. Employees of PMCs would belong to an own sort of mixed group of the categories, a “civilian legal combatant”.

To resolve this conflict of norms, the first step to take is to consider which of the norms is the later one, and then apply the *lex posterior* principle. Regarding the GC III and AP I, it is rather obvious that they were both adopted and entered into force even before PMCs became involved in armed conflicts. The two new international documents, the Montreux document and the Draft Convention, cannot be considered as having a legislative effect by themselves; at most, they could possibly be

invoked as evidence in the process of determining a customary rule as proof of state will or intent. The conclusion must then be that the customary rule is the later one, and hence prevailing.

As I discussed earlier, the *lex posterior* is superior to the *lex specialis* principle, and would only be relevant if the treaty rules and the customary rule could not be chronologically listed. Furthermore, even if one would consider that the *lex specialis* should prevail over the *lex posterior*, the customary rule would still get the upper hand in this case since it would be the special law, an exception, to the general law contained in the treaties on the status of civilians.

Apart from only prevailing over the treaty rules, the customary rule could possibly also modify the former. This would be the case if it could be assumed as the intention of the state parties. Given that the scope of the GC III is almost universal and quite widespread of the AP I, the evolution of a general customary international rule could be claimed to entail the intent to modify the treaties by the respective state parties.

In this paper, the alleged merit of clarity, stability and predictability of written law has been proven to be an overstatement. Granted, it is easy to view the content of the law when printed on paper, but that does not necessarily mean that the law is straightforwardly applicable in reality. If the preconditions differ greatly between the time of adaptation and of application of the treaty, it might become difficult to argue that the state consent given for the treaty also covers behavior under these new preconditions and, in this case, of new subjects.

On the other hand, the flexibility of customary law may also be questioned. The much troublesome process involved in proving the existence of custom would rather speak of the opposite. Perhaps the flexibility should be understood as an inherent potential to prove what needs to be proven at the right time.

None of the sources gives us by themselves the possibility to directly and unequivocally apprehend the content and applicability of the law. They are both needed to furnish a comprehensive system of international law, within which their interrelationship is necessary for the system to evolve. In this paper I have attempted to illustrate how close these sources may work. I found that, to determine the applicable law with regard to a new subject in the international sphere, it is necessary to examine the content of both sources independently as well as in relation to each other. The troublesome process of determining the existence of a rule of CIL hence becomes, in essence, a necessary process to determine the applicability of a treaty rule when there is reason to believe that a rule of CIL concerning the same subject matter may be evolving or has already evolved.

SOURCES

Books and Articles

Akehurst, Michael, *A Modern Introduction to International Law*, fourth edition, George Allen & Unwin (Publishers) Ltd, London, 1982

Akehurst, Michael, *Custom as a Source of International Law*, British Year Book of International Law, vol 47, 1974-5, (pp. 1-53)

Alexandra, Andrew, Baker, Deane-Peter and Marina Caparini, 'Introduction. The ethics and governance of private military and security companies', in *Private Military and Security Companies. Ethics, policies and civil-military relations*, edited by Alexandra, Baker and Caparini, Routledge, 2008

Alexandra, Andrew, 'Mars meets Mammon', in *Private Military and Security Companies. Ethics, policies and civil-military relations*, edited by Alexandra, Baker and Caparini, Routledge, 2008

Avant, Deborah, 'The emerging market for private military services and the problems of regulation', *From Mercenaries to Market. The rise and regulation of private military companies*, edited by Chesterman and Lehnardt, Oxford University Press, 2007

Baker, Deane-Peter, 'Of 'mercenaries' and prostitutes. Can private warriors be ethical?', in *Private Military and Security Companies. Ethics, policies and civil-military relations*, edited by Alexandra, Baker and Caparini, Routledge, 2008

Brauer, Jurgen, "Private military companies. Markets, ethics and economics", in *Private Military and Security Companies. Ethics, policies and civil-military relations*, edited by Alexandra, Baker and Caparini, Routledge, 2008

Brayton, Steven, *Outsourcing War: Mercenaries and the Privatization of Peacekeeping*, in Journal of International Affairs, Spring 2002, volume 55, number 2, pp. 303-329

Brownlie, Ian, *Principles of Public International Law*, 6th edition, Oxford University Press, 2003

Byers, Michael, *Custom, Power and the Power of Rules. International Relations and Customary International Law*, Cambridge University Press, Cambridge, 1999

Cassese, Antonio, *International Law*, Oxford University Press, 2001

Cheng, Bin, *United Nations Resolutions on Outer Space: 'Instant' International Customary Law?*, Indian Journal of International Law, vol 5, 1965 (pp. 23-48)

Chesterman, Simon and Lehnardt, Chia, 'Introduction', in *From Mercenaries to Market. The rise and regulation of private military companies*, edited by Chesterman and Lehnardt, Oxford University Press, 2007

Detter, Ingrid, *The international legal order*, Dartmouth, cop., 1994

Dickinson, Laura A, 'Contract as a tool for regulating private military companies', in *From Mercenaries to Market. The rise and regulation of private military companies*, edited by Chesterman and Lehnardt, Oxford University Press, 2007

Doswald-Beck, Louise, 'Private military companies under international humanitarian law', in *From Mercenaries to Market. The rise and regulation of private military companies*, edited by Chesterman and Lehnardt, Oxford University Press, 2007

Elias, Olufemi, *The Nature of the Subjective Element in Customary International Law*, International and Comparative Law Quarterly, vol. 44, nr. 3, 1995, (pp. 501-520)

Faite, Alexandre, *Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law*, in Defense Studies, Volume 4, Number 2, Summer 2004

Fitzmaurice, Gerald, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, British Year Book of International Law, vol. 30, 1953 (pp.1-70)

Gillard, Emanuela-Chiara, *Business goes to war: private military/security companies and international humanitarian law*, in International Review of the Red Cross, Volume 88, Number 863, September 2006

Gillard, Emanuela-Chiara, 'Private military/security companies. The status of their staff and their obligations under international humanitarian law and the responsibilities of states in relation to their operations', in *Private Military and Security Companies. Ethics, policies and civil-military relations*, edited by Alexandra, Baker and Caparini, Routledge, 2008

Guzman, Andrew, *How International Law Works. A Rational Choice Theory*, Oxford University Press, 2008

Henckaerts, Jean-Marie, *Customary International Humanitarian Law: a response to US comments*, International Review of the Red Cross, Volume 89, Number 866, June 2007

Holmqvist, Caroline, *Private Security Companies. The Case for Regulation*, SIPRI Policy Paper No. 9, Stockholm International Peace Research Institute, 2005

Isenberg, David, 'A government in search of cover. Private military companies in Iraq', in *From Mercenaries to Market. The rise and regulation of private military companies*, edited by Chesterman and Lehnardt, Oxford University Press, 2007

Jia, Bing Bing, *The Relations Between Treaty and Custom*, in Chinese Journal of International Law, no. 9, 2010 (pp. 81-109)

Kammerhofer, Jörg, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, in European Journal of International Law, vol. 15, no. 3, 2004, (pp. 523-553)

Kelsen, Hans, *Principles of International Law*, second edition, Holt, Rinehart and Winston, Inc., 1967

Kinsey, Christopher, *Corporate Soldiers and International Security. The Rise of Private Military Companies*, Routledge, 2006

Kirgis, Frederic L., *Custom on a Sliding Scale*, American Journal of International Law, vol. 81, 1987 (pp. 146-151)

Kolb, Robert, *Selected Problems in the Theory of Customary International Law*, Netherlands International Law Review, 2003 (pp. 119-150)

Koskenniemi, Martti, *From Apology to Utopia. The Structure of International Legal Argument*, Lakimiesliiton Kustannus Finnish Lawyers' Publishing Company, Helsinki 1989

Krahmann, Elke, 'The new model soldier and civil-military relations', in *Private Military and Security Companies. Ethics, policies and civil-military relations*, edited by Alexandra, Baker and Caparini, Routledge, 2008

Lauterpacht, Sir Hersch, *The Function of Law in the International Community*, Oxford University Press, 2011 (first published 1933)

Leander, Anna, *Regulating the role of PMCs in shaping security and politics*, in *From Mercenaries to Market. The rise and regulation of private military companies*, edited by Chesterman and Lehnardt, Oxford University Press, 2007

Lehnardt, Chia, *Private military companies and state responsibility*, in *From Mercenaries to Market. The rise and regulation of private military companies*, edited by Chesterman and Lehnardt, Oxford University Press, 2007

MacGibbon, I. C., *The Scope of Acquiescence in International Law*, British Year Book of International Law, vol. 31, 1954 (pp. 143-186)

Mendelson, Maurice, *The Subjective Element in Customary International Law*, The British Yearbook of International Law, vol. 66, 1995 (p 177-208)

Müllerson, Rein, *On the Nature and Scope of Customary International Law*, Austrian Review of International & European Law, 1997, no 2 (pp. 341-360)

O'Brien, Kevin, *PMCs, Myths and Mercenaries: The Debate on Private Military Companies*, in RUSI Journal, vol. 145 no. 1 (2000), pp.59-64

O'Brien, Kevin A, 'What should and what should not be regulated?', in *From Mercenaries to Market. The rise and regulation of private military companies*, edited by Chesterman and Lehnardt, Oxford University Press, 2007

Pauwelyn, Joost, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, 2003

Percy, Sarah, 'Morality and regulation', in *From Mercenaries to Market. The rise and regulation of private military companies*, edited by Chesterman and Lehnardt, Oxford University Press, 2007

Percy, Sarah, *Regulating the Private Security Industry*, Adelphi Paper 384, Routledge (International Institute for Strategic Studies), 2006

- Sands, Philippe, *Treaty, Custom and the Cross-fertilization of International Law*, in *Yale Human Rights and Development Law Journal*, vol. 1, 1999 (pp. 85-105)
- Schlütter, Birgit, *Developments in Customary International Law. Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*, Martinus Nijhoff, Leiden 2010
- Schmitt, Michael N., *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, *Chicago Journal of International Law*, volume 5, number 2, Winter 2005
- Shearer, David, *Private Armies and Military Intervention*, Adelphi Paper 316, International Institute for Strategic Studies, (Oxford University Press), 1998
- Singer, P. W., *Corporate Warriors. The Rise of the Privatized Military Industry and Its Ramifications for International Security*, in *International Security*, volume 26, number 3 (Winter 2001/02), pp. 186-220
- Sur, Serge, 'International Custom: Its Life, Its Craft', in *International Law, Power, Security and Justice. Essays on International Law and Relations*, Hart Publishing Ltd, Oxford, 2010
- Teson, Fernando R., *A Philosophy of International Law*, Westview Press, 1998
- Thirlway, Hugh, *The Law and Procedure of the International Court of Justice 1960-1989*, *British Year Book of International Law*, vol 61, 1990, (pp. 1-133)
- Thirlway, Hugh, *The Law and Procedure of the International Court of Justice 1960-1989*, *British Year Book of International Law*, vol 76, 2005 (pp.1- 119)
- Tunkin, Grigory, *Theory of International Law*, George Allen & Unwin Ltd, London, 1974 (original published in 1970)
- Venter, Al J., *War Dog. Fighting Other People's Wars: The Modern Mercenary in Combat*, Casemate Publishers, 2006
- Villiger, Mark Eugen, *Customary International Law and Treatises. A Manual on the Theory and Practice of the Interrelation of Sources*, second ed., Martinus Nijhoff Publishers, 1997
- Weber, Max, *The Vocation Lectures: "Science as a Vocation"; "Politics as a Vocation"*, ed. David Owen and Tracy B. Strong, Hackett Publishing Inc., 2004 (original speech given in 1918)
- Wolfke, Karol, *Custom in Present International Law*, second revised edition, Martinus Nijhoff Publishers, Dordrecht, 1993
- Wolfke, Karol, *Some Persistent Controversies Regarding Customary International Law*, *Netherlands Yearbook of International Law*, vol. 24, 1993 (pp. 1-16)
- Wulf, Herbert, *Internationalizing and Privatizing War and Peace*, Antony Rowe Ltd., 2005
- Wulf, Herbert, 'Privatization of security, international interventions and the democratic control of armed forces', in *Private Military and Security Companies. Ethics, policies and civil-military relations*, edited by Alexandra, Baker and Caparini, Routledge, 2008

Reports and Studies

Dearden, Nick, and Mathieu, Fabien *Corporate Mercenaries. The threat of private military and security companies*, War on Want, London, November 2006

Henckaerts, Jean-Marie, and Doswald-Beck, Louise, *Customary International Humanitarian Law. Volume I: Rules*, International Committee of the Red Cross, Cambridge University Press, 2005

Institut de Droit International, *Resolution on Problems from a Succession of Codification Conventions on a Particular Subject*, 1995

International Law Association — Committee on the Formation of Rules of Customary (General) International Law, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (2000)

Melzer, Nils, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross, 2009

Report of the Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions, convened at International Conference Centre, Geneva, 29-30 August 2005

Report of the International Law Commission to the General Assembly, *Ways and means for making the evidence of customary international law more readily available*, Yearbook of the International Law Commission, 1950, Vol. II

Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN document A/HRC/15/25

Singer, Peter W., *The Private Military Industry and Iraq: What Have We Learned and Where to Next?*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Policy Paper, November 2004

Legal and Other Documents

Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949

Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly, Yearbook of the International Law Commission, 1966 vol. II

Documents of the sixteenth session including the report of the Commission to the General Assembly, Yearbook of the International Law Commission, 1964, vol. II

International Convention Against the Recruitment, Use, Financing and Training of Mercenaries of 1989

The Montreux Document. On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict. Montreux, 17 September 2008

Organisation of African Unity Convention for the Elimination of Mercenarism in Africa of 1977

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

US Department of Defense Instruction, *Policy and Procedures for Determining Workforce Mix*, Number 1100.22, April 12, 2010

Vienna Convention on the Law of Treaties, 23 May 1969

Court Cases

Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971 p. 16

Advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136

Asylum case (Colombia v. Peru), Judgement, 20 November 1950, ICJ Reports 1950, p. 277

Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985, p. 13

Corfu Channel case, Judgment of April 9th, 1949: ICJ Reports 1949, p. 4

Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, ICJ Reports 1984, p. 246

Fisheries case, Judgment of December 18th, 1951: ICJ Reports 1951, p. 116

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p.226

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14

North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 3

The Case of the S.S. Lotus, Judgment, PCIJ Publications 1927

Internet

<http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html>

<http://projects.publicintegrity.org/wow/>

<http://www.aegisworld.com/>

<http://www.airforce-technology.com/projects/b2/>

<http://www.airforce-technology.com/projects/predator/>

<http://www.caci.com/>

<http://www.defense.gov/contracts/>

http://www.icrc.org/eng/assets/files/other/ihl_and_other_related_treaties.pdf

<http://www.ishr.ch/archive-council/909-human-rights-council-little-support-for-new-convention-regulating-private-security-companies>

<http://www.mpri.com/web/>