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Private Security Companies and Other Private Security Service Providers (PSCs) and Environmental Protection in *Jus Post Bellum* Policy and Regulatory Challenges

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13.1 Introduction

The need for better environmental protection has been highlighted as a key issue within the regulation of armed conflict, particularly at the *jus post bellum*¹ stage. As Payne notes, '[i]nternational legal instruments do not address the normal operational damage to the environment that is left after hostilities cease, from sources such as the use of tracked vehicles on fragile desert surfaces; disposal of solid, toxic, and medical waste; depletion of scarce water resources; and incomplete recovery of ordnance.'² Nevertheless, the issue of environmental protection in *jus post bellum* including challenges associated with 'toxic remnants of war' ('TRW'), is gaining prominence. TRW describes 'any toxic or radiological substance resulting from military activities that forms a hazard to humans and ecosystems.'³ The term was coined to facilitate greater awareness of the impact of military pollution and conflict-based activities on the environment and public health.

Another challenge to environmental protection as part of the *jus post bellum* framework is the huge rise in the use of private security companies, private military security contractors, and private security service providers (collectively, 'PSCs')⁴ in recent years. PSCs have, in recent conflicts, played a key role, not only during conflict, but

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¹ '[T]he set of norms applicable at the end of armed conflict—whether internal or international—with a view to establishing sustainable peace.' See Vincent Chetail, 'Introduction: Post-Conflict Peacebuilding—Ambiguity and Identity' in Vincent Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon* (Oxford: Oxford University Press, 2009), 18.

² Cymie Payne, 'The Norm of Environmental Integrity in Post-Conflict Legal Regimes' in Carsten Stahn, Jennifer Easterday, and Jens Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: Oxford University Press, 2014), 511.

³ TRW Project, 'Pollution Politics: Power, Accountability and Toxic Remnants of War' (2014) accessed at <www.toxicremnantsofwar.info/report-pollution-politics-power-accountability-and-toxic-remnants-of-war> accessed 9 February 2017.

⁴ This abbreviation PSC encompassing private security companies and private security service providers is adopted by the 2010 International Code of Conduct for Private Security Service Providers (ICoC). We use the abbreviation PSC to include the terms Private Security Companies and Private Military Companies as well.

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also during the withdrawal phase of official troops, in managing the disposal of huge amounts of military waste and conflict debris. This stage sees the prominent presence of PSCs in fragile states like Iraq and Afghanistan,⁵ undertaking training and reconstruction work.⁶ There is also a trend for states involved in international conflicts seeking to maintain a presence in unstable regions, utilizing the services of PSCs in the face of waning domestic support for providing troops and supplies. It is at this transitional phase that PSCs are most prominent and their activities raise environmental concerns.

During the US-led occupation of Iraq (2003–11) for example, significant operational, logistical, and reconstruction work was outsourced to companies like Halliburton and former subsidiary Kellogg Brown & Root ('KBR'). Much of this work involved the handling and disposal of hazardous waste, reconstruction work, and the disposal of conflict debris. Controversy around the use of open burning techniques such as burn pits by Halliburton and KBR⁷ as a primary means of waste disposal on US bases in Iraq and Afghanistan has brought to light issues on the environmental implications of PSC activity. Environmental implications that can have a negative effect on the war-torn country achieving sustainable peace. However, a detailed assessment of the regulation of PSCs in specific reference to their environmental responsibilities is yet to be conducted. This chapter reviews this topical area with a focus on PSC activities post-conflict.⁸ Using the recent Iraq and Afghanistan conflicts as examples, with a focus on US use of PSCs, this chapter first explores the growth of PSCs and their influence on the creation and management of environmental issues, including TRW, and secondly reviews the applicable legal and policy frameworks within which this takes place. The current regulation of PSCs is explored, alongside the question of whether the existing framework is adequate to the task of protecting the environment during the transition from conflict to sustainable peace.

13.2 PSCs and Environmental Issues: An Overview

13.2.1 The rise of PSCs

PSCs are defined by the International Committee of the Red Cross ('ICRC') as 'private business concerns that provide military and/or security services'.⁹ During the Cold

⁵ Nicholas Tsagourias and Nigel White, *Collective Security: Theory, Law and Practice* (Cambridge University Press, 2013), 138.

⁶ Scott Hickie, Chris Abbott, and Raphaël Zaffran, 'Trends in Remote Control Warfare' in 'New Ways of War: Is Remote Control Warfare Effective?' *The Remote Control Digest* (October 2014), at <<http://oxfordresearchgroup.org.uk/sites/default/files/Remote%20Control%20Digest.pdf>> accessed 9 February 2017.

⁷ A majority of contracts since 2001 have been implemented by KBR (a subsidiary of Halliburton until 2007). This chapter refers only to KBR in relation to these contracts.

⁸ *Jus post bellum* covers the post-conflict phase. See, for example, Roxana Vatanparast, 'Waging Peace: Ambiguities, Contradictions, and Problems of a *Jus Post Bellum* Legal Framework' in Stahn, Easterday, and Iverson (n 2) 144 (argues that 'a legal jus post bellum framework can consolidate the current piecemeal approaches to the post-conflict phase in international human rights law, international criminal law, and international humanitarian law, fill in any gaps, and define the way these various laws ought to interplay with each other' (footnote omitted)).

⁹ ICRC, *International Humanitarian Law and Private Military/Security Companies* (ICRC, 2013), at <<https://www.icrc.org/eng/resources/documents/faq/pmsc-faq-150908.htm#header>> accessed 9 February 2017.

War, there was a realization in the United States that despite its economic and military strength, it would not be able to respond to multiple large threats simultaneously.¹⁰ A key issue was US ability to sustain supply lines across the world. Out of this concern, the Logistics Civilian Augmentation Program ('LOGCAP') emerged.¹¹ LOGCAP awarded contracts for logistical work to civilian contractors, which allowed the army's influence to extend without significantly expanding recruitment.

It is widely recognized that the global war on terror, particularly US foreign policy in Iraq and Afghanistan, has a strong correlation with the post-9/11 growth in the private security industry.¹² The Iraq and Afghanistan conflicts over the last two decades saw the most significant use of PSCs yet, with a majority of support services¹³ outsourced to KBR, DynCorp, and Fluor.¹⁴ While exact figures are difficult to establish, Avant and Nevers note that during the 1991 Gulf conflict, the ratio of troops to contractors was approximately ten to one, and in the 2003 Iraq conflict the ratio was approximately one to one.¹⁵ In April 2014, the ratio of private contractors to US soldiers in Afghanistan was two to one.¹⁶ As we are witnessing the drawdown of troops in Afghanistan at present, it is likely that significant numbers of PSCs will remain.¹⁷ While popular support for the Iraq and Afghanistan conflicts has waned, the use of PSCs allows the United States to maintain a strong presence in both countries.

The subsequent section explores PSC activities at the post-conflict phase and their impact on the environment and human health.

¹⁰ Pratap Chatterjee, *Halliburton's Army: How a Well-Connected Texas Oil Company Revolutionized the Way America Makes War* (New York: Nation Book, 2010).

¹¹ *ibid.*

¹² Nikolaos Tzifakis, 'Contracting Out to Private Military and Security Companies' (2012) Centre for European Studies 1; Sam Perlo-Freeman and Elisabeth Sköns, 'The Private Military Services Industry' (2008) 1 SIPRI Insights on Peace and Security 1.

¹³ 'Contractors provide a wide range of services, from transportation, construction, and base support, to intelligence analysis and private security. The benefits of using contractors include freeing up uniformed personnel to conduct combat operations; providing expertise in specialized fields such as linguistics or weapons systems maintenance; providing a surge capability, quickly delivering critical support capabilities tailored to specific military needs. Because contractors can be hired when a particular need arises and released when their services are no longer needed, contractors can be less expensive in the long run than maintaining a permanent in house capability.' See Moshe Schwartz and Jennifer Church, 'Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues of Congress' (2013) CRS Report for Congress (Congressional Research Service), Summary.

¹⁴ LOGCAP III (2001–2007) was awarded to KBR. LOGCAP IV (2007–present) was awarded to three companies: KBR, DynCorp, and Fluor.

¹⁵ Deborah Avant and Renée de Nevers, 'Military Contractors & the American Way of War' (2011) 140(3) *Journal of the American Academy of Arts & Sciences* 1, at <http://www.academia.edu/2870854/Military_Contractors_and_the_American_Way_of_War> accessed 9 February 2017.

¹⁶ 61,452 contractors and 30,000 US troops. See Ian Livingston and Michael O'Hanlon, 'Afghanistan Index' (Brookings, 2014), at <<https://www.brookings.edu/wp-content/uploads/2016/07/index20150210.pdf>> accessed 9 February 2017. In 2016, there were roughly 25,197 contractors to 9,800 US troops. See Ian Livingston and Michael O'Hanlon, 'Afghanistan Index' (Brookings, 2016), at <https://www.brookings.edu/wp-content/uploads/2016/07/21csi_20161031_afghanistan_index.pdf> accessed 9 February 2017.

¹⁷ Hickie, Abbott, and Zaffran (n 6). See also Leo Shane III, 'Report: Contractors Outnumber U.S. Troops in Afghanistan 3-to-1' (Military Times, 2016), at <<http://www.militarytimes.com/articles/crs-report-afghanistan-contractors>> accessed 9 February 2017.

13.2.2 PSCs and environmental harm

There are many situations in which environmental harm occurs during the transition from conflict to peace. These instances, which take place outside the period of violent conflict, occur as a result of poor environmental management practices or the breakdown of environmental governance. These incidents differ from most environmental damage that takes place during violent conflict, which is usually the result of targeting decisions of military forces or armed groups. In contrast, post-conflict environmental harm can result for example from the mishandling and improper disposal of hazardous military waste or the mismanagement of war debris.

PSCs undertake a variety of work that supports the back end of military operations during this transitory *jus post bellum* period. The services that are of most relevance to post-conflict environmental issues are waste management, munitions, and military materials disposal. Military operations produce huge amounts of waste, including: designated hazardous waste—batteries, fuels, oils and solvents as well as ‘domestic’ waste generated from military bases and general conflict detritus such as building rubble, damaged vehicles, abandoned munitions, landmines, and other unexploded ordnance (‘UXO’). According to one military source there were an estimated 11 million pounds of hazardous military waste in Iraq in 2008.¹⁸ HALO Trust, a demining agency, estimates that up to 640,000 mines have been laid in Afghanistan since 1979.¹⁹ There is also a substantial UXO problem, in both battle areas and on abandoned International Security Assistance Force (‘ISAF’) ranges. In addition, a substantial volume of ex-regime arms and munitions have been destroyed in Iraq. The US Army and its PSCs are said to have disposed of 215,000 tonnes with a further 92,000 stockpiled.²⁰ Given the vast amounts of harmful materials involved, the careful management of waste is of central importance after the cessation of hostilities, particularly for the effective transition to sustainable peace.

Unfortunately there are numerous reports of PSC malpractice in Iraq and Afghanistan.²¹ The fast-growing and largely unregulated PSC industry has allowed for contractor malpractice in three ways: the sector has overwhelmed the US Department of Defense’s (‘DoD’) capacity to adequately oversee and manage contractors; the proliferation in sub-contractor use has widened the management and accountability gap; and the use of prime contractors and no-bid contracts has encouraged a culture of impunity within the PSC industry.

According to the Commission on Wartime Contracting in Iraq and Afghanistan, the number of contract specialists (critical for the proper management of contracts) only

¹⁸ David Botti, ‘The Challenge of Making Iraq and Afghanistan’s Battlefields Green’ *Newsweek* (10 March 2008), at <<http://www.newsweek.com/challenge-making-iraq-and-afghanistan-battlefields-green-223158>> accessed 9 February 2017.

¹⁹ The Halo Trust, ‘Afghanistan’, at <<http://www.halotrust.org/where-we-work/afghanistan>> accessed 9 February 2017.

²⁰ UNEP, *Assessment of Environmental ‘Hot Spots’ in Iraq* (UNEP, 2005) 50.

²¹ See, for example, Blake Mobley, ‘Outsourcing in Post-conflict Operations: Designing a System for Contract Management and Oversight’ (2004) 15 *Journal of Public and International Affairs* 21, 29–30; David Mosher *et al.*, ‘Green Warriors: Army Environmental Considerations for Contingency Operations from Planning through Post-conflict’ (2008) RAND Corporation 2008, 132–3.

rose by 3 per cent across the US government between 1992 and 2009, while the use of PSCs increased enormously, outpacing contract specialists in the same period.²² This lack of contract management in Washington, alongside the lack of contracting officers managing PSCs on the ground in Iraq and Afghanistan has led to an extremely unregulated environment. This failure to oversee contracts involving PSCs has led to waste, fraud, and abuse.²³

Secondly, the common use of sub-contractors or local contractors, without restriction on the contract chain and the lack of transparency surrounding such sub-contracting,²⁴ has made it harder to ensure proper oversight over their activities. The hiring of local contractors by larger companies such as KBR to undertake waste disposal services, has had both positive and negative effects. While hiring local companies is seen as beneficial in efforts to develop positive local relations as well as making use of local knowledge, in a number of cases, local sub-contractors have mishandled harmful waste products.²⁵

Thirdly, the structure in which PSCs operate, is one in which there are a small number of very large corporations such as Halliburton, KBR, and DynCorp, who dominate the market and have repeatedly been offered no-bid contracts through the DoD's LOGCAP policy. The DoD is fully reliant on these companies for any overseas military operations which leads to a dangerous dynamic in which it is easy for companies to act without regard for contractual agreements or the law, as the following testimony from a former KBR logistics contract manager illustrates:

management would brag that they could get away with doing anything they wanted because the Army could not function without them. KBR figured that even if they did get caught, they had already made more than enough money to pay any fines and still make a profit.²⁶

These problems have resulted in a number of reported cases where PSC conduct has led to environmental damage that has endangered the health of contracted workers, soldiers, and civilians.

The issue that first brought environmental and health concerns to light was the controversy around the misuse of burn pits by KBR in Iraq and Afghanistan.²⁷ Burn pits are open-air waste combustion pits in which waste is burned, creating high levels of air pollution that may result in harmful health impacts on those exposed.²⁸ Particular problems arise when prohibited items such as plastic, batteries, oil products, and

²² Commission on Wartime Contracting in Iraq and Afghanistan, *Transforming Wartime Contracting: Controlling Costs, Reducing Risks*, Final Report to Congress (2011).

²³ Avant and de Nevers (n 15).

²⁴ UN Human Rights Council, Second Session of the Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies, UN Doc. A/HRC/15/25, UNGA, 2 July 2010, 6.

²⁵ Mosher *et al.* (n 21) 133.

²⁶ *Jobes v KBR*, United States District Court for the District of Maryland (5 April 2010) 7, para. 23.

²⁷ US Government Accountability Office, 'Afghanistan and Iraq, DoD Should Improve Adherence to Its Guidance on Open Pit Burning and Solid Waste Management' (US Government, 2010), 1.

²⁸ *ibid.*

medical waste are burned, emitting toxic aerial compounds and particulates into the surrounding environment. While burn pits are only meant to be used during military operations when no other means of waste disposal are available, their use was extensive in Iraq and Afghanistan. The US Central Command ('CENTCOM') estimates that in August 2010 there were 251 burn pits in Afghanistan and twenty-two in Iraq.²⁹ A US Government Accountability Office investigation reveals that burn pits had been used throughout the conflicts due to their 'expedience'.³⁰ US base Joint Base Ballad in Iraq, is suspected of having burned 240 tonnes of waste a day at its peak of operations.³¹ While many Iraq and Afghanistan veterans have returned to the US and reported ill health and death as a result of burn pit exposure,³² as of yet, there has been little information available as to the impact of burn pits on civilians and the surrounding environment.

Another key issue is the management of hazardous waste. The spillage or improper disposal of hazardous waste is identified as one of the most common environmental incidents in military operations.³³ Problems related to the lack of facilities in host countries for hazardous waste disposal and the difficulties associated with transporting waste across borders means that waste often builds up.³⁴ Reports note the improper disposal of hazardous waste in Iraq.³⁵ In one case, an unsubstantiated report states that several hundred thousand lead-acid batteries were sold for lead, whilst the acid was improperly discarded.³⁶ While accurate information is hard to find, a US government funded think tank the RAND Corporation, has reported similar incidents. It notes that:

[o]n more than one occasion in recent operations, contractors have removed hazardous wastes from base camps and, without Army knowledge, dumped them along the side of a road or in other inappropriate locations, sometimes to avoid disposing of them properly or to sell the drums that hold the wastes.³⁷

Such harmful environmental practices not only cause environmental damage but also cause harm to the civilian population.

Alongside the cases of PSC malpractice, there are also questions about whether commercial imperatives can be a driver of environmentally harmful practices. For example, in Iraq, a substantial volume of ex-regime arms and munitions have been destroyed. UNEP found that many commonly used disposal practices ensure that 'contamination of munitions disposal sites is inevitable'.³⁸ Where financial constraints

²⁹ *ibid.* ³⁰ *ibid.*

³¹ Kate Kurera, 'Military Burn Pits in Iraq and Afghanistan: Considerations and Obstacles for Emerging Litigation' (2011) 28(1) *Pace Environmental Law Review* 288.

³² Matthew Gault 'The Human Cost of the Military's Toxic Burn Pits: Taxpayers Wasted Millions to Replace Open-air Burning, but the Damage was Done' *War is Boring* (12 February 2015), at <<https://war-isboring.com/the-human-cost-of-the-militarys-toxic-burn-pits-d9111eb3e2cc#.e4be3ojcd>> accessed 9 February 2017.

³³ Mosher *et al.* (n 21) 24. ³⁴ *ibid.*

³⁵ See, for example, Botti (n 18); Adam Levine, 'Halliburton, KBR Sued for Alleged Ill Effects of "Burn Pits"' *CNN* (28 April 2009), at <<http://edition.cnn.com/2009/US/04/28/burn.pits/>> accessed 9 February 2017.

³⁶ Ms Sparky 'US Army Recycling Program is Destroying Iraq Environment Claim Iraqis' (1 December 2009), at <<http://mssparky.com/2009/12/us-army-recycling-program-is-destroying-iraq-environment-claim-iraqis/>> accessed 9 February 2017.

³⁷ Mosher *et al.* (n 21) 7–8

³⁸ UNEP (n 20) 50.

and to a degree the security of stockpiles require massive destruction of munitions, the most common method of disposal is controlled explosion or burning.³⁹ This form of disposal creates environmental pollution, primarily as a result of the incomplete detonation of energetic materials and the dispersal of particulate, which may also contain heavy metals.⁴⁰ Detonation causes soil compaction and explosive compounds and metals result in soil and air pollution. Contaminants can be reduced through technical measures aimed at ensuring the complete detonation of compounds but these may not be properly implemented. Similarly, guidelines⁴¹ have been developed to reduce the impact of mine clearance operations on the environment but these represent best practice and are not legally binding. The extent to which PSCs follow best practice guidelines on munitions disposal and landmine clearance depends on their weighting of financial, strategic, and humanitarian concerns. As Bolton notes, ‘strategic’ as opposed to ‘humanitarian’ demining as is often undertaken by PSCs (as opposed to non-governmental organizations (‘NGOs’)) has typically emphasized speed and cost-efficiency over quality and safety.⁴²

It is clear that a lack of oversight and regulation combined with the cost-efficiency concerns of PSCs have led to a situation where environmental diligence has not been prioritized, resulting in environmental and human harm. Problems that could have been avoided were not, illustrating a failure in PSC governance. Thus strengthening environmental governance, particularly in relation to PSCs, is a key aspect of increasing post-conflict environmental protection and contributing effectively to the transition from conflict to sustainable peace. The extent to which PSCs and their environmental responsibilities are covered by existing international law is explored in the remainder of this chapter.

13.3 PSCs: Law and Policy and its Relevance to Environmental Protection—an Overview

Assertions have been put forward that PSCs lack control, transparency, and accountability.⁴³ Many commentators argue that such problems are consequences of a lack of domestic and international regulation of PSCs.⁴⁴ In addition, there have been various incidents involving PSCs and their personnel over the years, allegations of operating outside the law—from reports of excessive use of force on civilians to other human rights abuses.⁴⁵ To combat these issues, regulatory efforts have taken place at various

³⁹ *ibid.* ⁴⁰ *ibid.*

⁴¹ IMAS 10.70, *First Edition, Safety & Occupational Health—Protection of the Environment*, United Nations Mine Action Service (1 October 2007).

⁴² Matthew Bolton, *Foreign Aid and Landmine Clearance: Governance, Politics and Security in Afghanistan, Bosnia and Sudan* (London: I.B.Tauris & Co, 2010), 174

⁴³ Elke Krahnemann, ‘Private Military Services in the UK and Germany: Between Partnership and Regulation’ (2005) 14 *European Security* 277.

⁴⁴ *ibid.* 277.

⁴⁵ Irene Pietropaoli, ‘Private Military & Security Companies and their Impact on Human Rights’ (2013) 5 *PMSC Bulletin* 1, 1–2.

levels within the international community—from international, national, to industry.⁴⁶ Because these efforts have taken place at multiple levels, with no cohesion, this has led to a fragmented regulatory framework for the governance of PSCs.⁴⁷ In addition, regulations differ from country to country, further contributing to the disorganized and decentralized PSC regulatory framework.⁴⁸

This section explores regulations governing PSCs, focusing on international law, and assesses whether these international frameworks are adequate to the task of protecting the environment during the transition to sustainable peace.

13.3.1 PSCs and IHL

In armed conflict, the underlying premise of international law is ‘that states are the primary actors on the battlefield.’⁴⁹ In modern conflicts, PSCs have changed the status quo—challenging primary international law principles in this field.⁵⁰

The ICRC confirms that the status of PSC personnel is determined by International Humanitarian Law (‘IHL’) in armed conflicts ‘on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved.’⁵¹ Unless PSC personnel ‘are incorporated in the armed forces’⁵² of a state or have combat functions for an organized armed group belonging to a party to the conflict, the staff of PMSCs are civilians.⁵³ The ICRC also states that ‘[i]f PMSCs are operating in situations of armed conflict the staff of PMSCs must respect IHL and may be held criminally responsible for any violations they may commit.’⁵⁴ This is the position regardless of whether PSCs and their personnel are hired by states, international organizations (‘IOs’), or by private companies.⁵⁵ Therefore any activities or actions by PSC personnel relevant to armed conflict are governed by IHL. It is worth making clear however, that while PSC employees as individuals working for the company could be bound by IHL depending on their role in the conflict,⁵⁶ as companies, PSCs per se are not legally bound to respect IHL ‘which is binding only on parties to a conflict and individuals, not corporate entities.’⁵⁷ However, PSCs are obliged to comply and uphold IHL if such

⁴⁶ Daphné Richemond-Barak, ‘Regulating War: A Taxonomy in Global Administrative Law’ (2011) 22(4) *European Journal of International Law* 1027, 1027–8.

⁴⁷ *ibid.*

⁴⁸ Francesco Francioni and Natalino Ronzitti, ‘Introduction’ in Francesco Francioni and Natalino Ronzitti (eds.), *War by Contract: Human Rights, Humanitarian Law and Private Contractors* (Oxford: Oxford University Press, 2011), 2.

⁴⁹ Chia Lehnardt, ‘Private Military Companies’ in Nigel White and Christian Henderson, *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello, and Jus post Bellum* (Cheltenham : Edward Elgar, 2013), 422.

⁵⁰ *ibid.* ⁵¹ ICRC (n 9).

⁵² Many military manuals (citing military manuals from Argentina, Australia, Canada, Germany, Netherlands, etc.) and scholars recognize ‘that the armed forces of a party to the conflict consist of all organised armed groups which are under a command responsible to that party for the conduct of its subordinates’. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (Cambridge: Cambridge University Press, 2005), 14 (footnote omitted).

⁵³ ICRC (n 9) . ⁵⁴ *ibid.* ⁵⁵ *ibid.* ⁵⁶ *ibid.*

⁵⁷ Montreux Document (Swiss Federal Department of Foreign Affairs/ICRC 2009), 36 (in reference to Statement 22).

laws are integrated into national law. This obligation extends to all national law,⁵⁸ which would include domestic environmental law of the host state.

While scholarship in this area focuses primarily on the regulation of PSCs during conflict, there appears to be a dearth of research on how PSCs are regulated post-conflict. As one commentator aptly notes, '[a]rmed conflict is the easy part ... [i]nternational humanitarian law at least provides a framework for addressing the armed conflict settings.'⁵⁹ However, what happens when armed conflict is in the grey area of not quite having ceased or when it is in the post-conflict stage.

According to Jinks, the general rule under the Geneva Conventions is that IHL applies until the 'general close of military operations.'⁶⁰ Jinks also notes that:

many commentators have suggested that the 'general close of military operations' standard is distinct from the 'cessation of active hostilities' standard. The latter refers to the termination of hostilities—the silencing of the guns—whereas the former refers to the complete cessation of all aggressive military maneuvers. On this reading, an 'armed conflict' might persist beyond the 'cessation of active hostilities.'⁶¹

In fact, the International Law Commission ('ILC') argues that IHL 'is also applicable before and after an armed conflict since it contains rules relating to measures taken before and after an armed conflict.'⁶² If this is the case, it could be argued that PSC personnel have to respect IHL even at the post-conflict stage that is, at least until the general close of military operations and if the relevant IHL is incorporated into domestic law, so does the PSC as a company. However, it would still be problematic to determine when the general close of military operations is in many conflict situations.

Nevertheless, if IHL is still applicable after an armed conflict, this could mean that PSCs would have some obligation to protect the environment post-conflict. This could include protection from IHL rules such as Articles 35(3) and 55 of the First Additional Protocol (1977) to the 1949 Geneva Conventions ('AP I')—specifically formulated to protect the environment⁶³ as well as other rules under the 1949 Geneva Convention that are relevant to PSC activities. For example, Article 147 considers grave breaches to include 'extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly'. In the context of occupation, Article 53 provides that 'any destruction by the Occupying Power of real or personal

⁵⁸ *ibid.*

⁵⁹ Ian Ralby, 'Regulation of Private Military Security Companies', Meeting Summary: International Law Programme (Chatham House, 7 October 2011), 12.

⁶⁰ Derek Jinks, 'The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts' Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law (Cambridge, 27–29 January 2003), 3.

⁶¹ *ibid.*

⁶² See UN, Report of the International Law Commission, Sixty-third Session (26 April–3 June and 4 July–12 August 2011), Annex E, 'Protection of the Environment in relation to Armed Conflicts' Supplement No. 10, A/66/10, 357.

⁶³ Although there is voluminous literature on the weaknesses and difficulties of actually implementing these particular rules. See, for example, Onita Das, *Environmental Protection, Security and Armed Conflict: A Sustainable Development Perspective* (Cheltenham: Edward Elgar, 2013), 132–42; UNEP, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (UNEP, 2009).

property belonging individually or collectively to individuals, or to the state, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.⁶⁴ These provisions could therefore extend to PSC activities that destroy property and subsequently cause harm to the environment and civilians. For example, it could be argued that dumping toxic waste into a river which leads to the contamination of a water source could be interpreted as destroying civilian property. However, it is worth pointing out that these direct and indirect environmental protection provisions within IHL are difficult to apply in relation to regular state armed forces, and that it is unlikely that applying these provisions to PSCs would be any easier.⁶⁵

13.3.2 PSCs and IHRL

As with IHL, PSCs as companies and therefore non-state actors, are not bound by international human rights law ('IHRL'), only states are.⁶⁶ However, PSCs are obliged to comply and uphold IHRL if such laws are integrated into national law.⁶⁷ The Montreux Document⁶⁸ and the International Code of Conduct for Private Security Service Providers ('ICoC'),⁶⁹ are international instruments that provide guidance on regulation and best practices for PSCs globally. Both documents provide that PSCs and their personnel should respect IHRL in conduct of their activities.⁷⁰

IHRL is relevant in the context of protecting the environment as damage to the environment could adversely affect the human rights of affected populations. As UN Special Rapporteur on Toxic Waste, Ibeanu notes, '[a]lthough war has always had an adverse effect on the environment, the voluntary or incidental release of toxic and dangerous products in contemporary conflicts has an important adverse effect on the enjoyment of human rights.'⁷¹ Harm and 'contamination of the environment, through soil, water, air or the food chain can lead to the denial of enjoyment of basic rights, such as the right to life, to health, to food, to safe and decent housing, etc.'⁷² Such effects on the environment and population creates additional problems to achieving sustainable peace. Ibeanu goes on to argue that, 'corporations must be held liable for their direct involvement in the violation of human rights, or for supplying toxic or dangerous products in the knowledge that their use will lead to a violation of human rights.'⁷³

⁶⁴ This provision provides a similar scope of protection to property as Article 55 of the Hague Regulations.

⁶⁵ Michael Bothe *et al.*, 'International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities' (2010) 92 *International Review of the Red Cross* 569 (on gaps of IHL environmental protection in armed conflict).

⁶⁶ Montreux Document (n 57) 36 (in reference to Statement 22). ⁶⁷ *ibid.* ⁶⁸ *ibid.*

⁶⁹ ICoC website, 'About the ICoC Association', at <<https://icoca.ch/en/icoc-association>> accessed 10 February 2017.

⁷⁰ See, for example, Art. 22, Section E, Montreux Document; Arts. 3, 4, 6, Preamble and Art. 21, Section E, ICoC.

⁷¹ Okechukwu Ibeanu, Special Rapporteur, Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights UNGA, A/HRC/5/5, 5 May 2007, 1

⁷² *ibid.* 11.

⁷³ *ibid.* 18.

There are a number of IHRL principles that may be relevant to PSC post-conflict activities that causes harm to the environment. For example, individuals may be able to invoke the ‘right to life’ under Article 3 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Civil and Political Rights (‘ICCPR’) ‘in cases in which death results from the release of toxic products into the environment, as long as responsibility of the state is established.’⁷⁴ This could include cases where PSC post-conflict activities cause environmental harm from toxicity released into the environment which as a result, causes serious injury or death. This right could thus be invoked against the state and possible PSC and its employees—the state by virtue of state responsibility and the PSC, if the relevant IHRL principle is already part of the national law of the state.⁷⁵ Even though the state may not be responsible for the activities that caused the release of toxic chemicals into the environment, leading to harm to the population, it could be argued that state responsibility may be established in that ‘the state may be subject to an obligation to take all possible measures to ensure the safety of the local population in the aftermath of the incident. These may include inter alia evacuation, assessment of contamination and a clean-up and remediation programme.’⁷⁶ In a post-conflict situation however, establishing the responsibility of the host state (in particular) for violations committed by the PSC may be difficult as the war-torn host state may be in a weak and vulnerable position.⁷⁷ The responsibility of states and other organizations hiring PSCs is considered later in this chapter.

The state could also be found in violation of the right to life by harm to the environment itself. For instance, the state could be found liable via state responsibility for PSC activities that cause such harm and extensive damage to the environment, that as a consequence it violates the right to life of the affected population, adversely affecting their living environment and livelihood resources. This is illustrated by the Ogoni case⁷⁸ where action by Nigerian military forces and oil companies resulting in destruction of the environment and living resources of the Ogoni community in Nigeria was found by the African Commission on Human and People’s Rights (‘AComHPR’) to be a violation of right to life.⁷⁹ According to AComHPR:

Given the widespread violations perpetrated by the government of Nigeria and private actors (be it with its blessing or not), the most fundamental of all human rights, the right to life has been violated ... The pollution and environmental degradation to a level humanly unacceptable has made living in Ogoniland a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the government. These and similar atrocities not only persecuted

⁷⁴ *ibid.* 14. ⁷⁵ Montreux Document (n 57) 36 (in reference to Statement 22).

⁷⁶ *Ibeanu* (n 71) 14.

⁷⁷ Iraq for example, does not regulate PSCs operating in its territory. See Emanuela-Chiara 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’ ICRC Third Expert Meeting on the Notion of Direct Participation in Hostilities (Geneva, October 2005), 1.

⁷⁸ Communication No 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (AHRLR 60, 27 October 2001).

⁷⁹ See also Frederico Lenzerini and Francesco Francioni, ‘The Role of Human Rights in the Regulation of Private Military and Security Companies’ in Francioni and Ronzitti (n 48) 62–3 (for a discussion on PSCs and right to life).

individuals in Ogoniland but also the Ogoni community as a whole. They affected the life of the whole of the Ogoni society.⁸⁰

This case demonstrates that severe environmental destruction, where a community's access to resources and living space is disrupted—from a health, livelihood, and environmental perspective, could be considered a violation of right to life and in the post-conflict context, negatively affecting the transition to sustainable peace. Unfortunately, the Ogoni case, as per traditional IHRL liability, only established liability for the state, Nigeria, and not private actors involved. Therefore, PSCs conducting activities such as uncontrolled dumping of toxic post-conflict waste, for example, that could cause the environment to become significantly hazardous in that it interferes with the 'right to life' of the local population, would require the victims to look towards the state for liability. This demonstrates the difficulty of non-state entities being held responsible for potential violations of IHRL.

Another relevant IHRL right is the right to health which the Committee on Economic, Social and Cultural Rights ('CESCR') has recognized as being interrelated to other IHRL rights.⁸¹ In its General Comment no 14 (2000) on Article 12, International Covenant on Economic, Social and Cultural rights ('ICESR'), the CESCR recognized that realizing the right to health requires states to:

refrain from unlawfully polluting air, water and soil, e.g., through industrial waste from state-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health.⁸²

With regard to PSCs, it is the state that would be liable under IHRL if it fails to ensure that non-state actors do not violate the populations' right to health. As Lenzerini and Francioni state, '[f]rom this perspective, the PMSC operations might well interfere with the enjoyment of the right to health, given that the types of interferences to this right listed by the CESCR—or at least some of them—can certainly be committed by these companies in carrying out their usual mandate.'⁸³ In the context of PSCs and environmental protection within the *jus post bellum* framework, this means the state must take appropriate measures to limit or prevent post-conflict activities that release toxic substances into the environment that could adversely affect the health of the human population. For example, activities such as burn pits and other forms of waste disposal that releases harmful toxins into the environment, leading to serious health risks, may interfere with the 'right to health' of the local population and PSC personnel involved. Mitigating such activities to realize the right to health could indirectly protect the environment.

Other IHRL principles that may be applicable to PSC activities at the peacebuilding stage include the right to food which could tie in with PSC activities that contaminate the environment as a consequence of toxic exposure and disrupt the food chain

⁸⁰ Communication No 155/96 (n 78) para. 70.

⁸¹ For example, right to life, right to food, etc.

⁸² See General Comment No. 14, The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C12/2000/4, 11 August 2000, para. 34.

⁸³ Lenzerini and Francioni (n 79) 65.

as a result. Contaminated soil and water could ‘render agricultural goods unsafe for human consumption.’⁸⁴ Also, Article 17 of the ICCPR ‘has been interpreted as prohibiting environmental damage that negatively affects family and home life.’⁸⁵ PSC actions causing such environmental damage could thus be prohibited by the state. Failure to do so may attach liability to the state for the PSC’s violation of IHRL.

Although IHRL is a useful framework of guidance in the context of PSCs and protection of the environment that is, guidance as to what environmentally harmful activities may violate IHRL, the flaw is that IHRL only binds states. This limits environmental protection in such situations as respecting IHRL is discretionary on the part of PSCs. International soft law regulation on PSC best practices require the respect and adherence to IHRL⁸⁶ but again, it is not binding. Therefore the only way PSCs as a non-state entity would be bound by IHRL is if the relevant IHRL laws were part of the domestic law of the host state.⁸⁷ This illustrates the difficulties in holding non-state entities accountable for IHRL breaches and as a result, ‘PMSCs are rarely held accountable for violations of human rights.’⁸⁸

13.3.3 PSCs: International efforts on binding legislation and soft law

At international level there have been significant developments regarding PSC regulation. These efforts have involved attempts to develop binding legislation as well as soft law. The strongest attempt at creating binding legislation was put forward by the UN Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination (‘Working Group’).⁸⁹ Their efforts led to the formulation of a Draft of a Possible Convention on Private Military and Security Companies (‘UN Draft’),⁹⁰ which was presented to the Human Rights Council (‘HRC’) in July 2010.

This work, while significant, needs development in regard to its environmental protection provisions. In its current form the document reflects IHL’s weak form of environmental protection, noting Article 35 of AP I, which prohibits means and methods of warfare which causes ‘widespread, long-term and severe’ damage to the natural environment. This IHL provision has been widely criticized for its high threshold of harm which permits a majority of environmental damage in conflict.⁹¹ The UN draft document is also limited in its call for a limitation on weapons that might cause harm, as opposed to taking a wider view of military activity, including military waste disposal that can also cause severe harm to civilians and combatants alike. For example, Article 10(2) provides that each state party should take the necessary measures ‘to prevent PMSCs and their personnel from using weapons likely to adversely and/or irreversibly

⁸⁴ Ibeanu (n 71) 15 (referring to CESCR, General Comment No. 12 (1999), para. 8).

⁸⁵ UNEP (n 63) 48.

⁸⁶ See, for example, Art. 22, Section E, Montreux Document; Arts. 3, 4, 6, Preamble and Art. 21, Section E, ICoC.

⁸⁷ See Montreux Document (n 57) 36 (in reference to Statement 22). ⁸⁸ UNHRC (n 24) 6.

⁸⁹ HRC Res 2005/2. See UN Working Group website, at <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/WGMercenariesIndex.aspx>> accessed 10 February 2017.

⁹⁰ UNHRC (n 24). ⁹¹ UNEP (n 63) 11.

damage the environment on a massive scale'. On the other hand, Article 10(3) sets out that states parties should take necessary measures 'to ensure that PMSCs and their personnel under no circumstances use, threaten to use and/or engage in any activities related to nuclear weapons, chemical weapons, biological and toxin weapons, their components and carriers'. This could be interpreted to include PSC post-conflict activities that engage in military waste and conflict disposal involving the disposal of such toxic weapons and its components. However, this provision is still narrow in that it does not cover non-weapon-related toxic materials.

By not taking a wider view of military activity, this document missed the opportunity to create more specific legislation that could provide environmental protection within the *ius post bellum* framework. The Draft does however, state that 'the Convention applies to all situations whether or not the situation is defined as an armed conflict'.⁹² This could be interpreted to apply to all stages of a conflict including in- and post-conflict. Unfortunately, the draft convention was not adopted by the HRC. Instead, the HRC passed a resolution establishing 'an open-ended intergovernmental group' to assess and 'consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument'.⁹³

International efforts are also evident in the formulation of various soft law instruments to provide guidance on PSC regulation. 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 Document') sets out guidance on pertinent international legal obligations and good practices for states related to operations of PSCs during armed conflict.⁹⁴ The Montreux Document, produced in 2008, is widely regarded as a template for acceptable practices in engaging and monitoring PSC services. It is the first document of international significance to define how international law applies to PSCs operating in an armed conflict zone. The document also specifies that the existing obligations and good practices contained within it may also provide guidance to PSCs on activities in post-conflict situations.⁹⁵

The good practices set out in the document are also designed to help states take measures nationally in order to fulfil their obligations under international law.⁹⁶ It aims to address legal questions raised by PSC activities without creating new obligations. It has been criticized that the provisions are very broad, setting out that states must respect IHL and adhere to their obligations under IHRL without explicitly specifying which provisions within IHL and IHRL.⁹⁷ It is not a legally binding instrument and although the Montreux Document is only a best practice guide, it can be helpful to hiring parties in formulating their own internal policies relating to PSCs. Moreover, though directed to states, the document can provide guidance to non-state actors (IOs, private companies, NGOs) hiring PSCs.

⁹² Art. 3 (3), Draft of a Possible Convention on Private Military and Security Companies.

⁹³ UNHRC, UN Doc. A/HRC/RES/15/26, adopted 1 October 2010.

⁹⁴ Montreux Document (n 57). ⁹⁵ *ibid.* 9. ⁹⁶ Ralby (n 59) 10.

⁹⁷ Part 1, Section E, Montreux Document (n 57).

Du Plessis sums this up, stating that

[t]he list of best practices in the Montreux Document includes recommendations that clients determine which services they want to outsource and they clearly set out how they will select and contract companies, including the criteria they will apply in making their selection. There are also recommendations regarding clauses that should be included in contracts and ways that clients can monitor compliance with the contract and ensure that companies are held accountable for any breaches.⁹⁸

Therefore the Montreux Document provides additional guidance on the formulation of contracts between the hiring party and PSC. However, how it works in practice differs, with reports⁹⁹ showing that state efforts to adhere to the commitments within the document are mixed, with some states finding the document of value in developing the relevant laws and policies while others finding it of limited relevance.¹⁰⁰ These reports include evidence that the human rights impact of PSC activities are often not adequately addressed,¹⁰¹ illustrating a failure to respect IHRL obligations as required by the document.

Although the title of the Montreux Document indicates it applying ‘during armed conflict’, it has been suggested that the document can also be used to provide post-conflict guidance on PSC regulation. As Beerli notes, ‘[t]hough the Montreux Document explicitly focuses on armed conflict situations, it can serve to guide and inspire States in the development of regulations and policies aimed at preventing violations of international law by PSCs in post-conflict and in other, comparable situations.’¹⁰² Therefore guidance for post-conflict PSC activities can be found in this document.

Though welcomed by key NGOs involved in the process, there have been criticisms levelled at the document—one being ‘that some relevant and well-established propositions of IHRL were not fully reflected in the text, including the state’s obligation to protect and apply the standard of due diligence.’¹⁰³ Such gaps in the guidance, where important IHRL principles are relevant to post-conflict PSC activities could further lead to a lack of respect of IHRL and as a consequence, contribute to adverse human rights impacts and indirectly, negative environmental impacts, of PSC post-conflict activities.¹⁰⁴ Another criticism is that there is no specific guidance on any

⁹⁸ André du Plessis, ‘The Global Code of Conduct for Private Security Companies: Why It Matters to Humanitarian Organisations’ 47 *Humanitarian Exchange* (June 2010), at <<http://www.odihpn.org/humanitarian-exchange-magazine/issue-47/the-global-code-of-conduct-for-private-security-companies-why-it-matters-to-humanitarian-organisations>> accessed 10 February 2017.

⁹⁹ For a review of the Montreux Document in practice, see Rebecca De Winter-Schmitt (ed.), ‘Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Legal Obligations and Good Practices’ (Washington College of Law, 2013).

¹⁰⁰ *ibid.* 19. ¹⁰¹ *ibid.*

¹⁰² ‘Private Military/Security Companies: Rules Should be Implemented’ Keynote address by Christine Beerli, Vice-president of the ICRC, Montreux +5 Conference, Montreux, Switzerland, 11–13 December 2013, at <<http://www.icrc.org/eng/resources/documents/statement/2013/12-11-privatization-of-war-montreux-plus-5-beerli.htm>> accessed 10 February 2017.

¹⁰³ Scott Jerbi *et al.*, ‘The International Code of Conduct for Private Security Service Providers’ Academy Briefing No. 4 (Geneva Academy of International Humanitarian Law and Human Rights 2013) 6. (footnote omitted) (referring to a statement by Amnesty International).

¹⁰⁴ *ibid.* 6–7 (for further discussion on the lack of reflection of pertinent human rights principles in the Montréal Document).

environmentally-related obligations. Nevertheless, there is no doubt that the Montreux Document has been gaining acceptance. Originally supported in 2008 by seventeen states and the EU, currently fifty-four states, the EU, and two additional international organizations (NATO and OSCE) participate in the process.

Another relevant international soft law document is the ICoC, a multi-stakeholder initiative following on from the Montreux Document. By 2013 the ICoC had 708 signatories.¹⁰⁵ The code is considered the next step in international PSC regulation. The code sets out human-rights-based principles for more accountable provision of PSC services.¹⁰⁶ For example, the first section of the code sets out the norms and standards PSCs should adhere to. This covers a range of issues from the use of force to defend people and property, to requiring PSCs to adopt and implement broader management policies to ensure that they are operating in compliance with IHRL, including appropriate training for PSC personnel. This section also includes an undertaking by PSCs to set up both personnel and third-party complaint and grievance procedures. The next section of the code aims to establish an international accountability mechanism ('IAM') to ensure that the standards set out in the first section are met. Du Plessis comments that, 'it is anticipated that this will include some form of international certification of private security companies, and a complaints mechanism for third parties.'¹⁰⁷ Du Plessis further notes that the overall aim of the ICoC 'is to clarify the standards according to which private security companies should operate, thereby encouraging an overall improvement in the quality of services they provide and minimising any adverse human rights impacts.'¹⁰⁸

Though limited, the relevant sections which could contribute towards environmental protection in light of PSC duties within the *jus post bellum* framework include for example, Article 62 which provides guidance on policies and procedures for the management, storage, and proper disposal of hazardous materials and munitions—including adhering to principles of 'due care'.¹⁰⁹ Article 64 requires a safe and healthy working environment and Article 69 addresses the requirement that PSCs have sufficient financial capacity to meet potential liabilities arising from death, personal injury, and damage to property. Though not specifically environmental, these guidelines on regulating such activities could indirectly provide some protection to the environment, civilian population, and PSC employees involved.

With regard to international soft law efforts by the international community as a whole, Richmond-Barak argues that 'multi-stakeholder initiatives of this kind offer highly promising avenues in enhancing the regulation of the industry—in particular in terms of participation, transparency, and harmonization.'¹¹⁰ Although these soft law instruments do not provide specific guidance for environmental best practices, the best practice provisions within these documents that are based on human rights obligations,

¹⁰⁵ ICoC, 'Signatory Companies', at <http://www.icoc-ppsp.org/uploads/Signatory_Companies_-_September_2013_-_Composite_List_SHORT_VERSION-1.pdf> 18 August 2015.

¹⁰⁶ James Cockayne, 'Private Military and Security Companies' in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 2014), 654.

¹⁰⁷ du Plessis (n 98). ¹⁰⁸ *ibid.*

¹⁰⁹ Art. 62, ICoC. For commentary on the Articles, see Jerbi (n 103) 47–8.

¹¹⁰ Richmond-Barak (n 46) 1055–6.

could perhaps be used by hiring parties or PSCs themselves to provide some guidance on acceptable PSC activity that is, guidance on avoiding or mitigating PSC activity that could cause harm to human health and indirectly, the environment.

As these documents are non-binding, parties cannot be held liable for breach of any best practice provision. Regardless, these documents do have some effect, as evidenced by the increasing number of states, IOs, and PSCs that have signed up to them which illustrates their voluntary intentions to use these best practices. Although some argue that voluntary soft law agreements such as the ICoC have undermined UN efforts to create binding legislation,¹¹¹ overall, these soft law documents, though in need of improvement and clarity, are welcome achievements in filling the gaps of PSC regulation in conflict-related situations, making the situations they operate in less opaque and in the context of *jus post bellum*, assisting in the transition to sustainable peace.

13.4 Law and Policy in Practice: Attaching Liability for PSC Wrongdoing

Having explored international regulations applicable to PSC activities, particularly at the post-conflict stage, noting that international law can be difficult to enforce and that PSC specific regulation at present is predominantly soft law, the next question is, how can such regulation attach liability to PSC and PSC personnel wrongdoing that may harm the environment? We explore contract litigation, corporate liability, and responsibility of states and other non-state actors in hiring PSCs in this context.

13.4.1 Contract litigation

This section covers two aspects: first, how stronger environmental provisions could be included into PSC contracts, and second, how contract litigation can be utilized to hold PSCs accountable for environmental harm as well as human health impacts as a result of such harm.

In the case of LOGCAP contracts,¹¹² broad environmental protection provisions were written into the ‘Statement of Work’, ‘Task Orders’, and Standard Operating Procedures which dictate the parameters of how PSCs fulfil their responsibilities. These provisions in the LOGCAP contracts note that contractors must adhere to the US Environment Protection Agency and host nation guidelines,¹¹³ that KBR ‘take all possible and reasonable actions to protect human health and preserve the environment’,¹¹⁴ and that while in contingency operations the environment is subordinate to the mission, ‘this does not mean the preservation of the environment is ignored in the execution of orders.’¹¹⁵

¹¹¹ ‘Charity Slams Conduct Code for Private Military and Security Companies’ *War on Want* (19 September 2013), at <<http://www.waronwant.org/media/charity-slams-conduct-code-private-military-and-security-companies>> accessed 10 February 2017.

¹¹² See Section 13.3.1 above.

¹¹³ *Jobes* (n 26) 4, para. 15.

¹¹⁴ *ibid.* para. 16.

¹¹⁵ *ibid.* 4, para. 17.

While these broad provisions are useful and have provided the basis of legal challenge to PSC practice that have caused harm to the environment and human health, the inclusion of more specific environmental responsibilities within contracts has thus far been limited and complicated by structural factors and expertise gaps. Throughout the Iraq and Afghan wars there were no standard contracts for base camps.¹¹⁶ Each camp drafted its own.¹¹⁷ Drafting an environmentally sound contract requires specific expertise on the part of engineering officers and base camp staff, which in most cases has been lacking. This has meant that contracts have not been clearly drafted to include standards of conduct that would ensure environmental protection.¹¹⁸ The lack of environmental guidelines within PSC contracts has been a part of a wider problem within the US military in which there is no comprehensive approach to environmental considerations within contingency operations.¹¹⁹ It is illustrative that it was only after widespread media attention over the burn pit controversy in 2009, leading to PSC waste mismanagement becoming a political problem, did the DoD develop comprehensive guidance for burn pit management.¹²⁰

One means of improving environmental protection in relation to PSC activities is to encourage PSCs to sign up to ICoC (which does provide indirect environmental protection)¹²¹ and integrate the ICoC into their contracts. Although the ICoC is a non-binding code, Creutz argues that it has the possibility of becoming legally binding via incorporation into service contracts.¹²² Moreover, by signing up to the ICoC, signatory companies make general commitments to operate in accordance with the principles within the code, ‘mak[ing] compliance with this Code an integral part of contractual agreements’¹²³ and adhering to the code even when it is not included in service contracts.¹²⁴ As Rosemann (a government representative involved in drafting the ICoC) aptly notes:

[s]uggesting that these codes of conduct are “soft law” wrongly indicates that they are not binding on those involved and that violations have no consequences ... Once the ICoC is included into a contract, the violation of human rights becomes a reason for contract litigation.¹²⁵

Ultimately, this means that IHRL violations by PSCs and their personnel could constitute a breach of contract and result in contract litigation. This includes IHRL breaches resulting in or from TRW-related activity or environmental damage in general at both the in-conflict and post-conflict stages. Opportunity can also be taken to incorporate specific environmental obligations in these service contracts. With regard to the ICoC, it is worth noting that in addition to the UK and the United States having stated their intention to incorporate ICoC provisions into their own PSC service provider agreements, the ICoC has gained credibility by being signed up to by major PSC providers

¹¹⁶ Mosher *et al.* (n 21) 107. ¹¹⁷ *ibid.* ¹¹⁸ *ibid.* ¹¹⁹ *ibid.*

¹²⁰ US Government Accountability Office (n 27).

¹²¹ See, for example, Arts. 62, 64, and 69, ICoC.

¹²² Katja Creutz, ‘Law versus Codes of Conduct: Between Convergence and Conflict’ in Jan Klabbers and Touko Piiparinen (eds.), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2013), 195.

¹²³ Arts. 16 and 17, ICoC. ¹²⁴ Art. 19, ICoC, paras. 16, 18, 19.

¹²⁵ Cited in Creutz (n 122) 195.

in the industry ‘making it look and feel like law, despite not being law, formally speaking.’¹²⁶ Such laws incorporated into PSC contracts providing some form of environmental and human rights protection could go a long way to assisting the transition to sustainable peace.

On the question of how contract litigation can be utilized to hold PSCs accountable for environmental harm, *Jobes v. KBR*¹²⁷ is explored. In this case, over 200 former military and contractor personnel (who died allegedly from exposure to burn pit fumes) and their families filed lawsuits in a US district court in 2010 against KBR and its former parent company Halliburton. The plaintiffs claim that exposure to burn pit fumes ‘are causing a host of serious diseases to Plaintiffs, increased risk of serious disease in the future, and death.’¹²⁸ The plaintiffs argued that KBR has contractual agreements that include protecting human health and the environment within the confines of operational requirements and that these agreements were breached by KBR’s actions.¹²⁹

KBR argued that it is entitled to derivative sovereign immunity under the Federal Tort Claims Act’s (‘FTCA’) discretionary function exemption. The United States is generally immune from lawsuits¹³⁰ and KBR argued that as an agent of the state carrying out the will of the state, it too should be immune from suit. In 2013, the US District Court for the District of Maryland ruled in favour of KBR and dismissed the burn pit lawsuit concluding that:

The critical interests of the United States could be compromised if military contractors were left “holding the bag” for claims made by military and other personnel that could not be made against the military itself. The ability of the military to recruit contractors and their willingness to assist the military in time of war could be called into serious question if they did not enjoy the same protections as does the United States for combat activities.¹³¹

However in 2014 the US Court of Appeals overruled the District Court, stating that KBR was only entitled to derivative sovereign immunity if it had adhered to the terms of its contract. The Court of Appeals vacated the District Court’s judgment on the grounds that the Court did not have enough evidence to judge whether KBR had kept to its original contract with the government.¹³² Six years since filing suit, the case is ongoing, with a full hearing yet to take place.¹³³

¹²⁶ *ibid.* ¹²⁷ *Jobes* (n 26) 7, para. 23. ¹²⁸ *ibid.* para. 1. ¹²⁹ *ibid.* para. 1.

¹³⁰ The US Federal government is immune from lawsuits unless it waives that immunity or a case is brought forward by an individual through the Federal Tort Claims Act. ‘Sovereign immunity’, Legal Information Institute, Cornell University Law School, at <http://www.law.cornell.edu/wex/sovereign_immunity> accessed 10 February 2017.

¹³¹ *Re: KBR, Inc. Burn Pit Litigation*, United States District Court for the District of Maryland, No. 8:09-md-02083-RWT 8 September 2010, 32.

¹³² *KBR, Inc. Burn Pit Litigation*, United States Court of Appeals for the Fourth Circuit, No. 13-143, Judgment of 7 March 2014, 39–40.

¹³³ Patricia Kime, ‘Burn-Pit, Electrocutation Lawsuits to Continue’ *Military Times* (27 January 2015), at <<http://www.militarytimes.com/story/military/pentagon/2015/01/22/kbr-iraq-lawsuits-supreme-court/22158399/>> accessed 10 February 2017. See also Jon L. Gelman, ‘Burn Pit Lawsuit Hearing Rescheduled to March 2017’ (*Burn Pit Claims Blog*, 8 February 2017), <<http://burnpitclaims.blogspot.co.uk/2016/12/burn-pit-lawsuit-hearing-rescheduled-to.html>> accessed 10 February 2017.

This case shows that contract litigation has the potential to provide a forum for accountability for PSC misconduct. The general environmental protection and human health provisions in existing contracts (before initiatives such as the ICoC) have been useful in making the case for contractor misconduct. Nevertheless, increased environmental and human health provisions in contracts is still crucial in transforming PSCs into environmentally responsible actors. Contract litigation also has value in acting as a deterrent to PSC malpractice,¹³⁴ which may eventually lead to a change in norms of acceptable behaviour in wartime.

In addition, recent US court proceedings reveal that while PSCs fall within the ambit of US state immunity from lawsuits, they lose this immunity if they breach their contracts. Thus the onus of responsibility for contractor malpractice is on PSCs themselves. Yet, as noted earlier, PSCs are aware that they can ‘get away with doing anything they want’¹³⁵ and pay any fines that result from their malpractice. Malpractice that has been encouraged by a weak regulatory setting. Thus, the question is whether accountability for PSC malpractice should not be left to PSCs alone but also sought from hiring or home states, who are responsible for wider regulatory settings that PSCs act within. Finally, while contract litigation can provide accountability for people impacted by environmental damage, the environment by itself is not protected. Stronger, more environmental specific regulatory restraint and an alternative form accountability is needed, to better protect the environment and affected population as well as contribute to the establishment of sustainable peace.

13.4.2 Corporate liability

Modern PSCs are generally companies with individuals employed to work for them, thus they are like any other corporation. They are registered corporate entities ‘with legal personalities and hierarchical management structures.’¹³⁶ Therefore, the question arises whether PSCs can be found liable through corporate civil liability.

Although traditionally international law exclusively addressed states and their agents, the rise of non-state actors and the evolution of IHL and international criminal law in particular have demonstrated that international law also applies to non-state entities and individuals. This essentially means that ‘[t]he idea that international law applies to non-state actors, and hence to companies, and that they have duties and responsibilities under that law consequently does not pose a conceptual problem.’¹³⁷ Therefore, a company could in theory be found liable for its own actions as demonstrated after the Second World War in the US Nuremberg Military Tribunal judgment of *I.G. Farben*¹³⁸

¹³⁴ Heath Druzin, ‘Supreme Court Allows Lawsuits Over Burn Pits, Electrocutations’ (*Stars and Stripes*, 20 January 2015), at <<http://www.stripes.com/news/us/supreme-court-allows-lawsuits-over-burn-pits-electrocutations-1.324782#.VMDh6kmQaQ8.twitter>> accessed 10 February 2017.

¹³⁵ *Jobs* (n 26) 7, para. 23.

¹³⁶ Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (Cambridge: Cambridge University Press, 2011), 2.

¹³⁷ Eric Mongelard, ‘Corporate Civil Liability for Violations of International Humanitarian Law’ (2006) 88 *International Review of the Red Cross* 665, 670 (Mongelard also sets out conventions that explicitly create obligations for companies in specific areas of international law).

¹³⁸ *The I.G. Farben Trial, Trial of Carl Krauch and Twenty-two Others*, US Military Tribunal, Nuremberg, 14 August 1947–29 July 1948, *Law Reports of the Trials of War Criminals*, Vol. X, 1–68.

where twenty-three board members of the German chemical and pharmaceutical company were accused of various war crimes, including plundering public and private property in occupied territory. A number of the Tribunal's findings were based on Farben as a corporate body. Moreover, the Tribunal held that the company itself was responsible for specifically violating Article 47 of the Hague Regulations, which prohibits pillage and, although the Tribunal did not have jurisdiction over legal persons, it did come to the conclusion that the war crime of pillage could be directly imputed to IG Farben as a company. This case demonstrates that companies can commit and potentially be held responsible for violations of IHL.¹³⁹

In more recent cases, civil claims for violations of IHL and IHRL seem to be brought under US law via the US Alien Tort Claims Act ('ATCA') by application of the 'aiding and abetting standard'.¹⁴⁰ In *Doe v. Unocal Corp.*,¹⁴¹ Myanmar citizens sued the company Unocal for aiding and abetting Myanmar military forces in committing grave human rights violations, 'in the context of oil and gas extraction operations and building of a pipeline'.¹⁴² In *Talisman*,¹⁴³ the New York District Court applied the aiding and abetting standard, where a Canadian oil company, Talisman, was sued by the Presbyterian Church of Sudan for collaborating with the Sudanese government in violation of human rights and war crimes committed in the context of international armed conflict in Sudan. While the US Court of Appeals in *Talisman* dismissed the case on the grounds that the plaintiffs had not 'established Talisman's purposeful complicity in human rights abuses',¹⁴⁴ the Court of Appeals in the *Unocal* case on the other hand, found that on grounds of the aiding and abetting theory and the fact that Unocal had knowledge of the human right breaches committed by the government of Myanmar before becoming a party to the joint venture between Unocal and the Myanmar government, that there was sufficient evidence to hold *Unocal* liable under ATCA. These recent cases further confirm the possibility of holding companies liable for violations of IHL as well as IHRL but also highlight the legal complexities in achieving such accountability.¹⁴⁵

Corporate civil liability may therefore be a good route for victims of PSC violations during and post-conflict as they may be able to hold PSCs accountable as well as have the possibility of obtaining financial compensation for their suffering.¹⁴⁶ Arguably

¹³⁹ See also *The Krupp Trial, Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*, US Military Tribunal, Nuremberg, 14 August 1947–29 July 1948, Law Reports of the Trials of War Criminals, Vol. X, 69–181. For detailed analysis on this case, see Mongelard (n 137) 674–6.

¹⁴⁰ Mongelard (n 137) 681.

¹⁴¹ *Doe v. Unocal Corporation*, US Federal District Court, 110F. Supp. 2d. 1294 (C.D. Cal. 2000) Judgment of 31 August 2000.

¹⁴² Mongelard (n 137) 679–80.

¹⁴³ *Presbyterian Church of Sudan v. Talisman Energy*, US District Court for the Southern District of New York, 224 f. Supp. 2d289, 19 March 2003.

¹⁴⁴ *Presbyterian Church of Sudan v. Talisman Energy*, US Court of Appeals for the Second Circuit, 582 F.3d 244, 2 October 2009, 2.

¹⁴⁵ See Mongelard (n 137) 678–81 (for detailed analysis of these cases).

¹⁴⁶ *ibid.* 667. See also UN Office of the High Commissioner for Human Rights, 'Corporations Must be Held Accountable for Human Rights Violations' (20 February 2012), at <http://www.ohchr.org/EN/NewsEvents/Pages/CorporationsMustBeHeldAccountableForHRViolations.aspx> accessed 10 February 2017 (High Commissioner Pillay argues that 'holding corporations liable for human rights violations is fully consistent with international law').

this could also apply in situations where PSC activities generate TRW or environmental damage that causes harm to the environment and human health. Moreover, as Mongelard points out,

[i]f civil actions are brought against companies and the courts award large sums of money in damages and interest against them, this could make them more accountable and induce them to change their corporate culture; shareholders, too, would become more aware of their responsibilities on seeing their profits thus dwindle and fearing the loss of their investments.¹⁴⁷

In theory, national law provides the possibility of enforcing corporate liability for IHL breaches.¹⁴⁸ However, in practice, domestic judges ‘are rarely open to cases based on international humanitarian law.’¹⁴⁹ Thus the reality is that while corporate civil liability exists, it is difficult to enforce.

13.4.3 International legal obligations of states and non-state actors in relation to PSCs

State responsibility is another way to attach accountability for PSC actions.¹⁵⁰ Essentially, ‘States have legal obligations to control PSCs and ensure that they are held accountable for misconduct.’¹⁵¹ States that are identified as having possible responsibility (regardless of being party to a conflict) are categorized as either the hiring state (state that hired the PSC), the host state (state on whose territory the PSC is operating in), or the home state (state where the PSC is registered and based). Out of the three categories, host states that is, states where the conflict has taken place, are generally considered weak and vulnerable. As one commentator notes, ‘one cannot realistically rely on the effective control of PSCs by the host state, whose inability or incapacity to provide security and governance is the *raison d’être* [sic] of the resort to private contractors.’¹⁵² Thus, using principles of state responsibility¹⁵³ to hold the hiring state or home state responsible is particularly useful when the host state is unable or unwilling to hold the PSC accountable for violations of international law. For example, the hiring state could be held responsible if the PSC was an agent of that state, therefore any misconduct by the PSC is attributable to the hiring state.¹⁵⁴ The home state has particular relevance in trying to attach accountability for PSC activities, particularly ‘because of the paramount importance attributed by international law to the exclusive territorial

¹⁴⁷ Mongelard (n 137) 666–7 ¹⁴⁸ *ibid.* 691. ¹⁴⁹ *ibid.* 691.

¹⁵⁰ Lindsey Cameron and Vincent Chetail, *Privatizing War* (Cambridge: Cambridge University Press, 2013) 134.

¹⁵¹ Tonkin (n 136) 6.

¹⁵² Francesco Francioni, ‘The Responsibility of the PSC’S Home State for Human Rights Violations Arising from the Export of Private Military and Security Service, s EUI Working Papers, AEL 2009/18, Academy of European Law, PRIV-WAR Project (2009) 2.

¹⁵³ See Arts. 4, 5, and 8, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

¹⁵⁴ Tonkin (n 136) 7.

control exercised over the company by the state where the company has been legally created or where the centre of gravity of its management and operations.¹⁵⁵

Commentators argue that states (including states not party to a conflict)¹⁵⁶ have ‘positive obligations to control PSCs and ensure accountability’ under IHL and IHRL.¹⁵⁷ International law imposes clear obligations on states to ensure respect for IHL; this includes protecting the civilian population and preventing IHL breaches. It follows that states, through state responsibility, also have a duty to ensure that PSCs comply with IHL rules as well as to ‘take action to prevent and punish misconduct by PSCs’.¹⁵⁸ Tonkin argues that there are also positive obligations for states under IHRL, from obligations ‘to plan and control security operations to minimise risk to life’¹⁵⁹ to an ‘obligation to protect individuals whose lives are at risk’.¹⁶⁰ Arguably, these positive obligations could apply in situations in which there is a risk of TRW generation or any PSC action in violation of IHL, IHRL, or other international law obligations leading to environmental damage that could also in turn cause harm or the risk of harm to human health. Such violations by PSCs could interfere with States’ positive obligations under international law and thus incur state responsibility.¹⁶¹ State responsibility therefore provides some form of control and deterrent for PSC behaviour, which at the post-conflict stage could greatly contribute to the establishment of sustainable peace.

While hiring states not party to a conflict can incur responsibility if the PSC’s violation of international law can be attributed to the state, with regard to non-state actors (IOs, corporations, NGOs) hiring PSCs on the other hand, there are limits to the reach of responsibility under international law. For example, the position of IOs regarding responsibility for violations by PSCs hired is still uncertain. As Lehnardt notes,

[w]hile it is accepted that international organizations can in principle incur international responsibility, the efforts of the International Law Commission (‘ILC’) to formulate rules on the responsibilities of international organizations are complicated by the facts that there is much less case law and practice from which principles can be drawn than in the context of state responsibility.¹⁶²

However, Lenhardt argues (in the context of the UN), that an IO may be responsible if the PSC personnel hired can be considered agents of the IO that is, an agent being ‘any official and other persons or entities through whom the organizations acts’.¹⁶³ Therefore PSC violations of IHL, IHRL, or international law obligations that causes harm to the

¹⁵⁵ Francioni (n 152) 2. See also Ibeanu (n 71) 17–19.

¹⁵⁶ ICRC confirms that the obligation to ‘ensure respect’ of IHL is not limited parties to a conflict. See ICRC Customary IHL, ‘Rule 144’, at <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule144> accessed 10 February 2017.

¹⁵⁷ Tonkin (n 136) 6–8. ¹⁵⁸ *ibid.* 6–8. ¹⁵⁹ *ibid.* 7. ¹⁶⁰ *ibid.*

¹⁶¹ For further discussion on state responsibility for PSC actions, see Cameron and Chetail (n 150) 134–287.

¹⁶² Chia Lehnardt, ‘Peacekeeping’ in Simon Chesterman and Angelina Fisher (eds.), *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (New York: Oxford University Press, 2009), 210 (footnote omitted).

¹⁶³ Art. 4(2), Draft Articles on Responsibility of International Organizations, ILC, UN Doc. A/CN.4/L.648, 27 May 2004.

environment or wellbeing of the population *jus post bellum* could in theory incur the responsibility of the hiring IO. Interestingly, further guidance can be found in the UN Draft Convention which goes beyond responsibility of states and also addresses the obligations of IOs exercising their due diligence under international law with regard to hiring PSCs.¹⁶⁴ Unfortunately, the UN Draft makes no mention of any responsibility or obligations on the part of corporations or NGOs hiring PSCs.

As discussed above, it is difficult to hold corporations liable for breaches under international law as the ILC Articles of Responsibility do not apply to them nor are there any rules under international law for the attribution of private actor wrongdoing to other private entities.¹⁶⁵ As Perrin points out, '[i]n many national jurisdictions, there are legal barriers to holding corporate clients criminally liable for the conduct of private security and military companies they hire'¹⁶⁶ However, as mentioned earlier, corporate clients hiring PSCs could theoretically be held civilly liable for PSC violations of IHL or IHRL for example, under ATCA, but it is not easy to do so. As Perrin notes, 'there has yet to be a case of a corporation being held liable under the Alien Tort Claims Act for the violations of a private military and security company that it has hired'.¹⁶⁷ Obligations to prevent or redress violations of IHL or IHRL in this case would fall not on the hiring party (corporation) but on the host and home states.¹⁶⁸ This is similarly the case for NGOs hiring PSCs. The ILC Articles of Responsibility also do not apply to NGOs, and international law does not provide for the attribution of PSC wrongdoing to NGOs. This poses a problem for accountability of PSC actions when hired by non-state actors. Nevertheless, while there are no legally binding obligations at international level, non-state actors do have the option to look towards non-binding guidance in the form of the Montreux Document and ICoC in hiring PSCs and in that vein, ensure PSC responsibility through contracts that is, incorporating the soft law guidance or international law provisions protecting the environment into the service contracts between the hiring NGO and the PSC.

Due to the difficulties in attaching responsibility to PSCs for environmental damage including violations under IHL and IHRL, and the even more complex nature of attaching responsibility to hiring non-state actors for PSC violations, an alternative solution may be to look towards the principle of shared responsibility. According to Plakokefalos, shared responsibility for environmental damage could be triggered when environmental harm is brought about by a breach in an international obligation by multiple actors—requiring the responsible actors to make full reparation for

¹⁶⁴ Art. 3(1), Draft of a Possible Convention on Private Military and Security Companies.

¹⁶⁵ Leonard Stenner, 'Private Military and Security Companies: Security Actors Without Accountability' Occasional Paper No. 36 (Kofi Annan International Peacekeeping Training Centre, July 2014), 11, at <<http://www.kaiptc.org/Publications/Occasional-Papers/Documents/Stenner-KAIPTC-Occasional-Paper-2014.aspx>> accessed 10 February 2017.

¹⁶⁶ Benjamin Perrin, 'Promoting Compliance of Private Security and Military Companies with International Humanitarian Law' (2006) 88(863) *International Review of the Red Cross* 613, 623 (footnote omitted).

¹⁶⁷ *ibid.* 626.

¹⁶⁸ Giulia Pinzauti, 'Adjudicating Human Rights Violations Committed by Private Contractors in Conflict Situations before the European Court of Human Rights' in Francioni and Ronzitti (n 48) 167.

the damage caused.¹⁶⁹ In this case, it is the PSC and not multiple actors breaching an international obligation. However, in light of the difficulty in establishing liability to PSCs for violations in international law, it is argued that in the spirit of shared responsibility, multiple actors in a situation of PSC violation could be interpreted to include the hiring party (state or non-state), host state, and home state if the PSC violation could be attributed to either or all parties. Therefore, in the absence of holding the PSC responsible, shared responsibility provides an avenue for other responsible actors to take responsibility in mitigating or fixing the environmental damage caused.¹⁷⁰ This ensures that the PSC violation causing damage does not go unheeded and will go a long way towards contributing to the *jus post bellum* aim of achieving sustainable peace. However, shared responsibility is not without its problems—one of the downsides being that ‘international law provides little or no guidance as to exactly how responsibility (or reparation) is to be allocated between multiple actors’¹⁷¹ and with regard to hiring non-state actors, the issue of attribution of PSC wrongdoing to non-state actors under international law arises. Illustrating once again the complexities associated with holding PSCs and other parties associated with them accountable for PSC violations in international law.

13.5 Conclusion

The increasing use of PSCs particularly during the peacebuilding stage poses significant challenges to transparency, oversight, and accountability. It is clear that a lack of PSC oversight and regulation have led to situations where environmental diligence has not been prioritized, resulting in environmental and human harm. Unfortunately, PSCs do not fall neatly into the existing legal framework. An examination of international law reveals that the basis for some environmental protection exists within both IHL and IHRL—from environmentally specific provisions within IHL to indirect environmental protection through human centred concerns under IHRL. However, IHL and IHRL are laws primarily applicable to states, making it very difficult to apply to PSC actions.

In terms of PSC regulation specifically, there has been some movement to create binding and non-binding legislation. These documents, primarily the UN Draft, ICoC, and Montreux Document, include aspects (to varying degrees) that could be interpreted or tailored to reflect environmental issues. However, there is space to take a stronger stance on environmental protection. In addition, while soft law instruments such as the ICoC have merit in their wide acceptance by states and PSCs, and particularly in their contribution to creating norms around responsible PSC behaviour, there

¹⁶⁹ See chapter 11 in this volume.

¹⁷⁰ See *ibid* (for analysis of reparations for environmental damage under international law).

¹⁷¹ André Nollkaemper, ‘Introduction’ in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2014) 13 (footnote omitted). See also chapter 11 in this volume (on problems of shared responsibility with regard to breach and attribution).

is an argument for whether these norms could be strengthened if states supported UN efforts to create binding legislation.

Whilst regulatory frameworks have been developed, contract litigation, corporate liability, state and shared responsibility are viable avenues by which victims of PSC violations could hold PSCs or other relevant parties accountable for their actions. However, contract litigation only works if the relevant law violated is incorporated into the PSCs' contracts, while corporate liability can be difficult to enforce in situations involving PSCs. In addition, through contract litigation and corporate liability, there have been parallel attempts to hold PSCs liable for malpractice within US courtrooms. This has proved to be a difficult route in most cases. It remains to be seen how these cases before the US courts will develop and whether successful outcomes for the plaintiffs may shift norms around PSC practice to better respect IHL and IHRL in conflict-related situations. With regard to accountability for PSC violations by hiring non-state actors, the position under international law remains unclear. While in theory IOs could bear some responsibility for violations by PSCs hired, in practice this position is still uncertain under international law and with regard to other hiring non-state actors like corporations and NGOs, there are no rules under international law for the attribution of private actor (PSC) wrongdoing to other private entities. Therefore, in situations involving PSC violations of international obligations and in the absence of PSC responsibility under international law, state responsibility though not easy to achieve, remains the most promising avenue to providing some accountability for PSC wrongdoing. Whilst shared responsibility for PSC violations is another avenue to provide accountability, it too can be problematic to apply.

It is obvious from the discussion above that there is a lack of clear regulations relating to PSC obligations as well as PSC misconduct for not only PSCs but also state and other hiring non-state parties. The international community (states, NGOs, PSC industry) thus has a part to play in creating clearer accountability and liability options. These could work as a deterrent to PSCs with regard to violating IHL, IHRL, other international law obligations, or even breaching their contractual obligations. For example, more stringent fines—fines that could be turned into compensation, contributed to a PSC compensation fund that is used for restitution, that is, to restore the environment or mitigate the damage done or provide compensation for victims harmed due to PSC actions. The PSC compensation could perhaps be administered through the ICoC, in that each signatory to the ICoC pays into a global PSC compensation fund. In addition, to enhance accountability for PSC actions in breach of IHL and IHRL, criminal accountability for PSC personnel could be developed further that is, enforcing criminal consequences for grave breaches of international law by its personnel.

Further work must also be done to ensure transparency of PSC activities, to ensure that they are respecting the laws during and after conflict as well as to make it easier to hold them accountable for any violations of those laws. This could also prove to be a preventative measure to signal that PSCs are not above the law. Finally, the environmental protection issues explored here have relevance for wider questions around environmental protection and conflict. Should more be done to address the diverse nature of conflict pollution events that occur throughout the life cycle of conflict and are related

not only to military targeting decisions but also to military base waste management, contaminated conflict debris, and more? Environmental protection will be limited if current IHL provisions are used as a guide. Therefore, the *jus post bellum* framework that applies during the transition from conflict to peace should integrate key principles enshrined in IHRL as well as other legal frameworks such as international criminal law and international environmental law into regulations (binding or non-binding) for PSCs. This could contribute to a more rigorous protection of the environment in relation to PSC activities. Without adequately addressing the challenges associated with PSCs and environmental protection, sustainable peace in a war-torn society would be that much harder to achieve.

