
Аннотация
genocide, crimes against humanity and war crimes. Some elements of horizontal hierarchy may also be seen in the facts the Prosecutor of the ICTY at the same time is the Prosecutor of ICTR, and a number of international criminal courts use the procedures of the ICTY.

Only the presence of some fragments of vertical hierarchy may explain the fact that if the ICTY refers a case in accordance with the approved regulations to the Prosecutor of Bosnia and Herzegovina, he must start criminal persecution in accordance with the facts of the referred case, and this criminal case must be heard by the Department for War Crimes of the Bosnia and Herzegovina Court.

At last, the examination of the subordination links of the international criminal justice system demonstrates that its highest element is not just some other court, but the United Nations, under the auspices or with the participation of which all without any exception international criminal courts have been established. For this reason the Presidents of the ICTY, ICTR, SCSL and ICC submit annual reports to the UN Security Council and General Assembly.

Only some aspects of the topic defined by the title of this work are described in the above paragraphs. In conclusion it is worth noting that the growth or decline of any social system (and the international criminal justice system in particular) depends upon, firstly, what possibilities or threats there are actually or potentially in the environment of this social system, secondly, upon the ability of its leaders to analyse the relevant factors of the environment and to take them into account when determining the aims, strategy and tactics of the operation and development of this system. At each particular moment some factors may have a dominant significance for the existence of the system, other factors may be not so important. From the point of view of the general theory of functional and social systems the legal regulation and activities of the international criminal courts with international criminal jurisdiction may be considered as a unified system of international criminal justice.

At present this system is in the process of development. It came a long and complex way from the publication of the first doctrinal studies to the working international courts administering justice. Until recently their activities dealt mainly with the past — they were set up for investigating and punishing crimes committed earlier. After the establishment of the International Criminal Court international criminal justice has got a preventive aspect, since this court will deal with future crimes.

Understanding this, the international community and the UN pay special attention to eliminating factors that potentially may negatively influence the further development of the international criminal justice system. In particular, by promoting education and training in international criminal justice in accordance with the principle of the rule of law in the context of the standards and norms of the UN in preventing crime and administering criminal justice and by interpreting the term «international criminal justice» in a wider sense as including the material and procedural norms of international criminal law and the necessary mechanisms for enforcing these norms in the form of international criminal courts.

Lawmaking as a Mechanism for Eliminating Competition between Some Norms of International Humanitarian Law and International Human Rights Law

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For a long time international humanitarian law (IHL) and international human rights law (IHRL) developed independently of each other.

1 Practical Workshop «Education in International Criminal Justice to Ensure the Rule of Law». Document of XII UN Congress on Crime Prevention and Criminal Justice. // UN Document A/CONF.213/12 dd. 05.02.2010.
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From around the end of the 1960s these two branches of international law started to come noticeably closer and to develop mutually influencing each other.

Among experts in international law there are different points of view on this phenomenon — from its categorical denial (Meirovitz) to treating it as the convergence (Picte, Robertson, Al-Falludji, Coller, Meron) of IHL and IHRL up to the point when no distinctions between them will remain, since they have a common subject of legal regulation and have common objective trends in their development.

At present the most widely accepted theory that seems to match in the best way the actual state of affairs in this area is the theory of complementarity (Colb, David, Gasser). According to this theory, the norms of IHL and IHRL mutually supplement each other. If we use this approach in the situation of an armed conflict, the rights of an individual person may be protected both by IHL and IHRL applied in combination, thus making such protection complete and consistent.

The theory of complementarity is viewed by its supporters as an ambitious project and the evidence of the progressive improvement of these two branches of international law with closer cooperation between them.

However, there are some serious contradictions in enforcing the norms of IHL and IHRL, requiring to take measures for eliminating such competition by revising the text of the corresponding provisions of IHL and IHRL and taking into account the present-day situation. Probably, this could be even done through universal general legal acts that might regulate both these branches of international law.

But what are these contradictions, and in what way might it be possible to formulate the new norms of IHL and IHRL to eliminate them? Let us explain it using a specific example.

Mercenaries — individual persons, taking part in an armed conflict not because of their ideological, political or other views and not because of conscription but exclusively with the aim of making private gain — have participated and continue to participate in many armed conflicts. Practically all recent armed conflicts proved that the activities of mercenaries seriously damage the sovereignty, stability and safety of nations, violate human rights and the right of peoples for self-determination. Without any legal grounds the mercenaries appropriate the right to perform public functions in connection with the use of military force, i.e. the functions of the state.

For the first time the international community seriously tried to solve this problem after the involvement of mercenaries from developed Western countries in local interethnic conflicts in a number of African states.

In 1970 the UN General Assembly adopted a declaration that denounced the use of mercenaries and emphasised that states must refrain from recruiting irregular forces or armed gangs, including mercenaries, to invade other states or from encouraging such actions. During the same period the Organisation of African Unity (OAU) also approved a number of resolutions and conventions aimed at preventing the use of mercenaries.

The Additional Protocol I to the 1949 Geneva Conventions became an important step in the legal regulation of this issue. It introduced into international law the definition of mercenary and deprived mercenaries of the right to be recognised as combatants or prisoners of war.

During the 1980s an attempt was made in the UN to develop a universal approach to the problem of mercenaries, and in 1989 the International Convention against the Recruitment, Use, Financing and
Training of Mercenaries was opened for signature\(^1\). According to this Convention, the use of mercenaries or being a mercenary is a serious international crime.

«Traditional» mercenaries have been brought to justice and punished for their crimes only in several cases. Two of them are especially known. The first episode is connected with the trial of several mercenaries in Equatorial Guinea for their part in an attempted military coup against president of Equatorial Guinea Obiang in 2004. The second one is in connection with the conviction of Yair Klein, an Israeli mercenary, by a Colombian court for training members of Colombian paramilitary groups and armed gangs of drug dealers in the 1980s and 1990s. He was sentenced in his absence to 10 years of prison by the criminal court in Manizales for instructing and training members of illegal groups in the use of military and terrorist methods. The government of Colombia unsuccessfully tried to get him extradited from Israel. In March 2007 Interpol issued an international warrant for his arrest. In August 2007 Yair Klein was detained at a Moscow airport and held in custody, and the government of Columbia asked for his extradition.

Although a Russian court authorised the extradition of Yair Klein to Columbia, the European Court of Human Rights decided to suspend the extradition and on April 1, 2010 made a decision affirming that the extradition will result in the violation of article 3 of the European Convention on Human Rights (banning the use of torture or inhumane or degrading treatment or punishment). As the result, a person who committed a serious violation of the norms of IHL banning the use of mercenaries \textit{de facto} was allowed to go free. This decision was based not only on suspicions that the rights of Yair Klein might be violated if he was extradited to Columbia, but also on the fact that actually he did not train mercenaries in the «traditional» sense of this term.

In 1987 the UN Human Rights Commission appointed a Special Rapporteur for studying various issues in connection with the use of mercenaries as violating human rights and the right of peoples for self-determination (Resolution 1987/16). The results of the studies of the Special Rapporteur were to be reported annually to the UN Secretary General and General Assembly\(^1\).

For over 15 years the Special Rapporteur collected and submitted to the UN unique factual and analytical materials. They provide an evidence of the growing «privatisation of the use of force» by non-governmental actors in the following forms:

- individual mercenarism;
- activities of illegal paramilitary formations or non-governmental military companies during domestic or international conflicts;
- export of services provided by private military and security companies (PMSC) to foreign states or non-governmental organisations.

The first two forms are so-called «traditional» mercenarism that may be countered in accordance with the above-mentioned convention. In the opinion of the Rapporteur, the export of services of PMSCs is a new form of mercenarism in the sense in which this term is defined in the Convention.

However, such private military and security companies and their personal comparatively rarely are brought to justice when accused of crimes connected with violations of human rights or the norms of IHL. In connection with several criminal and civil actions brought against them, the PMSCs alleged that the courts have no authority to hear cases regarding supposed violations committed abroad (for example, in Iraq, as is the case with American PMSCs). They also alleged that the situation in

\(^1\) It came into force on 20.10.2001 when 22 instruments of ratification had been submitted to the UN Secretary General. In accordance with the Convention the recruitment, use, financing or training of mercenaries is an international crime, punished in accordance with the national legislations of parties states. It has been signed by 40 states (Angola, Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Congo, Costa Rica, Croatia, Cuba, Cyprus, Democratic Republic of Congo, Georgia, Germany, Guinea, Guinea, Italy, Liberia, Libya, Maldives, Mali, Mauritania, Moldova, Montenegro, Morocco, New Zealand, Nigeria, Peru, Poland, Qatar, Rumania, Saudi Arabia, Senegal, Serbia, Seychelles, Surinam, Togo, Turkmenistan, Ukraine, Uruguay, Uzbekistan) and ratified by 30 of them (not yet ratified by Angola, Germany, Democratic Republic of Congo, Congo, Morocco, Nigeria, Poland, Rumania, Serbia and Montenegro).

question may not be defined as «violation of international law» — a sufficiently serious accusation resulting in the application of the US law with respect to offences committed against foreign citizens. Besides, they alleged that the issues in question are political and as such lie outside the court jurisdiction, and limitations exist as to providing evidence, making it impossible to conduct a proper court hearing. The use of private individuals and companies for carrying out functions usually implemented by the armed forces started as long ago as during the Second World War, when civilians, hired under individual contracts, were often used by the US army as translators and specialists in interrogation techniques. This trend continued during the Vietnam War, when the delivery rate of new military equipment exceeded the rate of training of military specialists in its use. As a result, special contracts with manufacturers were widely used, under which they not only delivered military equipment but also carried out its servicing and maintenance in field conditions.

In spite of such long history, this practice was not conspicuous for outside observers. So it was a real surprise for the general public when it turned out that in 2003–2004 up to 20,000 armed men, involved on the side of the Coalition in Iraq, were employees of private military companies (PMCs), working under contracts with the US Government, Provisional Coalition Authority or with commercial companies operating in Iraq. Moreover, even during the active phase of military operations in 2003 about 10% of the personnel of the US military forces in Iraq represented PMCs that provided logistic and sometimes military support for Operation Iraqi Freedom.1

At present approximately 4,000–6,000 citizens of the US, Great Britain, Australia, New Zealand and South Africa, 1,500–2,000 citizens of third-world countries from Nepal, Fiji, Singapore, Philippines and Nigeria, and about 15,000–20,000 citizens of Afghanistan work for private security companies in Afghanistan.2

Such increase in the activities of PMSCs to a significant degree is caused by reductions in «traditional» armies in many countries. Instead special task units are needed for policing operations in third-world countries. Military experts believe that there is a growing trend to privatise war, ending the monopoly of the state to use violence. All the more so since the armed forces significantly more often have to face not a «normal» regular army, but guerrilla and terrorist groups. For this reason the advantages of private military companies (PMCs) increased significantly… The fact the government is not formally responsible neither for losses suffered by the PMCs nor for crimes committed by their employees leads to a wider use of such companies in armed conflicts either jointly with the regular armed forces or instead of them… The reductions of the armed forces and their decreased combat readiness are not adequate to the present-day geopolitical situation. Naturally, vacuum begins to be filled by foreigners and private companies... The role of the state continues to diminish and its place is being taken by corporations in the wider sense of this word»1.

However, one should not forget that at present PMSCs are not subjects of international law, although are widely used by some states and international organisations for provision of military and security services on the territory of third countries — the independent subjects of international law and parties of international relations. Current international law does not include yet any norms on the principles and conditions of such activities, and this in general may threaten the sovereignty and independence of the states where the PMSCs carry out their activities, besides, their personnel might violate the norms of IHL.

In these conditions for the international community as a whole and for each its member it is extremely important to introduce unified and common legal regulations in this area. This will prevent both the transformation of the PMSCs and their personnel into mercenaries and transfer to them of some of the inalienable military functions of the state, such as direct participation in armed conflict, conducting military operations, taking prisoners of war, military reconnaissance etc.


Unfortunately, international organisations, specialising in improving IHL and IHRL, are very late with lawmaking aimed at eliminating contradictions between the norms of law and activities of the PMSCs.

Today 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, set up in accordance with Resolution 2005/2 on Apr. 7, 2005 by the UN Commission on Human Rights, is actively trying to improve the situation in this field. Using the results of its field missions and consultations, the Working Group began to develop principles and criteria that may serve as a basis for national and international mechanisms for regulating activities of PMSCs. The Working Group came to the conclusion that the legal regulation of their activities must ensure (among other things) that «PMSCs as legal entities and their employees as individual persons comply with general human rights and norms of IHL».

These and other developed principles served as a basis for the draft International Convention on Private Military and Security Companies, developed by Russian experts and publicly presented in the autumn of 2008. The aim of the proposed legally binding document is not to introduce a complete ban on PMSCs but to provide basic international standards for regulating their activities by the member states.

During 2009–2010 the text of the draft Convention was revised after discussions with non-governmental organisations and experts, and in July-August 2010 it was presented to the international community at the UN Human Rights Council and in the report of the UN Secretary General.

The draft Convention also includes propositions on introducing legal norms that may be applied in cases similar to the above-mentioned case of Yair Klein.

According the preamble of the draft Convention, it is based on «the principles and norms of international human rights law and international humanitarian law and their complementarity».

Article 5 of the draft states that «each Party State shall ensure that PMSCs, their personal and any connected with their activities structures implement their functions taking into account the provisions of officially approved laws complying with the norms of international human rights law and international humanitarian law».

According to article 7 of the draft, «each State Party shall adopt such legislative, judicial, administrative and other measures that may be necessary to ensure the accountability of PMSCs and their personnel regarding the norms of international human rights law and international humanitarian law in accordance with this Convention.

Each State Party shall monitor that PMSCs and their personnel exercise necessary caution to ensure that their activities neither directly nor indirectly contribute to violations of human rights and the norms of IHL.

The superiors of the personnel of PMSCs, such as (a) state officials, both military commanders and civilian officials; or (b) directors and managers of PMSCs, in accordance with the norms of international law may be brought to justice for international crimes, committed by the PMSC personnel under their supervision and control, if they did not ensure proper control of their actions. In accordance with the norms of international law, no provision of the Convention may be interpreted as allowing the superiors to be exempt from liability».

According to article 17 of the draft, «each State Party shall ensure that the personnel of PMSCs strictly adhere to the respective norms of international human rights law and international humanitarian law, including by conducting prompt investigations of all violations of human rights and the norms of IHL and prosecuting and punishing those responsible».

Article 19 of the draft Convention affirms that «each State Party in accordance with its obligations with respect to international human rights law, international criminal law and international humanitarian law shall take such legislative, judicial, administrative and other meas-

1 UN Documents A/HRC/7/7, 9 January 2008; A/HRC/7/7/Add.2, 4 February 2008; A/HRC/7/7/Add.3, 8 January 2008; A/HRC/7/7/Add.4, 4 February 2008; A/HRC/7/7/Add.5, 5 March 2008 et al.
ures as may be deemed necessary for introducing personal criminal liability and bringing to justice PMSCs or their personnel for any violations of the law without applying the terms of any agreements on immunity and providing the injured party with effective legal protection».

According to article 23 of the draft «each State Party, acting in the interests of justice, shall take such measures as may be deemed necessary for ensuring that agreements, providing PMSCs and their personal with immunity from prosecution for violations of the norms of international human rights law and international humanitarian law, are not applied».

Article 21 of the draft provides for universal jurisdiction of states with respect to persons who committed crimes relating to the activities of PMSCs.

At present it is planned to set up a working group of the UN Human Rights Council with open membership and with a mandate to prepare a new convention regulating the activities of private military and security companies taking into account work that was done previously. An active participation by legal experts specialising in international humanitarian law and international human rights law in the activities of the working group will be desirable and necessary. It will ensure a successful development of a new and effective international document helping to eliminate existing collisions between legal norms that prevent from bringing to justice those guilty of violating the norms of IHL on banning the use of mercenaries.


Svetlana Vladimirovna Glotova

The first-ever Review Conference on the Rome Statute of the International Criminal Court (ICC) took place in Kampala, Uganda from 31 May to 11 June 2010. The representatives of about 120 states, international organisations, NGOs and other participants discussed proposed amendment to the Rome Statute and the present-day state of international criminal justice.

Both the ICC states parties and other states that signed the Statute or the Final Act of the Rome Conference as observers (including Russia) took part in the Conference¹, as well as various international and non-governmental organisations and members of civil society. According to the Statute, Review Conference is convened by the UN Secretary General in seven years’ time after the coming into force of the Statute for examining any amendments to the Statute. Such review may include without limitation the list of crimes in article 5 (crime of genocide, war crimes, crimes against humanity, crime of aggression).

The Agenda of the Conference included not only issues connected with proposed amendments, but also issues in connection with a critical revision of the Statute, so that the present-day state of international criminal justice was to be assessed at the Conference, such as the impact of justice on injured parties and involved communities, cooperation between states, strategy for achieving the universal application of the Rome Statute, enforcement laws, complementarity and punishability, the impact of international justice on peace process and peacekeeping². The participants summed up the impact of the Statute on international justice and adopted three important annexes to the Rome Statute: on the validity of article 12³, the States Parties decided not to cancel it; on additions to the list of war crimes (article 8) regarding the use of certain weapons in non-international armed conflicts; and on provisions relating to the definition of aggression and relevant jurisdiction.

¹ According to article 123(1)), the terms for taking part in the Conference are similar to those for taking part in the Assembly of States Parties.
³ According to this article, a state, becoming a party to the Statute, may declare that during seven years after the coming into force of the Statute for this state it will not accept the authority of the Court as regards war crimes (art. 8), if such crimes are supposed to be committed by its citizens or on its territory.