

# Index

---

- Abu Ghraib scandal 162
- accountability of states *see* state responsibility
- acta jure imperii* and *acta jure gestionis* distinction 130–31, 135, 155, 220–21, 250–51, 258, 266
- active personality principle 171–2
- ‘Adapted Tip of the Spear’ (PMSC typology) 7, 112, 188, 192, 262
- Additional Protocol I to the Geneva Conventions 1977 15–16, 78
- Article 43: *de facto* members of armed forces 106–7, 115, 154, 196–7, 218–19, 264
- Article 44: combatants and POWs 197
- Article 47: mercenaries 26, 27–8
- Article 48: principle of distinction 203
- Article 91: state responsibility 62, 116, 127, 136, 155, 219, 236, 265
- jus cogens* norms under 75
- Additional Protocol II to the Geneva Conventions 1977 15–16, 78
- Article 13: protection of civilians 110, 198, 204
- Afghanistan
- al Qaeda terrorist acts attributed to 145–6
- PMSC regulation 36–7
- PMSCs’ role in war (2001–14) 22–4, 122, 208
- aid and assistance to foreign states, responsibility for 149–50, 230–31
- AP I *see* Additional Protocol I to the Geneva Conventions 1977
- AP II *see* Additional Protocol II to the Geneva Conventions 1977
- arbitrary deprivation of life *see* right to life
- Armed Activities in the Congo (DRC v. Uganda)* (ICJ) 91
- armed conflicts
- IACs *see* IACs (international armed conflicts)
- law in *see* IHL (international humanitarian law)
- NIACs *see* NIACs (non-international armed conflicts)
- remote warfare *see* remote warfare
- status of private contractors in *see* combatant status of private contractors
- armed forces, membership of 104, 115
- de facto* members *see de facto* members of armed forces
- de jure* members 104–6, 196
- armed groups, membership of 200–201
- Articles on State Responsibility (draft) (ILC) 16
- Article 2: attribution and breach 51–2
- Article 4 *see* state organs
- Article 5: exercise of elements of governmental authority 127–35, 152, 155, 220–22, 250–51, 265–6
- Article 6: organs placed at state’s disposal 125–6
- Article 7: *ultra vires* acts of state organs or entities 125, 135–6, 147, 156, 237–8
- Article 8 *see* conduct instructed, directed or controlled by a state
- Article 9: conduct in the absence of official authorities 148
- Article 10: conduct of insurrectional or other movement 148
- Article 11: conduct acknowledged by state as its own 148–9

- Article 12 *see* breach of international obligations
- Article 13: international obligation in force for a state 76–7
- Article 14: continuing and non-continuing acts and the duty to prevent 52–3, 88
- Article 15: composite acts 53, 82
- Articles 16–18: responsibility for foreign states' conduct 149–51, 230–31
- Articles 20–26: circumstances precluding wrongfulness 54–6
- Article 28: consequences of state responsibility 57
- Articles 40–41: *jus cogens* norm violations 75–6, 101
- Articles 42–48: invocation of state responsibility 57
- Articles 49–54: countermeasures 58
- Article 55: *lex specialis* principle 41–2, 54, 59, 109
- Article 58: individual responsibility 66
- Article 59: Articles without prejudice to UN Charter 55
- application in privatization of security context 48–9
- as customary international law 49–50, 51
- development and adoption of 46–8
- interpretation of 50–51
- see also* regulation of state responsibility
- Asimov, Isaac 243
- ASR *see* Articles on State Responsibility (draft) (ILC)
- assistance to foreign states, responsibility for 149–50, 230–31
- attribution of PMSC conduct to states 11, 81, 84–5, 154–6, 190, 264–6
- arbitrary deprivation of life 93
- case studies 212, 257–62
- drone operations *see* drone operations by PMSCs
- LAWS programming *see* LAWS (lethal autonomous weapons systems) programming
- conduct covered by ASR Article 8 *see* conduct instructed, directed or controlled by a state
- conduct covered by ASR Articles 9–11 148–9
- to contracting states 151–2
- to home states 152–3, 168
- PMSC employees as members of armed forces 104, 115
- de facto* members *see de facto* members of armed forces
- de jure* members 104–6, 196
- special rules of attribution 116
- PMSCs as state organs 116–17, 126–7
- de facto* organs *see de facto* state organs
- de jure* organs 118
- organs placed at state's disposal 125–6
- PMSCs empowered to exercise governmental authority 127, 134–5, 152, 155
- 'elements of governmental authority' *see* 'elements of governmental authority' concept
- empowered by law 128–9
- remote warfare, attribution challenges 127, 138, 145, 156
- subcontractors of PMSCs 109, 129, 145
- to territorial states 153–4
- ultra vires* acts 125, 135–6, 147, 156, 237–8
- see also* services provided by PMSCs; state responsibility
- attribution of wrongful conduct to states 40, 43–4, 102–3
- ASR Article 2 on 51–2
- ASR Articles 4–11 on 29, 103, 104
- CAT 1984 on 61–2, 103–4
- PMSC conduct *see* attribution of PMSC conduct to states
- positive and negative obligations distinguished 103
- primary rules of attribution 41, 61

- 'public official' concept 104, 117–18
- 'state organ' concept *see* state organs
- see also* state responsibility
- authorization of PMSCs in territorial states 178–9
- see also* territorial states' due diligence obligations
- autonomous weapons systems
  - programming *see* LAWS (lethal autonomous weapons systems) programming
- AWS programming *see* LAWS (lethal autonomous weapons systems) programming
  
- Banković and Others v. Belgium and Others* (52207/99) (ECtHR) 60–61
- Barrios Altos v. Peru* (IACHR) 83
- Blackwater* (PMSC) 21, 159, 178
- Blake v. Guatemala* (IACHR) 120
- Bosnia and Herzegovina v. Serbia and Montenegro* (Genocide case) (ICJ) 81
- ASR Article 8 illuminated by 120, 124–5, 136, 139, 143–5
- 'state organ' concept illuminated by 124–5, 126
- breach of international obligations 71, 101
- attribution to states *see* attribution of wrongful conduct to states
- by conduct or result 80–81
- IHL obligations *see* IHL (international humanitarian law)
- IHRL obligations *see* human rights
- by omissions 81–2
- due diligence failures *see* due diligence obligations of states
- sources and contents of obligations *see* international obligations
- British East India Company 20
- business and human rights initiatives 63–5
  
- Caire's Estate (France) v. United Mexican States* (French-Mexican Claims Commission) 117, 135
- Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (WTO) 133–4
- case studies 212, 257–62
- drone operations *see* drone operations by PMSCs
- LAWS programming *see* LAWS (lethal autonomous weapons systems) programming
- Cassese, Antonio 137, 144
- CAT 1984 61–2, 94, 103–4
- China, PMSC regulation 35–6, 171
- civilians
  - civilian officials, command of PMSCs by 106, 107
  - duty to investigate mistreatment or killing of 100, 166–7, 226
  - duty to protect 23, 98, 198, 202
  - private contractors as *see* combatant status of private contractors
- coercion of foreign states 151, 180
- combatant status of private contractors
  - under API Article 43 106–7, 115, 154, 196–7, 218–19, 264
  - armed forces, membership of 104, 115
  - de facto* members *see de facto* members of armed forces
  - de jure* members 104–6, 196
- direct participation test *see* direct participation in hostilities
- factual approach *vs.* government doctrine 194–6, 241–2
- under GC III Article 4A *see* Geneva Conventions (GC I-IV), GC III Article 4A: POW/ combatant status
- in NIACs 108, 198–201, 204, 216–19, 229–30
- remote contractors 191–4
- drone operators 229–30, 232, 236, 240–41
- see also* drone operations by PMSCs

- LAWS programmers 247–9, 256, 257–60  
*see also* LAWS (lethal autonomous weapons systems) programming  
 proximity to the battlefield  
 criterion 7, 188–9, 191–2, 261–2  
*see also* outsourcing security functions, whether legitimate
- Common Article 3 GC I-IV 14, 15, 78, 91, 98
- complete dependence test 120–24, 138, 151–2, 219–20, 236–8, 249, 257  
*see also de facto* state organs
- composite wrongful conduct 53, 82
- conduct instructed, directed or controlled  
 by a state 136–7, 146–7, 152, 153, 155–6  
 conduct by *de facto* state organs distinguished 118, 124–5  
 conduct by foreign states 150, 180  
 ‘control’ concept  
 effective control test 140, 141, 143–5, 146–7, 222–3, 252, 258–9, 266  
 financial control 140  
 harboring and supporting 145–6  
 overall control test 142–3  
 subcontractors, control over 145
- Zafiro* case (*Earnshaw and Others (Great Britain) v. United States of America*) (British-American Arbitral Tribunal) 139–40
- ‘direction’ concept 138, 222, 251–2  
 ‘instruction’ concept 137–8, 222, 251–2
- ultra vires* acts 147, 156  
*see also* attribution of PMSC conduct to states
- conduct, obligations of 80–81, 99, 176, 226  
*see also* international obligations
- continuing wrongful conduct 52–3
- continuous combat functions 194, 200–201  
*see also* direct participation in hostilities
- contract types *see* procurement of PMSCs, contract types
- contracting states  
 attribution of PMSC conduct to 151–2  
 concept 9–10  
 procurement of PMSCs by *see* procurement of PMSCs
- contracting states’ due diligence obligations 167–8, 184, 267  
 duty to investigate, prosecute and punish 166–7, 226, 227–8  
 duty to prevent harm 158, 225–6, 238–9, 253–5  
 contract provisions and rules of engagement 23, 132, 138, 146, 155, 161–4  
 legislation duty 165–6  
 monitoring 164–5  
 procurement standards 159–61  
*see also* due diligence obligations of states
- contractors *see* PMSCs (private military and security companies)
- ‘control’ concept *see* conduct instructed, directed or controlled by a state, ‘control’ concept
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 61–2, 94, 103–4
- Convention for the Elimination of Mercenarism in Africa 1977 (OAU) 27–8, 76
- Convention on Private Military and Security Companies (draft) (UN) 28, 29, 206, 209–10, 211
- Convention on the Prevention and Punishment of the Crime of Genocide 1948 94–5
- Corfu Channel* case (*United Kingdom v. Albania*) (ICJ) 86
- corporate responsibility  
 business and human rights initiatives 63–5  
 for international crimes 69–70

- interplay with individual and state responsibility 62–3, 65–70
- countermeasures 58, 61
- crimes against humanity 53, 95–6
- customary international law 77–8, 100
  - ASR as 49–50, 51
  - jus cogens* norms *see jus cogens* norms
- de facto* members of armed forces 115, 126–7, 154–5, 190–94, 265
  - autonomous definition for
    - attribution purposes 109–10
  - direct participation in hostilities
    - see* direct participation in hostilities
  - drone operators as 235–6, 240–41
    - see also* drone operations by PMSCs
  - international definition of 106–8
  - LAWS programmers as 247–9
    - see also* LAWS (lethal autonomous weapons systems) programming
  - in NIACs 216–19
  - right to self-defense, significance of 113–15
    - see also* attribution of PMSC conduct to states
- de facto* state organs 155, 265
  - Blake v. Guatemala* (IACHR) 120
  - complete dependence test 120–24, 138, 151–2, 219–20, 236–8, 249, 257
  - conduct instructed, directed or controlled by a state distinguished 118, 124–5
  - drone operators as 219–20, 236–8, 257
    - see also* drone operations by PMSCs
  - LAWS programmers as 249, 257
    - see also* LAWS (lethal autonomous weapons systems) programming
  - Stephens and Bowman Stephens (United States of America) v. United Mexican States* (US-Mexico General Claims Commission) 119
    - see also* attribution of PMSC conduct to states
  - de Wolf, Antenor Hallo 82
  - deniability, plausible 3, 22
  - Dickinson, Laura 130
  - diplomatic protection
    - PMSCs' role 23
      - as self-contained regime 60
      - Tehran Hostages* case (ICJ) 43–4, 60, 81, 86, 87
  - direct participation in hostilities 110–13, 132, 173, 194–5, 203–5, 210
    - by drone operators 229–30, 232, 236, 240–41
      - see also* drone operations by PMSCs
    - by LAWS programmers 247–9, 256, 257–60
      - see also* LAWS (lethal autonomous weapons systems) programming
    - in NIACs 108, 198–201, 204, 216–19, 229–30
    - proximity to the battlefield criterion 7, 188–9, 191–2, 261–2
    - in self-defense *see* self-defense right of PMSC employees
    - whether IHL violation *see* outsourcing security functions, whether legitimate
    - see also* combatant status of private contractors
  - 'direction' by a state concept 138, 222, 251–2
    - see also* conduct instructed, directed or controlled by a state
  - distinction principle of IHL *see* direct participation in hostilities
  - Draft Articles on State Responsibility *see* Articles on State Responsibility (draft) (ILC)
  - Draft Convention on Private Military and Security Companies (UN) 28, 29, 206, 209–10, 211
  - drone operations by PMSCs 212–14
    - case study 1: mistake during analysis of tactical intelligence 214–16, 231–3
      - attribution to contracting/home state 216–25

- state responsibility for lack of due diligence 225–9
- outsourcing, whether legitimate 229–31
- case study 2: contractors operating armed UAVs 233–5, 242–3
- attribution to contracting/home states 235–8
- state responsibility for lack of due diligence 238–40, 257
- outsourcing, whether legitimate 240–42
- see also* remote warfare and state responsibility
- due diligence obligations of states 11, 29, 184–5, 266–8
- case studies 212, 257–62
- drone operations *see* drone operations by PMSCs
- LAWS programming *see* LAWS (lethal autonomous weapons systems) programming
- due diligence principle 85–9
- duty to prevent *etc.* *see* duty to prevent, punish, investigate or redress
- duty to protect and fulfill 84, 157
- failures due to reliance on PMSCs 156–8
- contracting states *see* contracting states' due diligence obligations
- home states *see* home states, due diligence obligations
- territorial states *see* territorial states' due diligence obligations
- under IHL 98–100
- reasonable standard of care test 157–8
- see also* state responsibility Dutch East India Company 20
- duty to prevent, punish, investigate or redress 53, 69, 85, 87, 99–101, 157, 184–5
- contracting states *see* contracting states' due diligence obligations
- crimes against humanity 96
- genocide prevention 95
- home states *see* home states, due diligence obligations
- territorial states *see* territorial states' due diligence obligations
- unwilling or unable to prosecute test 69, 96, 146, 182–3
- see also* due diligence obligations of states
- duty to protect and fulfill 84, 157
- Earnshaw and Others (Great Britain) v. United States of America (Zafiro case)* (British-American Arbitral Tribunal) 139–40
- effective control
  - of foreign states 180
  - of PMSCs 140, 141, 143–5, 146–7, 222–3, 252, 258–9, 266
  - see also* conduct instructed, directed or controlled by a state
- 'elements of governmental authority' concept 129, 134–5, 155, 265–6
- acta jure imperii* and *acta jure gestionis* distinction 130–31, 135, 155, 220–21, 250–51, 258, 266
- and drone operations 220–22, 257–8
- see also* drone operations by PMSCs
- ECJ and ECHR approaches 131–2
- and LAWS programming 250–51, 257–8
- see also* LAWS (lethal autonomous weapons systems) programming
- PMSCs' right to self-defense, significance of 131, 134–5, 155
- two factor approach 129–30
- WTO law approach 133–4
- see also* attribution of PMSC conduct to states
- employees of PMSCs
  - combatant status of *see* combatant status of private contractors
  - recruitment and training, states' due diligence obligations 159, 160, 162

- rights violations by, consequences
  - for PMSCs 170
- self-defense right of *see* self-defense right of PMSC employees
  - see also* subcontractors of PMSCs
- erga omnes* obligations 45, 90, 91
- Estate of Jean-Baptiste Caire (France) v. United Mexican States* (French-Mexican Claims Commission) 117, 135
- export control regulation 169–71
- extradition duty 62, 95, 166
  - see also* duty to prevent, punish, investigate or redress
- extraterritorial application of IHL 91
- fault-based theory of state responsibility 42–3
- financial control of PMSCs 140
  - see also* conduct instructed, directed or controlled by a state
- foreign states' conduct, responsibility for 149–51, 180, 230–31
- France, PMSC regulation 168
- General Agreement on Trade in Services 1994 (WTO) 133–4
- Geneva Conventions (GC I-IV)
  - AP I *see* Additional Protocol I to the Geneva Conventions 1977
  - AP II 15–16, 78
  - Common Article 3 14, 15, 78, 91, 98
  - erga omnes* obligations under 91
  - GC III Article 4A: POW/combatant status 104, 188–9
    - Article 4A II criteria 107–8, 109, 115, 154–5, 188–94, 216–18, 240–41, 247–9, 259, 264–5
- grave breaches regime 97–8, 99–100
- jus cogens* norms under 75, 91
- on state responsibility 62–3
- genocide 53, 74
  - Genocide* case *see* *Bosnia and Herzegovina v. Serbia and Montenegro (Genocide case)* (ICJ)
- prohibition of 94–5
- German Settlers in Poland* (PCIJ Advisory Opinion) 102
- 'governmental authority' *see* 'elements of governmental authority' concept
- 'governmental functions' concept 206–11
  - see also* outsourcing security functions, whether legitimate
- grave breaches of IHL 97–8, 99–100
- Guiding Principles on Business and Human Rights (UN) 64–5, 168
- habitual relationship contracts 123–4, 151, 219, 237, 257
- Hague Convention on the Laws and Customs of War on Land 1907 (Hague IV) 15–16, 54, 62
- harboring armed groups 145–6
- home states
  - attribution of PMSC conduct to 152–3, 168
  - concept 9–10
  - due diligence obligations 168–9, 176–7, 184–5, 267
    - duty to investigate, prosecute and punish 171–2, 226
    - duty to prevent harm 169–71, 225–6, 238–9
  - Swiss regulation of 172–6, 261
- human rights 89–90
  - business and human rights initiatives 63–5
  - customary norms of 78
  - erga omnes* obligations 45, 90
  - non-derogable *see* *jus cogens* norms
  - outsourcing of security functions, lack of provisions on 186–7
  - PMSC violations, responsibility for 65–70
    - see also* due diligence obligations of states
  - positive and negative obligations 82–3, 157, 264
  - right to life *see* right to life
  - torture prohibition 61–2, 93–4, 103–4
- humanity principle of IHL 202–3

- IACs (international armed conflicts)  
 AP I *see* Additional Protocol I to the Geneva Conventions 1977  
 NIACs distinguished from 13–15, 78, 97, 142, 144–5  
 PMSCs, legal status in 188–98  
 ICCPR 92–3, 166–7  
 ICoC (International Code of Conduct for Private Security Service Providers) 30–31  
 ICoCA (International Code of Conduct Association) 30–31, 32, 33, 35, 160–61, 174–5  
 IDIQ contracts 164, 239  
 IHL (international humanitarian law)  
 90–91, 96–7, 259–60  
 customary norms of 78  
*jus cogens* norms 73–5, 91, 101  
 due diligence obligations under 98–100  
 extraterritorial application of 91  
 GC I–IV *see* Geneva Conventions (GC I–IV)  
 grave breaches of 97–8, 99–100  
 IAC and NIAC distinction 13–15, 78, 97, 142, 144–5  
 on outsourcing to PMSCs *see* outsourcing security functions, whether legitimate  
 positive and negative obligations 84–5, 97–8, 157, 264  
 principles  
 distinction *see* direct participation in hostilities  
 humanity 202–3  
 military necessity 54, 90, 202–3, 242  
 proportionality 202–3, 242  
 right to life *see* right to life *see also* international crimes  
 IHRL *see* human rights  
 immunities  
 for PMSCs  
 combatants' privilege 188, 192–3  
 under national laws 35, 37, 69, 166, 181–2, 184  
 state immunity *see* state immunity  
 individual responsibility 62–3, 65–70  
 'inherently governmental functions' concept 206–11  
*see also* outsourcing security functions, whether legitimate  
 inhuman or degrading treatment or punishment prohibition 61–2, 93–4, 103–4  
 'instruction' by a state concept 137–8, 222, 251–2  
*see also* conduct instructed, directed or controlled by a state  
 intelligence operations using drones *see* drone operations by PMSCs  
 international and regional regulation of PMSCs *see* regulation of PMSCs, international and regional regulation  
 of state responsibility *see* regulation of state responsibility  
 international armed conflicts *see* IACs (international armed conflicts)  
 International Code of Conduct Association (ICoCA) 30–31, 32, 33, 35, 160–61, 174–6  
 International Code of Conduct for Private Security Service Providers (ICoC) 30–31  
 International Convention against the Recruitment, Use, Financing and Training of Mercenaries 2001 26–7, 63, 76  
 International Covenant on Civil and Political Rights 1966 92–3, 166–7  
 international crimes  
 ASR, non-application to 47–8  
 as composite acts 53, 82  
 crimes against humanity 53, 95–6  
 genocide *see* genocide  
 Rome Statute *see* Rome Statute of the International Criminal Court 1998  
 state responsibility for 47–8, 68  
 interplay with individual and corporate responsibility 62–3, 65–70  
 war crimes 97–8, 99–100, 167, 199  
*see also* IHL (international humanitarian law); *jus cogens* norms  
 international obligations 71–2

- breach of *see* breach of international obligation
- customary international law 77–8
- under IHL *see* IHL (international humanitarian law)
- under IHRL *see* human rights
- jus cogens* norms *see jus cogens* norms
- obligations of conduct and result distinguished 80–81, 99, 176, 226
- positive and negative obligations 80–81, 82–9, 97–8, 101, 103, 157, 264
- treaty obligations 76–7
- unilateral obligations 79
- international responsibility of individuals and companies 66–70
- investigation duty *see* duty to prevent, punish, investigate or redress
- invocation of state responsibility 57
- Iraq
  - PMSC regulation 37, 166, 178
  - PMSCs' role in war (2003) 2–3, 22–4, 122, 123, 162, 208
- ISO 18788 Standard 31–2, 160–61
- jus cogens* norms 15, 48, 72–3, 90, 263–4
  - arbitrary deprivation of life prohibition 74–5, 92–3
  - consequences of breach 75–6 and countermeasures 58
  - crimes against humanity prohibition 53, 95–6
  - genocide prohibition 94–5
  - IHL and IHRL provisions as 73–5, 91, 101
  - torture prohibition 61–2, 93–4, 103–4
  - see also* international crimes
- LAWS (lethal autonomous weapons systems) programming 243–4
  - case study: LAWS hacked by third state 245–7
  - attribution to contracting/territorial state 247–53, 257–60, 266
  - state responsibility for lack of due diligence 253–6
  - outsourcing, whether legitimate 256
  - see also* remote warfare and state responsibility
- Legality of the Threat or Use of Nuclear Weapons* (ICJ Advisory Opinion) 93, 203
- legitimacy of outsourcing *see* outsourcing security functions, whether legitimate
- lethal autonomous weapons systems programming *see* LAWS (lethal autonomous weapons systems) programming
- lex specialis* principle of ASR Article 55 41–2, 54, 59, 109
- licensing of PMSC services 169–71, 178–9
- logistical support services by PMSCs 6, 111, 130
- LPTA (lowest price, technical acceptable) system 35, 160
  - see also* procurement of PMSCs
- Maffezini v. Kingdom of Spain* (ICSID) 129–30
- mercenaries *see* PMSCs (private military and security companies)
- Mercenary Convention 2001 26–7, 63, 76
- Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (ICJ) 49
- military companies *see* PMSCs (private military and security companies)
- military necessity principle of IHL 54, 90, 202–3, 242
- military occupation 180
- monitoring of PMSCs 164–5, 171
  - see also* due diligence obligations of states
- Montreux Document 30, 105
  - limits on outsourcing 205–6
  - PMSC definition 8
  - on states' duty to prevent harm 158, 159, 165
  - states, typology of 9

- multi-stakeholder initiatives 12, 29–30
  - ICoC (International Code of Conduct for Private Security Service Providers) 30–31
  - Montreux Document *see* Montreux Document
- national regulation of PMSCs *see* regulation of PMSCs, national regulation
- natural disasters 13
- necessity principle of IHL 54, 90, 202–3, 242
- negative obligations 80–81, 82–9, 97–8, 101, 103, 157, 264
- NIACs (non-international armed conflicts)
  - AP II *see* Additional Protocol II to the Geneva Conventions 1977
  - continuous combat functions 194, 200–201
    - see also* direct participation in hostilities
  - due diligence obligations during 100
  - IACs distinguished from 13–15, 78, 97, 142, 144–5
  - negative obligations during 98
  - PMSCs, legal status in 108, 198–201, 204, 216–19, 229–30
- Nicaragua case (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America))* (ICJ) 49, 140, 141
- non-derogable human rights *see jus cogens* norms
- non-international armed conflicts *see* NIACs (non-international armed conflicts)
- Nuclear Tests New Zealand v. France* (ICJ) 79
- Nuclear Weapons Advisory Opinion (Legality of the Threat or Use of Nuclear Weapons)* (ICJ) 93, 203
- OAU Convention for the Elimination of Mercenarism in Africa 1977 27–8, 76
- objective responsibility theory 42–3
- obligations *see* international obligations
- occupation of foreign states 180
- omissions, state responsibility for 81–2
  - due diligence failures *see* due diligence obligations of states
- outsourcing security functions, whether legitimate 11, 186, 210–11, 268
  - case studies 212, 257–62
  - drone operations *see* drone operations by PMSCs
  - LAWS programming
    - see* LAWS (lethal autonomous weapons systems) programming
  - empowerment of PMSCs by law 128–9
- IHL on 187
  - combatant status of contractors
    - see* combatant status of private contractors
  - principle of distinction, consistency with 203–5, 229–30, 232, 240, 261–2
  - principles of military necessity, humanity and proportionality, consistency with 201–3, 242
- IHRL, lack of relevant provisions 186–7
- limits to outsourcing 187, 205
  - ‘inherently governmental functions’ concept 206–11
  - see also* procurement of PMSCs; state responsibility
- overall control of PMSCs 142–3
  - see also* conduct instructed, directed or controlled by a state
- oversight of PMSCs 164–5, 171
  - see also* due diligence obligations of states
- Pellegrin v. France* (28541/95) (ECtHR) 131–2
- peremptory norms *see jus cogens* norms

- plausible deniability 3, 22
- PMSCs (private military and security companies)
- attribution of conduct to states *see* attribution of PMSC conduct to states
  - benefits of using 3, 22
  - business activities of 22
  - concept 5–8
    - ‘Adapted Tip of the Spear’ typology 7, 112, 188, 192, 262
  - data on 2–3
  - employees of *see* employees of PMSCs
  - history of 19–21
  - individual and corporate responsibility of 65–70
  - procurement of *see* procurement of PMSCs
  - regulation of *see* regulation of PMSCs
  - research on 11–12
  - rules of engagement for 23, 132, 138, 146, 155, 161–4
  - services provided by *see* services provided by PMSCs
  - states, relations with 8–10
  - subcontractors of *see* subcontractors of PMSCs
  - subsidiaries of 9–10
  - policing services by PMSCs 130, 131, 134–5
  - positive obligations 80, 82–9, 101, 103, 264
    - due diligence *see* due diligence obligations of states
  - POWs (prisoners of war)
    - duty to protect 84, 97
    - outsourcing POW camp management to PMSCs 187, 205
    - POW status
      - under API Article 44 197
      - under GCIII Article 4A *see* Geneva Conventions (GC I-IV), GC III Article 4A: POW/ combatant status
  - prevention duty *see* duty to prevent, punish, investigate or redress
  - primary and secondary rules of state responsibility 40–42, 46–7
  - Prince, Erik 21
  - principles of IHL *see* IHL (international humanitarian law), principles
  - prison guard services by PMSCs 128, 130, 187
  - prisoners of war *see* POWs (prisoners of war)
  - private contractors *see* PMSCs (private military and security companies)
  - privatization of security 2–4
    - history of 19–21
    - legitimacy of *see* outsourcing security functions, whether legitimate
    - new trends, case studies 212, 257–62
      - drone operations *see* drone operations by PMSCs
      - LAWS programming *see* LAWS (lethal autonomous weapons systems) programming
      - ‘tactical privatization’ 3–4, 11, 195
  - procurement of PMSCs
    - contract types
      - habitual relationship contracts 123–4, 151, 219, 237, 257
      - IDIQ contracts 164, 239
      - standing purchase agreements 164
    - legitimacy of *see* outsourcing security functions, whether legitimate
    - LPTA (lowest price, technical acceptable) system 35, 160
    - standards for 159–61
    - termination of contracts 164–5 *see also* contracting states
  - proportionality principle of IHL 202–3, 242
  - prosecution duty *see* duty to prevent, punish, investigate or redress
  - PSC.1 Standard 31, 35, 160–61
  - ‘public official’ concept 104, 117–18

- punishment duty *see* duty to prevent, punish, investigate or redress
- reasonable standard of care test 157–8  
*see also* due diligence obligations of states
- redress duty *see* duty to prevent, punish, investigate or redress
- regulation of PMSCs 25–6, 32, 37–8  
international and regional regulation  
Conventions addressing PMSCs 26–8  
Draft Convention on Private Military and Security Companies (UN) 28, 29, 206, 209–10, 211  
UN Working Groups 28–9  
licensing regimes and export control regulation 169–71, 178–9  
national regulation 33, 165–6  
Afghani 36–7  
Chinese 35–6, 171  
French 168  
Iraqi 37, 166, 178  
South African 34, 171  
Swiss 33, 172–6, 261  
US 34–5, 206–9  
self-regulation and voluntary initiatives 12, 28–9  
ICoC (International Code of Conduct for Private Security Service Providers) 30–31  
industry standards 31–3, 35, 160–61  
Montreux Document *see* Montreux Document
- regulation of state responsibility  
API Article 91 62, 116, 127, 136, 219, 236, 265  
ASR *see* Articles on State Responsibility (draft) (ILC)  
business and human rights initiatives 63–5  
international obligations *see* international obligations  
primary and secondary rules distinction 40–42, 46–7  
self-contained regimes 59–61  
treaty provisions 61–3  
remote warfare and state responsibility assistance to foreign states 150  
attribution challenges 127, 138, 145, 156  
combatant status of remote contractors 191–4  
drone operators 229–30, 232, 236, 240–41  
*see also* drone operations by PMSCs  
LAWS programmers 247–9, 256, 257–60  
*see also* LAWS (lethal autonomous weapons systems) programming  
proximity to the battlefield criterion 7, 188–9, 191–2, 261–2  
due diligence challenges 184  
fault-based responsibility 42–3  
'responsibility gap' 3–4, 10–11, 22  
*see also* state responsibility  
result, obligations of 80–81  
*see also* international obligations  
right to life 74–5, 92–3  
right to self-defense *see* self-defense  
right of PMSC employees  
states' investigation duty 166–7  
*Suarez de Guerrero* case (UN HRC) 165  
risk-based theory of state responsibility 42–3  
RoE (rules of engagement) for PMSCs 23, 132, 138, 146, 155, 161–4  
roles of PMSCs *see* services provided by PMSCs  
Rome Statute of the International Criminal Court 1998  
Article 7: crimes against humanity 95–6  
Article 8: war crimes 98  
Articles 17–20: admissibility 69, 96, 182–3  
Article 25: individual criminal responsibility 68, 69  
*see also* international crimes  
Ruggie Report on business and human rights (2008) 63–4

- rules of engagement for PMSCs 23, 132, 138, 146, 155, 161–4
- secondary rules of state responsibility
  - ASR *see* Articles on State Responsibility (draft) (ILC)
  - distinguished from primary rules 40–42, 46–7
- security companies *see* PMSCs (private military and security companies)
- self-contained regimes of state responsibility 59–61
- self-defense right of PMSC employees
  - guidelines in rules of engagement 163
  - significance of
    - as evidence of *de facto* membership of armed forces 113–15
    - as evidence of governmental authority 131, 134–5, 155
- self-determination right of peoples 186
- self-regulation of PMSCs 12, 28–9
  - ICoC (International Code of Conduct for Private Security Service Providers) 30–31
  - industry standards 31–3, 35, 160–61
  - Montreux Document *see* Montreux Document
- services provided by PMSCs 6–7, 24–5
  - acts sustaining war effort 111–12
  - in Afghanistan and Iraq 22–4
  - diplomatic security 23
  - drone operations *see* drone operations by PMSCs
  - LAWS programming *see* LAWS (lethal autonomous weapons systems) programming
  - logistical support 6, 111, 130
  - policing services 130, 131, 134–5
  - prison guard services 128, 130, 187
  - see also* attribution of PMSC conduct to states
- South Africa, PMSC regulation 34, 171
- standard of care test 157–8
  - see also* due diligence obligations of states
- standards for PMSC industry
  - industry standards 31–3, 35, 160–61
  - procurement standards 159–61
- standing purchase agreements 164
- state immunity 45–6
  - acta jure imperii* and *acta jure gestionis* distinction 130–31, 135, 155, 220–21, 250–51, 258, 266
- state organs 116–17, 126–7, 155
  - de facto* organs *see de facto* state organs
  - de jure* organs 117–18
  - organs placed at state's disposal 125–6
  - outsourcing to PMSCs by *see* outsourcing security functions, whether legitimate
- state responsibility 4–5, 10–17, 39–40
  - ASR *see* Articles on State Responsibility (draft) (ILC)
  - attribution *see* attribution of PMSC conduct to states; attribution of wrongful conduct to states
  - breach of international obligations *see* breach of international obligations
  - case studies 212, 257–62
  - drone operations *see* drone operations by PMSCs
  - LAWS programming *see* LAWS (lethal autonomous weapons systems) programming
  - for conduct of foreign states 149–51, 180, 230–31
  - consequences of 44–5, 57, 75–6
  - of contracting states *see* contracting states
  - due diligence obligations *see* due diligence obligations of states
  - of home states *see* home states
  - for international crimes 47–8, 68
  - interplay with individual and corporate responsibility 62–3, 65–70
  - for outsourcing *see* outsourcing security functions, whether legitimate
  - PMSCs, relations with states 8–10
  - regulation of *see* regulation of state responsibility

- ‘responsibility gap’ 3–4, 10–11, 22
- of territorial states *see* territorial states
- state sovereignty 2
- state immunity *see* state immunity
- Westphalian system 19–20
- state succession 148
- state support for armed groups 145–6
- states, typology of 9
  - see also* contracting states; home states; territorial states
- Statute of the International Criminal Court 1998 *see* Rome Statute of the International Criminal Court 1998
- Stephens and Bowman Stephens (United States of America) v. United Mexican States* (US-Mexico General Claims Commission) 119
- strict control test 120–24, 138, 151–2, 219–20, 236–8, 249, 257
  - see also de facto* state organs
- Suarez de Guerrero* case (UN HRC) 165
- subcontractors of PMSCs 26–7
  - attribution of conduct to states 109, 129, 145
  - engagement of, states’ due diligence obligations 159
  - Iraqi regulation of 37
  - see also* employees of PMSCs
- subsidiaries of PMSCs 9–10
- Switzerland, PMSC regulation 33, 172–6, 261
  
- tactical intelligence operations using drones *see* drone operations by PMSCs
- ‘tactical privatization’ 3–4, 11, 195
- Tadić* case (*Prosecutor v. Dusko Tadić a/k/a ‘Dule’*) (ICTY)
  - Interlocutory Appeal, 1995 14
  - overall control test laid down in 142–3
- Tehran Hostages* case (ICJ) 43–4, 60, 81, 86, 87
- termination of contracts 164–5
  - see also* procurement of PMSCs
- territorial states
  - attribution of PMSC conduct to 153–4
  - concept 9–10
  - territorial states’ due diligence obligations 154, 167, 177, 183–4, 186, 267
  - duty to investigate, prosecute and punish 181, 227–9
  - lack of jurisdiction and immunities challenges 69, 181–2
  - unwilling or unable 182–3
  - duty to prevent harm 177–8, 226–7, 228, 239–40, 255–6
  - authorization and licensing regimes 178–9
  - lack of institutional capabilities challenge 179–80
  - military occupation or effective foreign control challenge 180–81
  - and remote warfare 260–61
  - see also* due diligence obligations of states
- terrorist groups, harboring and supporting 145–6
- third states’ conduct, responsibility for 149–51, 180, 230–31
- ‘Tip of the Spear’ (PMSC typology) 5–6
  - adapted version 7, 112, 188, 192, 262
- torture prohibition 61–2, 93–4, 103–4
- training of PMSC employees 160, 162
  
- UAV (unmanned aerial vehicle)
  - operations *see* drone operations by PMSCs
- ultra vires* acts, attribution to states 125, 135–6, 147, 156, 237–8
- unilateral obligations of states 79
- United Nations
  - authorization of use of force 54–5
  - Draft Convention on Private Military and Security Companies 28, 29, 206, 209–10, 211
  - Guiding Principles on Business and Human Rights 64–5, 168
  - Mercenary Convention 2001 26–7, 63, 76

- Working Groups on PMSCs 28–9
- United States
  - PMSC deployment in Afghani and Iraqi wars 2–3, 22–4, 122, 123, 162, 208
  - PMSC regulation 34–5, 206–9
- unlawful combatants 189
- unwilling or unable to prosecute test 69, 96, 146, 182–3
- voluntary initiatives by PMSCs 12, 29–30
  - ICoC (International Code of Conduct for Private Security Service Providers) 30–31
  - industry standards 31–3, 35, 160–61
  - Montreux Document *see* Montreux Document
- war crimes 97–8, 99–100, 167, 199
- weapon systems programming *see* LAWS (lethal autonomous weapons systems) programming
- Westphalian system 19–20
- wrongful conduct *see* breach of international obligations
- WTO law on ‘governmental authority’ 133–4
  - see also* ‘elements of governmental authority’ concept
- Zafiro case (Earnshaw and Others (Great Britain) v. United States of America)* (British-American Arbitral Tribunal) 139–40
- Zimbabwean Human Rights NGO Forum v. Zimbabwe* (AComHPR) 85–6, 179–80

