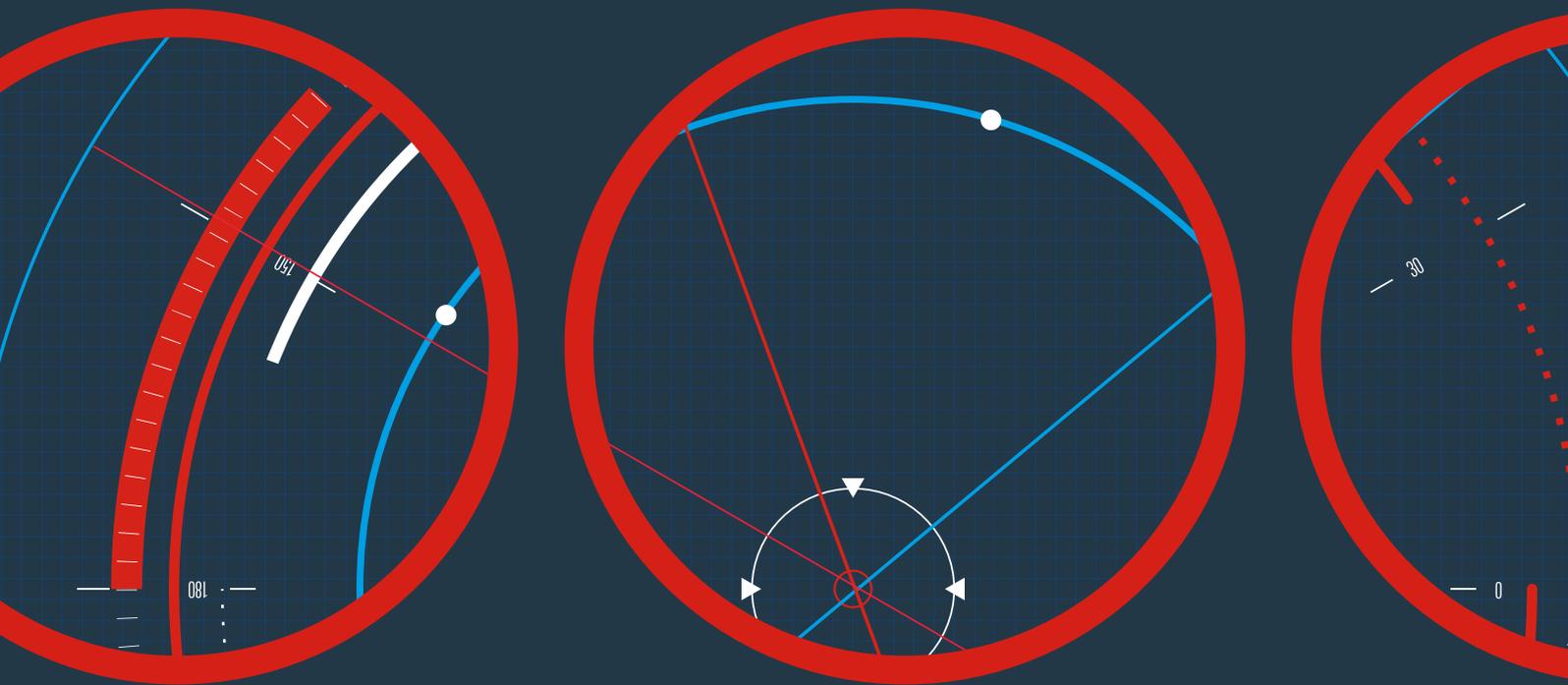


Weapons Systems Supply and Operational or Logistical Support under the PSSA

A Training Guide to comply with the Swiss Federal Act
on Private Security Services provided Abroad

Tobias Vestner and Alessandro Mario Amoroso

March 2019



GCSP
Geneva Centre for
Security Policy

This Training Guide was written by Tobias Vestner, Head of the Security and Law Programme, GCSP, and Alessandro Mario Amoroso, Programme Officer at the Security and Law Programme, GCSP. It was prepared within the framework of a joint project with the Swiss Association of Mechanical and Electrical Engineering Industries – Swissmem. The authors thank Dr Stuart Casey-Maslen for reviewing the Training Guide. The views expressed in this document do not necessarily reflect the position of the GCSP, Swissmem or the Swiss authorities.

© Copyright Geneva Centre for Security Policy, 2019. All Rights Reserved.

Suggested citation style: Vestner, Tobias and Amoroso, Alessandro Mario, *Weapons Systems Supply and Operational or Logistical Support under the PSSA*, Geneva Centre for Security Policy, March 2019.

This Training Guide is available online at www.gcsp.ch/global-insights#publications.

For further information, please contact publications@gcsp.ch.

March 2019

ISBN: 978-2-88947-104-1

Weapons Systems Supply and Operational or Logistical Support under the PSSA

A Training Guide to comply with the Swiss Federal Act
on Private Security Services provided Abroad

Tobias Vestner and Alessandro Mario Amoroso

March 2019



GCSP
Geneva Centre for
Security Policy

Contents

List of abbreviations and acronyms

Key to icons

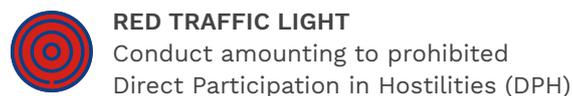
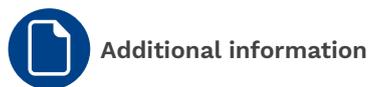
Introduction	1
<hr/>	
I. The Impact of the PSSA on Swiss Security Industry: Aims and Responsibilities	2
1. Aims	2
2. Scope of application	2
3. Prohibited activities for companies and for persons domiciled in Switzerland	5
a. The prohibition on Direct Participation in Hostilities	
b. The prohibition on services which foster serious violations of human rights	
c. Prohibitions issued by the competent authority	
4. Company reporting obligations	7
5. Company responsibility for subcontractor activities	9
II. Human Rights Law: Fundamental Standards and Prohibitions	10
1. Concept of human rights	10
2. Prohibition of human rights violations and international crimes	11
3. The right to life and the rules on the use of force	13
a. Decision-making for the use of force guided by the principles of legality, necessity, proportionality, precautions and accountability	
b. The concept of self-defence	
c. Avoidance of the use of force and precautions against harmful effects on bystanders	
d. Graduated response model and minimum use of force concept	
e. Importance of adherence to written rules on the use of force	
4. The right to liberty and the prohibition of arbitrary detention	17
a. Usage of apprehension and detention only to defend oneself or others against an imminent threat of violence or following an attack or crime	
b. Respect for the dignity and humane treatment of detainees and vulnerable groups	
5. Prohibition of human trafficking, sexual exploitation and abuse and gender-based violence	20
6. Avoidance of violations of major labour laws	21
III. International Humanitarian Law: Key Principles and Distinctions	22
1. Scope and purpose of IHL	22
2. Distinction between international armed conflict and non-international armed conflict	24
3. Prohibition of violations of IHL	25
4. Combatant status, corresponding rights and obligations	27
5. Definition of civilian, protection of civilians and civilian objects against direct attack	28
6. Principles for permissible attacks under IHL	29
7. Prohibited attacks under IHL	29
8. Respect for the principle of humanity and humane treatment	31

IV. Human Rights and International Humanitarian Law: A Dynamic Interplay	32
1. Complementarity of human rights and IHL	32
2. Non-derogable human rights	33
3. Non-derogability of IHL	33
V. Direct Participation in Hostilities: The Line Not to Be Crossed	34
1. Concept and criteria of DPH and of Continuous Combat Function in NIAC	34
a. The constitutive elements of DPH	
b. The notion of Continuous Combat Function	
2. Difference between DPH and general assistance to parties to armed conflict	37
3. Fine line between direct and indirect participation in hostilities	38
4. Loss of civilian protection and potential prosecution of civilians under domestic law due to DPH	38
5. Assessment of the provision of certain services during armed conflict against the background of DPH, in particular services for protection, guarding of places or persons that are legitimate targets under IHL	39
a. Criteria regarding the status of private security service providers or their personnel in armed conflict	
b. Likelihood of DPH during the provision of certain services in armed conflict, with resulting increased risk of death due to attack and domestic prosecution	
c. Compliance risks associated with the provision of services supporting one party to a conflict under the PSSA	
6. Company personnel avoidance of activities considered DPH	41
VI. Preventing and Reporting Human Rights and International Humanitarian Law Violations	42
1. General behaviour	42
a. Importance of individual identification to promote accountability	
b. Requirement to report orders beyond the mission or set tasks immediately to headquarters and superiors	
c. Responsibility to immediately inform superiors and/or management of on-the-ground situational changes that could turn previously permissible activities into DPH	
d. Requirement to report incidents or known or suspected violations of national law, human rights and IHL (including those committed by colleagues and public security officials) to superiors, authorities, and/or confidential reporting services	
2. Company responsibilities	44
a. Obligation to align activities with national and international control systems and regulations for the transfer of arms	
b. Best practices for appropriate and stringent human rights/IHL-based risk management and due diligence procedures prior to, and during, the provision of services	
c. Information requirements for deployed personnel	
d. Best practices for developing and distributing written rules on the use of force	
e. Importance of reporting known or suspected violations of national law, human rights and IHL (including those committed by colleagues and public security officials) to the client, a competent authority and/or a country with jurisdiction	
Annex 1. Applicable Regulatory Framework	48
Annex 2. Scenarios for Training on Direct Participation in Hostilities	50

LIST OF ABBREVIATIONS AND ACRONYMS

AP	1977 Additional Protocols I and II to the Geneva Conventions of 12 August 1949	ICRC	International Committee of the Red Cross
DPH	Direct Participation in Hostilities	IHL	International Humanitarian Law
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms	IHRL	International Human Rights Law
GC	Geneva Conventions I-IV of 12 August 1949	NIAC	Non-international Armed Conflict
IAC	International Armed Conflict	OPSA	Ordinance on Private Security Services provided Abroad
ICL	International Criminal Law	PSSA	Federal Act on Private Security Services provided Abroad
ICoC	International Code of Conduct for Private Security Service Providers	PSSS	Private Security Service Section

KEY TO ICONS



Introduction

This Training Guide is designed for Swiss industry to fulfil the obligations introduced by the Federal Act on Private Security Services provided Abroad (PSSA) of 27 September 2013 and its accompanying Ordinance (OPSA) of 24 June 2015, entered into force on 1 September 2015. Its modules and learning objectives are based on the training requirements developed by the Private Security Service Section (PSSS) within the Directorate of Political Affairs (DP) of the Swiss Federal Department of Foreign Affairs (FDFA).

The Training Guide is tailored to the needs of companies operating and maintaining weapons systems and/or providing installation services, training on equipment and systems, and/or operational or logistical support to armed forces. Its purpose is to enable company personnel to understand key concepts and standards of human rights and international humanitarian law, including the risk and avoidance of direct participation in hostilities, in order to ensure their activities do not violate the PSSA. The Guide therefore provides the necessary knowledge and tools to train company personnel to identify, prevent, and report activities that can constitute direct participation in hostilities or complicity in human rights and international humanitarian law violations.

Two annexes complete the Training Guide. The first outlines the applicable regulatory framework, highlighting relevant obligations and their sources. The second lists thirty scenarios for practical training on direct participation in hostilities, including answers, that can be used to discuss the risk and avoidance of activities amounting to direct participation in hostilities.

I. The Impact of the PSSA on Swiss Security Industry: Aims and Responsibilities

The Federal Act on Private Security Services provided Abroad (PSSA) of 27 September 2013 has a significant impact on the operating legal environment of Swiss companies providing security services outside Switzerland. It introduces standards and limits connected to the provision of security services abroad. At the same time, it brings clarity by creating a comprehensive legal framework for business operators. Such a novel legal framework needs to be understood and applied in line with the aims (sub-chapter 1) and scope of application (sub-chapter 2) of the PSSA. On this basis, the Federal Act specifically prohibits two activities (sub-chapter 3). To ensure compliance with these aims and prohibitions, new reporting obligations apply to companies providing security services abroad (sub-chapter 4). They also cover activities of subcontractors (sub-chapter 5).

1. AIMS

The **aims of the PSSA** are stated in Article 1, which lists four purposes:

- a. safeguarding Switzerland's **internal and external security**;
- b. realising Switzerland's **foreign policy objectives**;
- c. preserving Switzerland's **neutrality**;
- d. guaranteeing **compliance with** international law, in particular **human rights and International Humanitarian Law (IHL)**.

✔ Being mindful of these aims is essential to ensure not only compliance with the PSSA, but also uninterrupted provision of security services to clients. Indeed, potential conflict with these aims constitutes one of the reasons for the competent authority to initiate a review procedure of the activities declared ➔ [Chapter 1.4](#), and ultimately prohibit in full, or in part, such activity if conflict is proven.

📄 The PSSA is the end point of a long commitment by Switzerland to the respect of the rule of law in the private security domain. Two documents issued from international initiatives promoted by Switzerland mark this itinerary:

- the **Montreux Document**, addressed to states. It recalls existing legal obligations of states and companies providing security services, drawn from both IHL and human rights law, and outlines good practices for states to promote compliance with international law during armed conflicts;
- the **International Code of Conduct for Private Security Service Providers (ICoC)**, primarily conceived as a set of principles open for signature by private security companies. It articulates their human rights responsibilities in the provision of private security services, particularly when operating in complex environments.

2. SCOPE OF APPLICATION

Article 2 PSSA defines its **material, personal and geographical scope of application**.

The PSSA applies to companies and persons who:

- a. provide, from Switzerland, private security services abroad;
- b. provide services in Switzerland in connection with private security services provided abroad;
- c. establish, base, operate or manage a company in Switzerland that provides private security services abroad or provides services in connection therewith in Switzerland or abroad;
- d. exercise control over a company from Switzerland that provides private security services abroad or provides services in connection therewith in Switzerland or abroad.

As for the **temporal scope of application**, the entry into force of the PSSA and of its accompanying Ordinance on Private Security Services provided Abroad (OPSA) was fixed by the Federal Council on **1 September 2015**. The PSSA therefore applies to all activities realised as of that date.

There are a few relevant **exemptions** from the scope of application of the PSSA, defined in Article 3. The PSSA and the related reporting obligations  [Chapter 1.4](#) do not apply to the protection of persons, to the guarding or surveillance of goods and properties, or to security services at events, when these services are provided in the territories of the 28 Member States of the European Union, Iceland, Liechtenstein and Norway. Similarly, the PSSA does not apply to activities in Switzerland connected with, or facilitating, a private security service provided in one of the above mentioned territories.

Material scope of application

The PSSA applies to two kinds of activities: **a) private security services; b) services in connection with a private security service.**

Private security services are listed in Article 4(a) PSSA. They include the following activities when carried out by a private company:

1. the protection of persons in complex environments;
2. the guarding or surveillance of goods and properties in complex environments;
3. security services at events;
4. the checking, detention, or searching of persons, searching of premises or containers, and seizure of objects;
5. guarding, caring for, and transporting prisoners; operating prison facilities; and assisting in operating camps for prisoners of war or civilian detainees;
6. operational or logistical support for armed or security forces, insofar as such support is not provided as part of a direct participation in hostilities as set out in Article 8;
7. operating and maintaining weapons systems;
8. advising or training members of armed or security forces;
9. intelligence activities, espionage, and counter-espionage.

 The **list** of private security services in Article 4(a) PSSA is **not exhaustive**. Other services provided abroad by a private company in the realm of security may fall in the scope of application of the PSSA and conflict with its aims  [Chapter 1.4](#).

 Since the declaration of an activity under the PSSA  [Chapter 1.4](#) does not bring any disadvantage to the company, it is recommended that a declaration be submitted to the competent authority in case of doubt.

Services in connection with a private security service provided abroad are defined by Article 4(b) PSSA. They include the following activities:

1. recruiting or training personnel for private security services abroad;
2. providing personnel, directly or as an intermediary, for a company that offers private security services abroad.

 The **list** of services in connection with a private security service in Article 4(b) PSSA is **exhaustive**.

As explained in the Introduction, this Training Guide is specifically addressed to companies operating and maintaining weapons systems and/or providing installation services, training on equipment and systems, and/or operational or logistical support to armed forces. The kind of activities performed by this industry are encapsulated in **points 6, 7 and 8 of Article 4(a) PSSA**, namely 6) operational or logistical support for armed or security forces; 7) operating and maintaining weapons systems; 8) advising or training members of armed or security forces. Both **points 1 and 2 of Article 4(b) PSSA** are also relevant when realised in connection with one of these three activities provided abroad, on condition that recruiting and training are directed to the provision of security services abroad, and not merely to the performance of administrative tasks in Switzerland for a security company subject to the PSSA.

 Definitions for the key notions used in this chapter can be found in the Private Security Service Section (PSSS), Guidelines to the Federal Act on Private Security Services provided Abroad (PSSS Guidelines):

- Operational or logistical support for armed or security forces: Private Security Service Section (PSSS), Guidelines to the Federal Act on Private Security Services provided Abroad  [PSSS Guidelines, II.2\(f\)](#)
- Operating and maintaining weapons systems  [PSSS Guidelines, II.2\(g\)](#)
- Advising or training members of armed or security forces  [PSSS Guidelines, II.2\(h\)](#)
- Recruiting or training personnel for private security services abroad  [PSSS Guidelines, II.6\(a\)](#)
- Providing personnel, directly or as an intermediary, for a company that offers private security services abroad  [PSSS Guidelines, II.6\(b\)](#)
- Establishing, basing, operating or managing a company  [PSSS Guidelines, II.7](#)
- Exercising control over a company  [PSSS Guidelines, II.8](#)

 Security services can also be (and often are) provided in a **mixed or integrated** manner:

- a security service is provided in a **mixed** manner when it contains elements of different activities falling in the scope of application of the PSSA;
- a security service is provided in an **integrated** manner when it is performed jointly by several actors. Integrated services differ from subcontracting in that the various elements of one service are carried out by different actors, while in subcontracting the contracted security services provider assigns the entire service to a subcontracted company  [PSSS Guidelines, II.3.](#)

Personal scope of application

Companies subject to the PSSA include both **legal entities** and **business associations**.

Persons subject to the PSSA are both **those in the service of companies subject to the PSSA** (employees, those mandated by them, the recipients of instructions or other personnel) and **natural persons exercising one of the activities** listed in points a-d of Article 2 PSSA.

Geographical scope of application

The PSSA applies only to security services provided **abroad** from Switzerland and to security services provided **in Switzerland or abroad in connection with a private security service provided abroad**.

 A service is deemed to be provided abroad both when the **activity** itself takes place abroad and when an activity performed in Switzerland takes **effect** abroad  [PSSS Guidelines, II.5.](#)

3. PROHIBITED ACTIVITIES FOR COMPANIES AND FOR PERSONS DOMICILED IN SWITZERLAND

The PSSA introduces **two main prohibitions** on activities which can occur in the provision of private security services abroad: a prohibition on Direct Participation in Hostilities (DPH), enshrined in Article 8; and a prohibition on the provision of services which foster serious violations of human rights, established by Article 9.

a. The prohibition on Direct Participation in Hostilities

The **prohibition on DPH** is addressed both to companies and to persons domiciled in Switzerland.

 For the purposes of the PSSA, DPH is **defined** by Article 4(c) as an activity taking place abroad in the context of an armed conflict within the meaning of the Geneva Conventions and their Additional Protocols I and II. The concept and criteria of DPH will be described below  [Chapter V.](#)

Four activities are prohibited to **companies** by Article 8(1) PSSA:

- a. to recruit or train personnel in Switzerland for the purpose of DPH abroad;
- b. to provide personnel, from Switzerland, directly or as an intermediary, for the purpose of DPH abroad;
- c. to establish, base, operate, or manage, in Switzerland, a company that recruits, trains, or provides personnel, directly or as an intermediary, for the purpose of DPH abroad;
- d. to exercise control, from Switzerland, over a company that recruits, trains, or provides personnel, directly or as an intermediary, for the purpose of DPH abroad.

 Since the first paragraph of Article 8 PSSA lists activities performed by companies, it does not prohibit DPH as such, which is an individual activity, but the realisation in Switzerland of company activities enabling and assisting DPH abroad.

Conversely, Article 8(2) PSSA directly prohibits DPH abroad to all **persons who are domiciled, or have their habitual place of residence, in Switzerland** and are in the service of a company providing security services abroad subject to the PSSA.

 Companies need to understand and comply with the prohibition on DPH in order to avoid criminal consequences for their personnel. Indeed, a person who, in violation of Article 8 PSSA, carries out an activity in connection with DPH, or who directly participates in hostilities, commits a criminal offence under Article 21(1) PSSA, and is liable to a custodial sentence not exceeding three years or to a monetary penalty.

b. The prohibition on services which foster serious violations of human rights

The **prohibition on the provision of services which foster serious violations of human rights** aims at outlawing a series of **supporting activities** which can be performed in Switzerland or from Switzerland by a company providing security services abroad, **when it may be assumed that the recipient abroad will use the services in connection with the commission of serious human rights violations**. Only if this condition is met, Article 9 PSSA prohibits the following three activities:

- a. providing, from Switzerland, private security services or services in connection therewith;
- b. establishing, basing, operating, or managing, in Switzerland, a company that provides private security services, or services in connection therewith;
- c. exercising control, from Switzerland, over a company that provides private security services, or services in connection therewith.

 The concept of human rights will be clarified below  [Chapter II.1.](#)

 The PSSA does not prohibit security services when they can lead to any kind of human rights violations, but only the provision of security services that risk supporting **serious** violations of human rights. A **non-exhaustive list of serious violations of human rights** is proposed by the PSSS Guidelines and includes arbitrary killing, torture and other cruel, inhuman or degrading treatment or punishment, abduction, arbitrary imprisonment, deprivation of liberty or the systematic suppression of the freedom of expression  [PSSS Guidelines, V.2.](#)

 Article 9 PSSA therefore does not prohibit the direct commission by an individual of serious human rights violations. The norm rather applies to activities carried out by companies providing security services abroad in relation with a service recipient who may, in turn, be responsible for the commission of a serious human rights violation. It must be recalled however that **the direct violation of human rights remains prohibited by other applicable law, including when committed abroad.** If realised in times of armed conflict, such behaviours **can amount to war crimes, if certain circumstances are met.**

 The prohibition of Article 9 PSSA assumes that a **causal relationship** exists between the provision of security services in Switzerland, or from Switzerland, and the serious violation of human rights committed by the service recipient abroad. A causal relationship is proven when a **reasonable person** would realise that a security service can be used in the commission of a human right violation. Intent on the side of the company therefore does not need to be demonstrated in order to contravene Article 9 PSSA.

 Companies need to understand and comply with the prohibition on serious violations of human rights in order to avoid criminal consequences for their personnel. Indeed, a person who executes an activity in violation of Article 9 PSSA commits a criminal offence under Article 21(2) PSSA and shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

c. Prohibitions issued by the competent authority

Finally, a **prohibition to perform a specific security service** can be **issued by the competent authority** on the basis of Article 14 PSSA as a result of the review process.

In particular, prohibitions to carry out an activity in full, or in part, will be issued by the competent authority each time **the activity is contrary to the aims set out in Article 1 PSSA.**

Moreover, the authority shall prohibit the activity in full, or in part, in **three additional cases**: a) if a company committed serious human rights violations in the past and has made no provisions to ensure there is no recurrence thereof; b) if a company deploys personnel who do not possess the required training for the intended activity; c) if a company does not comply with the provisions of the Code of Conduct for Private Security Service Providers.

 Companies need to understand and comply with prohibitions issued by the competent authority. Indeed, a person who contravenes such prohibitions commits a criminal offence under Article 22 PSSA and is liable to a custodial sentence not exceeding one year, or to a monetary penalty.

4. COMPANY REPORTING OBLIGATIONS

The PSSA introduces in Switzerland a **compulsory declaration requirement** for companies performing private security services abroad. The purpose of this new reporting obligation is to ensure that all relevant activities conform to the aims fixed by Article 1 PSSA [⇒ Chapter I.1.](#)

According to Article 10 PSSA, any company intending to carry out an activity that falls within the scope of application of the PSSA [⇒ Chapter I.2\)](#) must provide the competent authority with a **declaration containing the following information:**

- a. the nature, provider, and place of performance of the intended activity;
- b. such details on the principal and on the recipient of the service as are necessary for an evaluation of the situation;
- c. the personnel to be deployed for the intended activities, and the training they have received;
- d. an overview of the business sectors in which the company is active;
- e. proof of accession to the International Code of Conduct for Private Security Service Providers (ICoC);
- f. the identity of all persons bearing responsibility for the company.

Who is subject to the declaration requirement

In line with the PSSA's personal scope of application, the declaration requirement **applies to both companies** (irrespective of their form of organisation) **and natural persons.**

What has to be declared

All activities falling within the material scope of application of the PSSA [⇒ Chapter I.2](#) must be declared. The declaration requirement therefore applies to the **following activities:**

- a) the provision from Switzerland of private security services abroad: both the company and every individual service provided abroad must be declared;
- b) the provision in Switzerland of services connected with private security services abroad: both the company and every individual connected service provided in Switzerland must be declared;
- c) establishing, basing, operating or managing a company that provides private security services abroad or connected services: the declaration shall include the identity of the natural person or legal entity that establishes, bases, operates or manages a company; and the identity of the company that is being established, based, operated or managed;
- d) controlling a company: the declaration shall include the identity of the controlling legal entity or natural person and the activities of the controlled company.

[⇒ PSSS Guidelines, III.2. and III.4.](#)

Declarations concerning a company must be made only **once**. Each single activity must also be declared once. However, companies also bear a **duty to notify** the competent authority of any **significant change in circumstances** occurred subsequent to the declaration.

[⇒ PSSS Guidelines, III.4.](#)

 Private security services which are exempted from the scope of application of the PSSA on the basis of Article 3 are accordingly not subject to the declaration requirement [⇒ Chapter I.2.](#)

To whom the declaration must be addressed

The **competent authority** to which the declaration must be addressed has been identified by Article 3 OPSS in the **Private Security Service Section** (PSSS) within the Directorate of Political Affairs (DP) of the Swiss Federal Department of Foreign Affairs (FDFA).

When the declaration must be made and ensuing time line

According to the temporal scope of application of the PSSA  [Chapter I.2](#), the declaration requirement applies to **all activities commenced** after the entry into force of the Act, i.e. **after 1 September 2015**.

All activities subject to the PSSA must be declared **in advance** of their commencement. Moreover, following the deposit of a declaration, the company concerned has a **duty to refrain from carrying out the declared activity** until it receives further communication by the competent authority of its determination. Determinations of the competent authority lead to one of the following:

- a notification, within fourteen days of receipt of the declaration, that the declared activity does not provide grounds to initiate a review procedure. In this case, the company can initiate the activity;
- a notification, within the same time frame, that a review procedure is deemed necessary, following which the competent authority has thirty days to inform the company of the outcome of the review procedure. During this new time frame, the company shall still refrain from carrying out the activity, unless otherwise decided by the competent authority according to Article 11(2) PSSA;
- a decision on the outcome of the review procedure, in the form of a decree, which can prohibit or not the performance of the activity.

 A decree of the competent authority prohibiting the declared activity can be contested at the Federal Administrative Court within a period of thirty days.

 [PSSS Guidelines, III.4 and III.5](#).

If a review procedure is initiated by the competent authority, the company concerned has a **duty of cooperation** under Article 18 PSSA. According to this norm, companies shall **provide the authority with all the information required** for the review and shall **submit to it all the necessary documents**. If the company concerned fails to satisfy the duty of cooperation, the competent authority can adopt oversight measures according to Article 19 PSSA. Offences against the duty of cooperation can also be criminally prosecuted under Article 24 PSSA.

 In order to satisfy their reporting obligations, companies providing security services abroad subject to the PSSA are advised to **preserve records** of all relevant activities. Moreover, members of the management board have a duty to retain the information and documents mentioned in Article 11 OPSSA for ten years.

 The PSSS, together with the Swiss State Secretariat for Economic Affairs (SECO), established a **single coordination and declaration procedure** for private security services provided abroad in the areas of war materiel, specific military goods and dual-use goods. Relevant information on this procedure is contained in the  [Fact sheet regarding the relation between the PSSA, the War Material Act \(WMA\) and the Goods Control Act \(GCA\)](#).

 It emerges from all of the above that the reporting obligations introduced by the PSSA are intended not only to ensure compliance by private security service providers with the aims of the Act, but also to grant **legal certainty** to the companies concerned. Since the competent authority assesses all declared activities against the limits and prohibitions of the PSSA, respecting the declaration requirement ultimately leads to clarity on the lawfulness of activities.

5. COMPANY RESPONSIBILITY FOR SUBCONTRACTOR ACTIVITIES

To conclude the review of company obligations established by the PSSA, it is worth mentioning that private security service providers **remain subject to all requirements and limitations** introduced by the Act **when they subcontract** the provision of a security service or of a service connected therewith to another company.

In such cases, according to Article 6 PSSA, the subcontracting company has an **obligation to ensure that the third party to which the mandate is transferred performs the service in keeping with the same constraints**, even if it would not fall within the scope of application of the PSSA (for example because it is located abroad).

To enable the competent authority to undertake the necessary evaluation, the activities performed by the subcontracted company must be declared. The subcontracted company shall also adhere to the ICoC.

⚠ As explained above ➡ [Chapter 1.2](#) and [PSSS Guidelines, 11.3](#), subcontracting differs from integrated services in that in subcontracting the contracted security service provider assigns the entire service to a subcontracted company, while in case of integrated services the various elements of one service are carried out by different actors.

⚠ As a result of this rule, if the company taking over the mandate does not comply with the PSSA, the competent authority can prohibit the transfer of contract.

✅ As mentioned above ➡ [Chapter 1.3](#), companies need to understand and comply with prohibitions issued by the competent authority. Indeed, a person who contravenes such prohibitions commits a criminal offence under Article 22 PSSA and is liable to a custodial sentence not exceeding one year, or to a monetary penalty.

II. Human Rights Law: Fundamental Standards and Prohibitions

Security management often takes place in operating environments presenting a heightened risk of a negative impact on the enjoyment of human rights. For this reason, the Federal Act on Private Security Services provided Abroad (PSSA) of 27 September 2013 introduces a prohibition on activities which foster the commission of serious human rights violations abroad. In order for business actors to comply with this norm, it becomes necessary first and foremost to understand the concept of human rights (sub-chapter 1) and the prohibition of human rights violations and of international crimes (sub-chapter 2). For companies operating and maintaining weapons systems and/or providing installation services, training, and/or operational or logistical support, specific knowledge of human rights concerns and related prohibitions linked to their activities is also needed. These include the right to life and the rules on the use of force (sub-chapter 3); the right to liberty and the prohibition of arbitrary detention (sub-chapter 4); the prohibition of human trafficking, sexual exploitation/abuse and gender-based violence (sub-chapter 5). Finally, companies providing private security services are also expected to avoid violations of major provisions of labour law (sub-chapter 6).

1. CONCEPT OF HUMAN RIGHTS

Compliance with human rights by Swiss companies providing security services abroad is one of the four **aims** listed by Article 1 PSSA  [Chapter 1.1](#). As a result, Article 9 PSSA sets out a **prohibition on the provision of services which foster serious violations of human rights**. The PSSA however does not provide a definition of human rights for the purpose of its application.

Human rights are rights to which each person is entitled for the simple fact of being a human being. They are based on the recognition of the **inherent dignity and equality of every human being**. For this reason, they are universal and inalienable, and must be granted and protected without discrimination. The attributes of human rights can be described as follows:

- **universal:** fundamental human rights belong to all humans equally. States have a duty to respect, protect and fulfil human rights regardless of their political, economic and cultural systems. This means respectively that states must abstain from activities resulting in human rights violations, exercise due diligence to prevent breaches by third parties (e.g. non-state actors), and take positive actions to implement the right;
- **inalienable:** they cannot be taken away, but only limited when specific conditions are met and in accordance with established procedures;
- **non-discriminatory:** they must be respected without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In the past, it was common to distinguish three categories or “generations” of human rights:

- **first generation:** civil and political rights, such as the right to life, equality before the law, the right of political participation, freedom of expression;
- **second generation:** economic, social and cultural rights, such as the rights to work, the right to social security, the right to healthcare and the right to education;
- **third generation:** referred to as “community rights”, “group rights” or “solidarity rights”, they made their appearance more recently and include the right to development, the right to a clean environment and the right to self-determination.

Today this categorisation is contested, since it risks curtailing the relevance of second and third generation rights. For this reason, greater emphasis is placed on the **indivisibility and interdependence of all human rights**.

 From a legal point of view, human rights are **universal legal entitlements**: this means that they must be **recognised and protected by the law**, and that **violations** of human rights **must be legally sanctioned**. This happens both in the domestic and the international legal system. For the latter, it is common to refer to **International Human Rights Law** (IHRL).

2. PROHIBITION OF HUMAN RIGHTS VIOLATIONS AND INTERNATIONAL CRIMES

Since human rights issued from the need to protect individuals against the arbitrary use of power by states, respect for, and protection of, human rights are attained first and foremost through the imposition of corresponding **limitations and duties on state authorities**. The obligation to **respect, protect and fulfil** human rights therefore implies for states a **prohibition to violate human rights**. When infringed, such prohibition gives rise to the responsibility of states towards the individual victim of the human rights violation.

According to the kind of human right protected, state authorities might be required to take either **negative** or **positive** actions to comply with their obligations. In the former case, states have a negative duty to refrain from actions resulting in an unjustified restriction of a human right; in the latter, states bear the positive duty to take active steps in order to ensure the full enjoyment of a legal entitlement.

 In IHRL, the **prohibition to commit human rights violations** applies to **states**. This is because IHRL treaties are addressed to states; states are therefore the bearers of the corresponding human rights obligations. Conversely, it is currently open to debate whether IHRL, in its customary norms, also prohibits **non-state actors** from committing **violations of human rights**. Indeed, while it is not questioned that such actors commit **human rights abuses**, the term **violation is usually associated with state responsibility and therefore reserved to state breaches**.

Human rights obligations of Switzerland

At the **domestic level**, the **Swiss Federal Constitution of 1999**, in Article 54, requires the Confederation to **promote respect for human rights** in Swiss foreign relations. Moreover, the **ratification of IHRL treaties** obliges Swiss authorities to ensure the compliance of the Swiss legal system with IHRL.

At the **international and regional levels**, **Switzerland is a party to most IHRL instruments**. These include:

- Universal Declaration of Human Rights (UDHR), 1948;
- International Covenant on Civil and Political Rights (CCPR), 1966;
- International Covenant on Economic, Social and Cultural Rights (CESCR), 1966;
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1965;
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979;
- Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), 1984;
- Convention on the Rights of the Child (CRC), 1989;
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC-OP-AC), 2000;
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OP-SC), 2000;
- Optional Protocol to the Convention against Torture (CAT-OP), 2002;
- Convention for the Protection of All Persons from Enforced Disappearance (CED), 2006;
- Convention on the Rights of Persons with Disabilities (CRPD), 2006;
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950.

Protection of human rights in the provision of private security services

The commitment to ensure the protection of human rights in the provision of private security services, besides being recognised among the PSSA's aims, is also reaffirmed in the Montreux Document and the International Code of Conduct for Private Security Service Providers.

- The **Montreux Document** is based on the understanding that well-established principles of human rights law, as well as of International Humanitarian Law (IHL), apply to states in their relations with private military and security companies, giving rise to legal obligations that the Document aims to recall.
- The **International Code of Conduct** asks signatory companies to recognise that they have a responsibility to respect the human rights of all those affected by their business activities and to commit to doing so.

States' duty to comply with their human rights obligations inevitably implies a duty to enact such legislation as may be necessary to ensure that a given human right is respected. The PSSA is precisely an expression of this objective. Accordingly, **Article 9** introduces in Swiss law a **prohibition on the provision of private security services which foster serious violations of human rights**.

As already anticipated, Article 9 PSSA does not prohibit the direct commission of serious human rights violations by an individual, but applies to activities of companies providing security services abroad in relation with a service recipient who may be responsible for the commission of a serious human rights violation. A non-exhaustive list of **serious violations of human rights** is proposed by the Private Security Service Section (PSSS) Guidelines and includes arbitrary killing, torture and other cruel, inhuman or degrading treatment or punishment, abduction, arbitrary imprisonment, deprivation of liberty or the systematic suppression of the freedom of expression  [Chapter 1.3](#) and [PSSS Guidelines, V.2](#).

 The direct **violation or abuse of human rights remains prohibited** by other applicable law, including when committed abroad, and can give rise to **civil liability** or amount to **criminal conduct**, punishable in accordance with the provisions of Swiss **domestic civil and criminal law**.

In addition to prohibiting human rights violations, international law criminalises the most serious violations of human rights and IHL. It does so by providing a **prohibition on international crimes** which, if violated, gives rise to **the individual criminal responsibility** of the perpetrator. **International Criminal Law** (ICL) is the branch of public international law prohibiting international crimes and providing procedures for their prosecution.

The term **international crime** refers to individual conducts perceived as atrocities that are of such concern to the international community as a whole that they are criminalised at the international level. ICL authorises and typically requires states to prosecute and punish international crimes.

The core international crimes are **genocide, war crimes, crimes against humanity, and aggression**. Different sources of international law have defined these crimes over time, with most attaining the status of customary law and *jus cogens*, i.e. peremptory norms from which no derogation is permitted and which can be modified only by subsequent norms having the same character. Today, the **Rome Statute of the International Criminal Court** represents the main reference for their definition, at least for states party to the Statute.

Apart from the core crimes, others whose prohibition and prosecution is prescribed by international law are also labelled as international crimes. These include torture, slavery, apartheid and enforced disappearance.

 The definitions of core international crimes can be found in Article 6 (genocide), Article 7 (crimes against humanity), Article 8 (war crimes) and Article 8 bis (crime of aggression) of the  [Rome Statute of the International Criminal Court](#).

For the definitions of other international crimes  [Article 1 CAT, Article 1 Convention to Suppress the Slave Trade and Slavery \(Slavery Convention\), Article 2 International Convention on the Suppression and Punishment of the Crime of Apartheid \(Apartheid Convention\), and Article 2 CED](#).

ⓘ Although human rights law applies primarily to relations between states and their citizens and implies state responsibility, Article 9 PSSA introduces in Swiss law a specific prohibition for companies to provide private security services in relation with recipients who may commit serious human rights violations. **Knowledge of human rights potentially affected by the services they offer is therefore necessary for security companies to fully comply with Article 9 PSSA.**

ⓘ Regardless of their status, the staff of PMSC are bound by IHL and may face individual criminal responsibility ➡ [Chapter III.3.](#)

3. THE RIGHT TO LIFE AND THE RULES ON THE USE OF FORCE

The **right to life** is often described as “first right”, “supreme right” or “fulcrum of all other rights”. It is guaranteed in all main human rights instruments and in customary international law. Its protection entails **both negative and positive obligations** for states, the first consisting in a duty to abstain from arbitrary deprivation of life, the second implying a due diligence obligation to ensure that the right to life is effective. Such due diligence obligation requires the prevention, investigation and prosecution of threats to the right to life, including those posed by private persons and entities.

The right to life is a **non-derogable right** in most human rights instruments, with the only exception being the ECHR, allowing derogations in respect of deaths resulting from lawful acts of war.

The right to life protects individuals against the **arbitrary** deprivation of life. This means that certain acts that lead to deprivation of life will not be arbitrary and therefore do not violate the right to life, such as necessary and proportionate use of force by law enforcement officials. There is also a procedural obligation of investigation of suspected arbitrary deprivation of life that contributes to fulfilling the principle of accountability for use of force under IHRL. **Restrictions** of the right to life must hence comply with the principles of legality, legitimate aim, necessity, proportionality and accountability.

The following paragraphs first offer an overview of these principles and then focus on those aspects of major relevance for companies providing security services abroad addressed by this Training Guide.

ⓘ For the principles on the use of force in the conduct of hostilities in armed conflicts, regulated by IHL rules on permissible and prohibited attacks ➡ [Chapter III.6](#) and [Chapter III.7](#).

📄 The two primary legal sources of reference for the protection of the right to life in IHRL, among those to which Switzerland is a party, are ➡ [Article 6 CCPR](#) and ➡ [Article 2 ECHR](#).

➡ [The General Comment No. 36 on Article 6 CCPR](#), recently adopted by the **Human Rights Committee**, provides extensive guidance on the correct implementation of the right to life by states party to Covenant.

In addition, two **non-legally binding instruments** set standards for the use of force in law enforcement scenarios:

- the **Code of Conduct for Law Enforcement Officials (CCLEO)**, adopted by General Assembly Resolution 34/169 of 17 December 1979;
- the **Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF)**, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.

ⓘ Principle 32 of the International Code of Conduct for Private Security Service Providers (ICoC) requires personnel of private security companies to comply, as a minimum, with the UN BPUFF if they are formally authorized to assist in the exercise of a state’s law enforcement authority.

a. Decision-making for the use of force guided by the principles of legality, necessity, proportionality, precautions and accountability

Legality

Everyone's right to life shall be **protected by law**.

To fulfil this duty, states cannot limit themselves to enact legislation prohibiting and criminalising the arbitrary deprivation of life. They are called to **establish an appropriate legal framework** providing such measure as may be necessary to ensure the full enjoyment of the right to life.

This entails, first and foremost, an obligation to define in law the **substantive grounds** for deprivation of life, i.e. the legitimate aims allowing a use of force or other act that affects life, provided all other conditions described below are met. In defining such circumstances, the law must be sufficiently **precise** as to avoid any arbitrariness in its interpretation and application.

Moreover, states must adopt sufficient legislation to ensure compliance with provisions protecting the right to life, including by the adoption of measures of prevention, investigation, prosecution, punishment and redress.

Necessity

The use of force must be **strictly necessary** to reach a legitimate aim, i.e. it must represent a method of last resort when non-violent alternatives had already proved or would reasonably prove inadequate. The principle of necessity thus aims to ensure that force is used only when **unavoidable**. It requires a **factual assessment**, based on the perceived threat and the feasibly available means to respond to it.

Since the use of force must be **exceptional**, the **legitimate aims** must be understood as exceptions to the general prohibition on deprivation of life. They are commonly limited to **three scenarios** described in Article 2 ECHR:

- a. self-defence or defence of others from unlawful violence  [Chapter II.3.b](#);
- b. effecting a lawful arrest or preventing the escape of a person lawfully detained;
- c. quelling a riot or insurrection.

 The principle of necessity applicable in law enforcement situations shall not be confused with the principle of military necessity in IHL, applicable to the conduct of hostilities in armed conflicts  [Chapter III.8](#).

Proportionality

Even when it is proven that the use of force is unavoidable in a given circumstance, it will be lawful only if the amount of force applied is **proportionate to the seriousness of the threat**, i.e. it does not exceed what strictly needed for responding to the threat. The principle of proportionality therefore requires a **balancing exercise**, comparing the harm one purports to avoid with that potentially deriving from the use of a given amount of force.

The proportionality test is particularly relevant to assess the lawfulness of the use of firearms. The use of such **potentially lethal force** is allowed only when it is strictly necessary against an **imminent threat of death or serious injury**. The use of **intentional lethal force** (i.e. shooting to kill rather than to stop) is only allowed when strictly necessary in order to **protect life from an imminent threat** (e.g. to prevent a suicide bomber from detonating the explosive device). This standard is also referred to as the "protect life principle."

 The principle of proportionality applicable in law enforcement must not be confused with the IHL principle of proportionality in the conduct of hostilities in armed conflicts  [Chapter III.6](#).

Precautions

The full implementation of the principles of necessity and proportionality in the use of force can only be granted if **precautionary measures** are put in place. The principle of precaution aims to:

- **prevent the use of force** by creating the conditions to avoid that the standard of strict necessity is met;
- **minimise the risk of death or injury**, when force is unavoidable.

For this reason, precautionary measures include first and foremost appropriate planning and control of the operation, within the limits imposed by the circumstances. Appropriate planning and control require in turn, among other measures, training law enforcement officials and other personnel involved in enforcement tasks, providing the necessary defensive equipment and making less-lethal weapons and ammunition available [⇒ Chapter II.3.c.](#)

Accountability

States are responsible to ensure accountability for any alleged or suspected unlawful use of force. Such responsibility is implicit in the obligation to protect and entails a **duty to investigate, and, where appropriate, prosecute and punish**, any instance of abusive use of force resulting in lethal consequences or in a serious risk of deprivation of life. The principle of accountability clearly serves at the same time the aims of preventing impunity and fostering justice.

In order to promote accountability, a series of measures should be implemented. These include both pre-incident measures, such as the **individual identification** of law enforcement officials, and post-incident actions, such as the **obligation to report promptly** every incident to the competent authority. For more information on individual identification and obligation to report incidents [⇒ Chapter VI.1.a](#) and [Chapter VI.1.d.](#)

b. The concept of self-defence

Every person has an **inherent right to protect him- or herself against an imminent threat of death or serious bodily injury, or a reasonable perception of such threat**. For this reason, self-defence is one of the **legitimate aims** allowing a use of force which affects the right to life.

Many domestic legal systems also associate to the right of self-defence a **right to defend others** from an imminent threat of death or serious bodily injury, or a reasonable perception of such threat.

While self-defence and defence of others represent legitimate aims allowing a use of force which can affect the right to life, such use of force, when realised by a law enforcement official, will obviously still need to comply with the other criteria regulating the use of force, notably the principles of necessity, proportionality and precautions as described in [⇒ Chapter II.3.a.](#)

! The right to use force in personal self-defence **does not depend on the status of the person defending him- or herself**. It is not limited to law enforcement officials, but belongs to every human being.

! As a result of the two previous observations, personnel in the service of companies providing security services abroad, regardless of their function or tasks, are always entitled to **use such force as is necessary and proportionate to defend themselves from attacks until the threat is removed**, including during armed conflicts. Such conduct **does not constitute Direct Participation in Hostilities (DPH)** [⇒ Chapter V.1.](#)

⇒ Personnel of companies providing security services abroad **should always be instructed to use force only in personal self-defence or in defence of others from unlawful attacks**, to avoid any risk of DPH [⇒ Chapter V.5.b.](#) This recommendation is in line with what required by Principle 31 of the [⇒ International Code of Conduct for Private Security Service Providers \(ICoC\).](#)

! The concept of self-defence in human rights shall not be confused with the right of self-defence of states against armed attacks, granted by [⇒ Article 51 United Nations Charter.](#)

c. Avoidance of the use of force and precautions against harmful effects on bystanders

Private security companies' personnel shall take all reasonable steps to avoid the use of force. If force is used, it shall comply with the above-mentioned principles of legality, necessity, proportionality, precautions and accountability.

As explained  [Chapter II.3.a](#), to comply with the principle of necessity the use of force must constitute a method of last resort. The principle of necessity leads therefore to a factual assessment which takes into consideration the seriousness of the threat, as reasonably perceived, and the means feasibly available to respond to it.

Full compliance with the principle of necessity requires not only to avoid any use of force falling below the necessity threshold, but also to adopt those **precautionary measures**  [Chapter II.3.a](#) that avoid or minimise the risk that such threshold is actually met.

This aim can be attained firstly by proper **training** of security personnel. Training should cover at least two aspects:

- how to conduct a **correct risk assessment**. To make lawful choices on the use of force, an appropriate and as much as possible flawless evaluation of the situation is needed and it depends on the capacity to properly analyse a scenario;
- **when the use of force can be considered necessary** in pursuance of a legitimate aim (in addition to training on how to use only an amount of force proportionate to the threat). This will also need to include training on the alternatives to the use of force.

Prior training is very likely to have a great impact on choices taken in pressuring contexts.

 Personnel in the service of private companies operating and maintaining weapons systems and/or providing installation services, training, and/or operational or logistical support are not mandated to perform enforcement tasks. For this reason, **they should be trained to use force only in self-defence or defence of others**.

Secondly, effective avoidance of the use of force depends on proper **planning**. Planning should cover two aspects:

- **prior preparation** of any mission with foreseeable threats, means to avoid them and methods to react;
- provision of **protective and self-defensive equipment** to help preventing or minimising the severity of incidents by decreasing the need to use force.

 Both training and planning of missions by personnel of companies providing security services abroad should focus on non-violent means and **de-escalation strategies**.

Finally, any necessary use of force must still **avoid as far as possible effects on bystanders**. Different from IHL  [Chapter III.6](#), which prohibits only excessive incidental civilian losses, human rights law does not generally accept the notion of collateral damage. Yet, effects on bystanders, including deaths or injuries, are not necessarily unlawful if the force used complied with the principles of necessity and proportionality and if all necessary precautions were taken.

 To avoid effects on bystanders, the force applied must be directed only against the attacker. Any **indiscriminate use of force is always unlawful**.

d. Graduated response model and minimum use of force concept

As explained  [Chapter II.3.a](#), the principle of proportionality requires that the amount of force applied is proportionate to the seriousness of the threat. This means that the amount of force used must be the **minimum necessary** to achieve the legitimate aim. Moreover, it requires a **balancing exercise** comparing the harm one purports to avoid with that potentially deriving from the use of a given amount of force.

In order to fully comply with the principle of proportionality, a **graduated response model** should be adopted. When actually using force, each situation must be treated differently and in a graduated manner, always using the minimum force necessary to repel the threat and which remains proportionate to the harm one aims to avoid. A graduated response model allows escalating and de-escalating the level of force in response to variations in the level of the threat.

A graduated response model includes **verbal warnings, demonstration of force, use of non-lethal methods and less-lethal means** before employing lethal force.

Planning has of course a major impact on the adoption of a graduated response model.

e. Importance of adherence to written rules on the use of force

In critical situations, behaviour affects outcomes. A professional and respectful attitude, together with restraint and caution, helps prevent incidents. This aim can be more easily realised if a clear set of rules on the use of force is relied upon. These rules should reflect international law and standards as well as national law of the country where the company is located and of the place where the mission takes place.

✔ To facilitate decision-making on the use of force by their personnel, companies providing security services abroad should adopt and implement written rules on the use of force. Such rules should be distributed in a pocket-sized version to employees and other persons in their service before missions. They should serve as terms of reference for both employees involved in the provision of services and those in monitoring positions.

📄 The adoption of **rules on the use of force** is an **obligation** for signatory companies of the  ICoC according to its Principle 29. Rules on the use of must be consistent with applicable law and the minimum requirements contained in the ICoC and agreed with the client.

4. THE RIGHT TO LIBERTY AND THE PROHIBITION OF ARBITRARY DETENTION

The right to liberty prohibits the **arbitrary deprivation of liberty, in particular through unlawful detention**. As with instances of use of force that affects the right to life, limitations of personal freedom that affect the right to liberty need to be assessed in light of the protection granted by human rights law. Adopting a human rights perspective in this case is particularly relevant considering the **condition of vulnerability** of persons whose liberty has been curtailed, which can affect their dignity and lead to human rights violations even when the deprivation of liberty is not arbitrary. The right to liberty therefore requires not only to outlaw arbitrary detention, but also to adopt safeguards to avoid the ill-treatment of those lawfully detained.

The right to liberty is guaranteed in **all main human rights treaties** and is a norm of **customary international law**. Its scope of application concerns actions amounting to deprivation of liberty. Deprivation of liberty must be distinguished from interference with liberty of movement, since deprivation of liberty involves more severe restriction than mere interference. Arrest (apprehension) and detention (the continuous deprivation of liberty from the moment of the arrest until release) constitute the main example of actions affecting the right to liberty.

The nature of the right carries a primarily **negative** obligation for states to refrain from arbitrary deprivation of liberty. It also enshrines a **positive** dimension: states have a duty to protect persons from arbitrary deprivation of liberty by third parties, including both unlawful and lawful organisations. Moreover, when a private entity is authorised by the state to conduct arrests and perform detention, the state remains responsible to ensure that the exercise of these functions complies with the right to liberty. This includes a duty to monitor and provide remedies in case of violation. Finally, the state bears the positive obligation to put in place such guarantees necessary to fulfil the right to liberty, including by preventing ill-treatment of detainees.

The right to liberty is a **derogable** right. However, the **fundamental guarantee against arbitrary detention is non-derogable**, although circumstances can affect the assessment of what constitutes arbitrariness. Moreover, the right to liberty has **non-derogable components** represented by all guarantees that are necessary to prevent the violation of non-derogable rights, such as freedom from torture and ill-treatment and the right to ask a court to rule on the lawfulness of the deprivation of liberty (*habeas corpus*).

Finally, the right to liberty is not an **absolute** right: it protects from deprivations of liberty which are arbitrary or otherwise unlawful in nature. Therefore, human rights law allows restrictions of the right to liberty if a set of conditions that avoid unlawfulness and arbitrariness are met. These conditions are:

- existence of a **legal basis**: domestic law must list the grounds and procedures for detention. The domestic law must be accessible and predictable, i.e. formulated with sufficient precision and clarity in order to be understandable;
- compliance with non-arbitrary **grounds for detention**: grounds for detention must be prescribed by domestic law and must not be prohibited by international law. Arbitrariness is usually associated with inappropriateness and unreasonableness and needs to be assessed considering the specific circumstances of the case. The ECHR, unlike the CCPR, provides an exhaustive list of seven grounds of detention;
- respect of **procedural safeguards and judicial guarantees**: the key procedural safeguards are the right to be informed of the reasons for detention, the right to humane treatment, the right to challenge the legality of detention (*habeas corpus*) and the right, for those detained on criminal charges, to be brought promptly before a judge exercising judicial control over the deprivation of liberty.

 The right to liberty is protected in IHRL treaties. The primary legal sources, among those to which Switzerland is a party, are  [Article 9](#) and [Article 10 CCPR](#) and  [Article 5 ECHR](#).

The **Human Rights Committee** adopted two General Comments on the right to liberty:

 [General Comment No. 21 on Article 10 CCPR](#) and  [General Comment No. 35 on Article 9 CCPR](#). They both provide extensive guidance on the correct interpretation and implementation of the right to liberty.

A number of **non-legally binding instruments** were drafted to set principles and standards for the protection of those deprived of their liberty. The most important are:

- the **Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)**, whose revised version was adopted by General Assembly Resolution 70/175 of 17 December 2015;
- the **Basic Principles for the Treatment of Prisoners**, adopted by General Assembly Resolution 45/111 of 14 December 1990;
- the **Rules for the Protection of Juveniles Deprived of their Liberty**, adopted by General Assembly Resolution 45/113 of 14 December 1990;
- the **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**, adopted by General Assembly Resolution 43/173 of 9 December 1988.

a. Usage of apprehension and detention only to defend oneself or others against an imminent threat of violence or following an attack or crime

States can contract out to companies providing security services abroad the performance of arrests and the management of detention facilities. While this is not normally the case for companies addressed by this Training Guide, the provision of security services abroad might present situations which require limiting the freedom of other persons by the usage of apprehension and/or detention.

✔ If the performance of arrest and detention is not included in the functions contracted to a company providing security services abroad, the personnel of such companies should always refrain from realising any deprivation of personal liberty that is not necessary to the following purposes:

- To defend oneself or others against an imminent threat of violence. This exception evidently draws from the recognition of the inherent right of self-defence of every person → [Chapter II.3.b](#);
- To halt a perpetrator following an attack or the commission of a crime. Some domestic legal systems allow the so-called “citizen’s arrest”, i.e. the possibility for persons who are not sworn law-enforcement officials to arrest or detain an individual. Citizen’s arrest is however subject to different conditions, depending on the applicable legal system. In the case of personnel of companies providing security services abroad, arrest and detention not motivated by the need to defend oneself or others should be strictly limited to apprehension of a suspect in the immediate aftermath of a crime or attack. The ensuing detention should be strictly limited to the time necessary to hand the suspect over to the competent law enforcement authority.

⚠ The use of apprehension and detention must, in all cases, comply with the domestic law applicable in the place where the deprivation of liberty occurs. This is especially relevant for the second of the two cases described above, since not all domestic legal systems allow citizen’s arrest. Moreover, where allowed, citizen’s arrest can be subject to different circumstances depending on the country.

📄 Also Principle 34 of the → [ICoC](#) limits apprehension by private security companies’ personnel to the need to defend themselves or others against an imminent threat of violence, or following an attack or crime committed by such persons against Company Personnel, or against clients or property under their protection. The Code moreover requires the handover of detained persons to the Competent Authority at the earliest opportunity. Principle 33 restricts detention to cases in which private security companies are specifically contracted to do so by a state and their personnel are trained in the applicable national and international law.

✔ Any such episode of arrest and detention must be promptly reported to both public authorities and company superiors.

b. Respect for the dignity and humane treatment of detainees and vulnerable groups

Persons deprived of their liberty are especially vulnerable. Their condition of vulnerability requires additional care to ensure that they are treated with **humanity** and respect for their **dignity**. This principle reflects one of the key guarantees of a lawful deprivation of liberty, and applies to both detainees’ treatment and conditions of detention. Its implementation cannot depend on the material means available.

The first guarantee connected to respect for dignity and humane treatment is the **prohibition of torture and other forms of cruel, inhuman or degrading treatment**. This prohibition is an **absolute** one: it **cannot be subject to derogations or restrictions**. It is a norm of customary international law and is reflected in all main human rights instruments. Torture occurs when severe pain or suffering is intentionally inflicted for a certain purpose by, or at the instigation of, or with the consent or acquiescence of a public official. States are called to ensure freedom from torture, not only by refraining from carrying out acts of torture, but also by adopting precautionary measures which are necessary to prevent violations, monitor compliance and punish infringements.

📄 The definition of torture can be read in → [Article 1 CAT](#).

📄 Principles 33-35 of the → [ICoC](#) restate the obligation to treat all detained persons humanely, consistent with applicable human rights law or international humanitarian law, including the prohibitions on torture or other cruel, inhuman or degrading treatment or punishment.

Secondly, detainees **cannot be subject to any hardship or constraint other than that resulting from the deprivation of liberty**; they must be **free from any abusive and discriminatory treatment**.

Detainees must also be ensured adequate **conditions of detention**.

✔ As explained, the prohibition of torture in the CAT concerns the actions of public officials. However, this requirement has been interpreted broadly to include cases in which detention management has been mandated by public authorities to **private actors**. Companies providing security services abroad might therefore be in a position to materially breach the prohibition. This interpretation is also adopted by Principle 3 of the  [ICoC](#).

Finally, if detention brings about a condition of vulnerability, certain groups are at a heightened risk of being affected by deprivation of liberty since they belong to so-called vulnerable groups. Although it is difficult to define **vulnerable groups** exhaustively, in case of deprivation of liberty these will typically include at least women, children, elderly people and persons with disabilities. Their special needs must result in special treatment.

Women must be protected from discrimination and gender-based violence in detention

 [Chapter 11.5](#). Special consideration should also be given to pregnant women.

Children should not be deprived of liberty except as a measure of last resort. Unaccompanied minors should be provided special assistance and all necessary measures must be taken to identify them.

Persons with disabilities must be ensured a reasonable accommodation. They must be provided health assistance which does not reinforce pre-existing disabilities. Detainees with severe disabilities should be diverted to non-custodial settings, and those with mental illnesses should not be detained in prisons.

5. PROHIBITION OF HUMAN TRAFFICKING, SEXUAL EXPLOITATION AND ABUSE AND GENDER-BASED VIOLENCE

Human trafficking is the **trade of human beings** (via recruitment, transport, transfer, harbouring, or receipt) **through the use of force or deception** and for the **purpose of their exploitation** (including prostitution, other forms of sexual exploitation, forced labour, slavery or practices similar to slavery, servitude, or the removal of organs). It can occur within a country or trans-nationally and does not necessarily require movement. It particularly affects women and children, who can be victims of both sex trafficking and labour trafficking.

 The generally accepted definition of human trafficking is provided in the  [Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children \(Trafficking Protocol\)](#) to the Convention against Transnational Organised Crime, adopted in 2000 and entered into force in 2013.

Human trafficking

Trafficking in person constitute a **serious crime** and a **grave violation of several human rights**.

The Trafficking Protocol requires states to **criminalise** human trafficking in their domestic legislation.

Human trafficking **itself is a serious violation of human rights**. Moreover, the actual process of trafficking **can result in the violation of several basic human rights**. These include the right to life, the right to liberty and security of the person, the freedom from torture and other ill-treatment, the freedom from slavery, servitude and forced labour, the freedom of movement, the prohibition of discrimination. Human rights law requires the state to take measures to prevent human trafficking and to protect, assist and redress victims of human trafficking.

Sexual exploitation of both adults and children is a form of human trafficking for the purpose of forcing the victim into sexual activities. More broadly however, **sexual exploitation** refers to any actual or attempted abuse of a position of vulnerability, differential power or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.

Sexual abuse consists instead in the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.

Human rights law requires states to protect people under their jurisdiction from both sexual exploitation and abuse.

 The main sources for this obligation are represented by the  [Declaration on the Elimination of Violence against Women](#), the [Convention on the Rights of the Child](#), and its [Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography](#). The CEDAW addresses exploitation of prostitution of women.

Finally, **gender-based violence** is a broader term compared to sexual exploitation and abuse and encompasses all violence directed against individuals or groups because of their gender. Gender includes not only a person's sex, but also sexual orientation. While gender-based violence affects mostly women and girls, also men can be victims of gender-based violence. It includes physical, sexual, and psychological harm or suffering and the threat of such harm.

Gender-based violence can result in several human rights violations and entails a failure by states to uphold the prohibition against discrimination, also when committed by private actors.

 Companies providing security services abroad are advised to adopt internal policies for prevention of, and response to, human trafficking, sexual exploitation and abuse and gender base violence. Safeguarding policies should set the standards of conduct, indicate activities to avoid and provide for monitoring procedures.

6. AVOIDANCE OF VIOLATIONS OF MAJOR LABOUR LAWS

As part of the human rights catalogue that companies providing security services abroad are requested to pay attention to, **labour rights** should also be mentioned.

In human rights law, labour rights belong to the category of economic and social rights. Both the **International Covenant on Civil and Political Rights** and the **International Covenant on Economic, Social and Cultural Rights** guarantee and protect core labour standards, including the freedom of association.

Moreover, the **International Labour Organisation (ILO)** elaborated a series of **international labour standards** setting out basic principles and rights at work. These standards include both **conventions**, binding on states as international law treaties, and **recommendations**, which are non-binding guidelines.

 **Eight ILO conventions** have been identified by its Governing Body as “**fundamental**” for the character of principles they state and rights they defend. They are the following:

1. Freedom of Association and Protection of the Right to Organise Convention, 1948;
2. Right to Organise and Collective Bargaining Convention, 1949;
3. Forced Labour Convention, 1930;
4. Abolition of Forced Labour Convention, 1957;
5. Minimum Age Convention, 1973;
6. Worst Forms of Child Labour Convention, 1999;
7. Equal Remuneration Convention, 1951;
8. Discrimination (Employment and Occupation) Convention, 1958.

Finally, companies domiciled in Switzerland and providing security services abroad are obviously subject to the application of **Swiss labour law**, as codified in Swiss domestic legislation.

III. International Humanitarian Law: Key Principles and Distinctions

International Humanitarian Law (IHL) is the branch of international law **regulating the behaviour of parties to armed conflicts**. It is also referred to as law of armed conflict (LOAC), law of war, or *jus in bello*. Its scope and purpose concern the effects and consequences of armed conflicts (sub-chapter 1). It applies to what are classified as either International Armed Conflicts (IAC) or Non-international Armed Conflicts (NIAC) according to precise criteria (sub-chapter 2). Its violations are prohibited and lead to different consequences (sub-chapter 3). It is based on the fundamental distinction between combatants, with the rights and obligations attached to their status (sub-chapter 4) and civilians, generally protected from the dangers of warfare (sub-chapter 5). It sets out clear principles governing attacks (6) and determining which attacks are prohibited (sub-chapter 7). The principle of humanity serves as general principle informing the whole system and balancing military necessity (sub-chapter 8).

1. SCOPE AND PURPOSE OF IHL

The **purpose** of IHL is to **limit the consequences of armed conflicts**. IHL attains this aim by:

- protecting those who are not, or no longer, taking direct part in hostilities;
- restricting the use of violence to the amount necessary to weaken the military force of the enemy enough to win the war; i.e. limiting the means and methods of warfare available to the parties.

IHL therefore establishes legal standards that must be respected in all situations of armed conflict. These standards apply:

- **equally** to all parties to an armed conflict;
- **regardless of the purpose** of the conflict (irrelevance of *jus ad bellum* considerations, meaning whether or not a state is deemed to be an aggressor);
- **without reciprocity**, meaning that breaches of IHL by one party do not allow violations by other parties.

The main sources of IHL

IHL rules are enshrined both in treaty law and in customary international law.

The main IHL treaties are the four **Geneva Conventions of 12 August 1949** (Geneva Conventions), enjoying universal ratification:

- First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I);
- Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II);
- Third Geneva Convention relative to the Treatment of Prisoners of War (GC III);
- Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV).

They concern the protection of the victims of armed conflicts and were generally referred to as “**Geneva law**”. As such, they were distinguished from the so-called “**Hague law**”, regulating the conduct of hostilities in armed conflicts and issued from the **Hague Conventions of 1899 and 1907**.

This distinction was ultimately dismissed with the adoption of the **1977 Additional Protocols I and II** to the Geneva Conventions (AP I and AP II), applying, respectively, to IAC and to NIAC, whose rules cover both the protection of victims and the conduct of hostilities.

Although IHL is a largely codified area of law, **customary IHL** retains a remarkable importance for rules that are not included in treaties and for parties which have not ratified a treaty (in the case of AP I and AP II) or cannot do it (because they lack recognition). The **International Committee of the Red Cross (ICRC)** produced a **study on customary IHL** identifying **161 rules** of customary IHL, the majority of which are applicable to both IAC and NIAC.

Finally, IHL relies on **general principles**. Some of these principles are applicable to the whole of international law; others are proper to IHL, and include for example the principles of distinction, prohibition of unnecessary suffering, military necessity and proportionality  [Chapter III.6](#).

IHL is a **self-applied system**. Its material, personal, temporal and geographical **scope of application** depends on the **existence of an armed conflict** and a **nexus** with it, regardless of the recognition of a state of war by its parties.

Material scope of application of IHL

IHL applies to **situations of armed conflict**. It distinguishes two possible kinds of armed conflicts, namely IAC and NIAC  [Chapter III.2](#). The term “armed conflict” is used instead of war precisely to avoid controversies of the legal definition of war and state of war, which parties to modern armed conflicts tend to deny.

Personal scope of application of IHL

The **passive** personal scope covers persons to whom IHL affords protection. These are first and foremost those belonging to the category of “protected persons” during IAC: wounded and sick in armed forces in the field, wounded, sick and shipwrecked members of armed forces at sea, prisoners of war, civilians in the hands of the enemy. Moreover, those who do not qualify as protected persons still enjoy the protection of several IHL rules. This is the case for all civilians and combatants protected by restrictive rules of the conduct of hostilities (principles applicable to attacks, principle of unnecessary suffering, etc.);

The **active** personal scope defines persons who are bound by IHL. They are primarily the belligerents, i.e. all those belonging to one party to the conflict, including non-state actors in NIAC.

Temporal scope of application of IHL

Besides a few rules already applicable in peacetime (rules on dissemination, training of commanders, precautions against the effects of attacks), IHL applies in **wartime**. Its temporal scope of application however differs for IAC and NIAC.

IAC:

IHL **starts** being applicable with a **declaration of war** or, **absent this, as soon as an armed conflict arises**. Following the so-called “**first shot theory**”, no level of intensity of armed confrontations is required for an IAC to begin. This means that IHL starts being applicable as soon as an attack is launched, the first protected person is affected or the first piece of territory is occupied by the enemy, even if it meets with no armed resistance.

The **end** of application conversely **changes depending on the scope of protection**. For wounded, sick and shipwrecked members of the armed forces as well as for prisoners of war, the respective conventions apply until repatriation. Civilians in the hands of the enemy are instead protected until the general close of military operations. Finally, in case of occupation, the end of application depends on the applicable law. If the occupying power did not ratify AP I, IHL stops applying one year after the general close of military operations, with the exception of core rules which remain applicable until the occupying power exercises functions of government in the occupied territory. For states that ratified AP I, IHL application ends only on the termination of the occupation.

NIAC:

IHL only applies when both conditions defining the material scope of application of NIAC are met, i.e. **intensity of violence** and **level of organisation** of the armed group  [Chapter III.2.](#)

Its application **ends** when a **peaceful settlement** is achieved. It remains open to question whether the fading of one of the criteria originally met, without a peaceful settlement, also implies the end of application.

Geographical scope of application of IHL

Also in this case, a distinction shall be drawn between IAC and NIAC.

- IAC: IHL applies to the entire territory of all states party to the conflict, regardless of the actual occurrence of hostilities on their soil.
- NIAC: IHL applies to the entire territory of the state on whose territory the conflict is taking place. Moreover, if the conflict spills over to the territory of neighbouring countries, IHL will also be applicable to the area involved.

With both IAC and NIAC, it remains a matter of dispute whether IHL also applies externally, i.e. outside the territory of the state(s) involved (besides cases of spill-over in NIAC) and without geographical limitations. If geographically unlimited application is accepted, nexus of the act with the armed conflict shall always be proven; moreover, it becomes even more relevant to prove that any use of force responds to the limits posed by the principle of military necessity.

2. DISTINCTION BETWEEN INTERNATIONAL ARMED CONFLICT AND NON-INTERNATIONAL ARMED CONFLICT

IHL distinguishes **two kinds** of armed conflict: IAC and NIAC. Their definition delimits the **material scope of application** of IHL, independent from recognition of the state of war by the belligerent parties.

An **IAC** exists in **four different cases**.

1. When war is declared or an armed conflict arises between two or more states. These two conditions are alternative, meaning that the objective existence of an armed conflict between states triggers the application of IHL regardless of a previous formal declaration of war. According to the generally accepted “first shot theory”, no threshold of violence is required for an IAC to start: it is sufficient that one single shot is fired or one single person is captured in order for IHL of IAC to be applicable.

2. When a state occupies partially or totally the territory of another state, even if the occupation meets with no armed resistance. Belligerent occupation requires that the occupying power is able to exercise effective control over a portion (for small it can be) of foreign territory, and that such control occurs without the consent of the sovereign. Control does not need to be stable, since IHL's scope of protection in case of occupation covers all civilians as soon as they find themselves in the hands of the enemy. Accordingly, IHL applies already in the invasion phase.
3. When a non-state armed group involved in an armed conflict against a state acts as the *de facto* agent of a third state. In this case, the acts of the armed group must be attributed to the third state, and the conflict has an international character (or turns into an IAC if a NIAC was ongoing: this process is sometimes referred to as "internationalisation"). The standard usually applied in order to attribute the actions of an armed group to a state is that of the "overall control", meaning that a state finances, or trains, or equips or provides operational support to the armed group and it also has a role in organising, coordinating or planning the military actions of the group.
4. When peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, and the authorities representing them issue a unilateral declaration undertaking to apply the Geneva Conventions and AP I. This last type of conflict can be classified as an IAC only if it takes place in states having ratified AP I.

A **NIAC** is triggered each time **two cumulative conditions** are met:

- the rebel force has a sufficient level of organisation. Indicative factors of sufficient organisation include the existence of a command structure and disciplinary rules and mechanisms, the fact that the group controls a certain territory, the ability to gain access to weapons, the ability to plan, coordinate and carry out military operations, the ability to speak with one voice;
- the violence has reached a certain level of intensity. Indicative factors of intensity include the number, duration and intensity of individual confrontations, the type of weapons used, the number and calibre of munitions fired, the number of persons and type of forces partaking in the fighting, the number of casualties, the extent of material destruction.

Situations of **internal disturbances and tensions** such as riots or isolated and sporadic acts of violence and other acts of a similar nature do not constitute a NIAC.



The two above mentioned conditions trigger the application of **Common Article 3 to the Geneva Conventions**, the only provision in the Conventions regulating NIAC.

Common Article 3 has been complemented in 1977 by **AP II**. In order to become applicable however, AP II requires four conditions to be met, providing therefore for a higher threshold of applicability application:

- the conflict takes place in the territory of a state party to AP II;
- the conflict occurs between that state's armed forces and dissident armed forces or other organised armed groups (so to exclude conflicts between armed groups without state involvement);
- the armed group is under responsible command;
- the armed group exercises such control over a part of the territory so as to enable them to carry out sustained and concerted military operations and to implement the Protocol.



It is strongly advised that companies providing security services abroad, before entering into business relations with service recipients or before sending their personnel on mission abroad, **conduct an assessment of the situation in the country** to determine whether it can be qualified as an armed conflict.

3. PROHIBITION OF VIOLATIONS OF IHL

All violations of IHL are **prohibited** and lead to **different consequences**.

Some individual behaviours generating violations of the Geneva Conventions and of AP I are **criminalised**, i.e. they determine the individual criminal responsibility of the author. These conducts are qualified as "**grave breaches**" of IHL. The Geneva Conventions and AP I (for states party to it) oblige states first and foremost to take specific measures to **repress "grave breaches"** committed in IAC.

Grave breaches occur when serious violations of IHL are committed against protected persons, or in case of breach of the principles governing attacks in the conduct of hostilities, or in a few additional cases listed in AP I (for states party to it).

In order to repress grave breaches, **states undertake to:**

- enact legislation criminalising grave breaches;
- search for persons alleged to have committed or to have ordered the commission of such crimes;
- prosecute these persons before their own courts or extradite them to another state for prosecution.

It is important to stress that these obligations are not limited to acts committed on a state's own territory or by its nationals, but on the contrary allow and even oblige states to exercise **universal jurisdiction**, i.e. to repress grave breaches wherever and by whoever committed.

 The notion of grave breaches does not apply in NIAC.

Grave breaches of the Geneva Conventions and AP I

The list of acts amounting to grave breaches of the Geneva Conventions and AP I can be found in the following provisions:  [Article 50 GC I](#); [Article 51 GC II](#); [Article 147 GC III](#); [Article 147 GC IV](#); [Articles 11\(4\)](#) and [85 AP I](#).

AP I qualifies **grave breaches** of the Conventions and the Protocol as **war crimes**. Customary international law more generally recognises that **serious violations of IHL constitute war crimes**.

International criminal law  [Chapter II.2](#) has gone beyond the text of the Geneva Conventions and AP I. Its catalogue of war crimes progressively included both violations of IHL of IAC that are not listed as “grave breaches” in IHL treaties and violations of IHL committed in NIAC.

War crimes in the Rome Statute

The main source of reference for a list of war crimes is  [Article 8 Rome Statute of the International Criminal Court](#).

Besides the obligation to repress grave breaches, states also bear an obligation to take all measures necessary to **suppress all other violations** of IHL.

Finally, **Common Article 1 to the Geneva Conventions** provides an obligation on all states to **respect and ensure respect** for the Conventions in all circumstances. Nowadays this obligation is interpreted as requiring states not only to respect the Geneva Conventions, but also to take measures to bring other states to compliance when they commit violations of IHL. IHL obligations must therefore be considered *erga omnes* obligations, i.e. they are legal commitments that states assume towards all other states, not only those against which they might possibly be involved in armed conflict.

Measures to ensure respect include demands of cessation of violations and of reparation. It is unclear whether counter-measures can also be taken to ensure respect, while reprisals against protected persons and goods and against the civilian population are prohibited.

 Companies providing security services abroad in countries involved in an armed conflict should take the two following precautionary measures:

- conduct an internal assessment in order to determine whether partners in the foreign country are engaged or suspected to be engaged in violations of IHL. This is important considering that guaranteeing compliance with IHL is one of the aims of the Federal Act on Private Security Services provided Abroad (PSSA), on which basis the Private Security Service Section (PSSS) of the Swiss Federal Department of Foreign Affairs (FDFA) can prohibit the provision of a specific service.
- if personnel are sent on mission to the country, precise directives should be provided on any behaviour which might constitute a war crime. Indeed, regardless of their status, the staff of PMSC are bound by IHL and may face individual criminal responsibility for violations amounting to international crimes.

4. COMBATANT STATUS, CORRESPONDING RIGHTS AND OBLIGATIONS

The **principle of distinction**, one of the fundamental principles of IHL, requires that all those who are involved in an armed conflict be distinguished as **civilians** or **combatants**. The main reason for this distinction is that civilians, different from combatants, may not be attacked. In order for this obligation to be practically implemented, IHL obliges all combatants to individually distinguish themselves from civilians.

The distinction between civilians and combatant is **fully complementary**, meaning that no intermediary category exists: notions like that of “unlawful combatant” have no legal basis in IHL.

IHL provides a definition of **combatants**. It sets the criteria that an individual must respect in order to be recognised combatant status and enjoy the connected rights. This definition is **formally only relevant in IAC**, since no equivalent notion of combatant is provided in IHL for NIAC. In NIAC, accordingly, all persons who are not members of the state armed forces or members of an organised armed group exercising a continuous combat function  [Chapter V.1](#) are civilians. Civilians playing a role in the armed conflict might, however, be classified as either civilians directly participating in hostilities or fighters with a continuous combat function  [Chapter V.1](#).

The definition of combatant partly changes depending on the applicable law. If the state concerned is not a party to AP I and therefore only the Geneva Conventions are applicable to the conflict, the definition shall be found in GC III and includes four categories:

1. Members of the (regular) armed forces of a party to the conflict, provided they individually respect the obligation to distinguish from civilians;
2. Irregular armed forces, i.e. members of an armed group (militias, volunteer corps, resistance movements) that belongs to a party to the IAC and fulfils collectively, as a group, four conditions:
 - being commanded by a person responsible for his or her subordinates,
 - having a fixed distinctive sign recognisable at distance,
 - carrying arms openly,
 - respecting IHL,
 provided that the member individually respects the obligation to distinguish from civilians;
3. Members of regular armed forces professing allegiance to a government or authority not recognised by the enemy and individually distinguishing themselves from civilians;
4. Inhabitants of a non-occupied territory, who, on the approach of the enemy, spontaneously take up arms to resist the invader, provided that they carry arms openly to distinguish themselves and respect IHL.

AP I broadened the scope of who is a combatant. If AP I is applicable, a combatant is any member of an organised force, group or unit that:

- is under command responsible to a party to the IAC;
- is subject to an internal disciplinary system;

provided that the person distinguishes from civilians:

- normally, by wearing a distinctive item of clothing when engaged in an attack or in a military operation preparatory to an attack;
- in exceptional situations, by carrying arms openly during each military engagement and each time he or she is visible to the enemy while engaged in a military deployment preceding an attack.

In any case, members of an organised force, group or unit who would qualify as prisoners of war under GC III cannot be denied such status for failing to meet the criteria of API.

Rights and obligations of combatants

The combatant status in IHL comes with a series of corresponding **rights and obligations**.

The most important right attached to the status of combatant is the **right to take direct part in hostilities**. Accordingly, combatants enjoy **combatant privilege**, i.e. they cannot be prosecuted or punished for their participation in hostilities. They have moreover the right to be **protected as prisoners of war** if they fall into the power of the enemy. They also enjoy protection when they are **wounded, sick or shipwrecked**. Finally, in conduct of hostilities they are **protected against means and methods of warfare** which cause unnecessary suffering or superfluous injury.

The most relevant **obligation** of every combatant is the **obligation to distinguish** him- or herself from civilians. Failing to respect such obligation, no person can be recognised as a combatant and enjoy full prisoner of war status if captured. Besides this primary duty, combatants obviously bear an **obligation to observe IHL**.

5. DEFINITION OF CIVILIAN, PROTECTION OF CIVILIANS AND CIVILIAN OBJECTS AGAINST DIRECT ATTACK

As mentioned in the preceding sub-chapter  [Chapter III.4](#), the notion of civilian is simply defined by exclusion from, and in opposition to, that of combatant, in accordance with the full complementarity between the two notions.

A **civilian** in IHL is **any person who is not a combatant**, i.e. any person who does not fall in one of the categories to which combatant status is attached. In case of doubt, a person shall be considered to be a civilian.

The **civilian population** is comprised of **all persons who are civilians**. The presence among them of combatants does not deprive the population of its civilian character, but at the same time does not prohibit attacking those combatants individually, in compliance with the principle of distinction, and provided the principles of proportionality and precautions are respected at the same time  [Chapter III.6](#).

Civilians, differently from combatants, **do not have a right to directly participate in hostilities**. At the same time, **IHL does not prohibit** their Direct Participation in Hostilities (DPH). Simply, civilians **do not enjoy combatant privilege** if they do take a direct part in hostilities. This means that DPH **can be prosecuted and punished** under domestic law. AP II however requires states party to consider, at the end of hostilities, granting the broadest possible amnesty to persons who participated in the armed conflict but are not suspected of, accused of or sentenced for war crimes.

Conversely, civilians have a **right to be protected** against the dangers of armed conflicts. This encompasses both their **protection as civilians in the hands of a party of which they are not nationals**, and their **protection against attacks and effects of hostilities**  [Chapter III.6](#), including by way of reprisals.

 Civilians lose their protection from attacks if, and for such time, as they directly participate in hostilities  [Chapter V.1](#).

Finally, IHL protects **civilian objects** as well. Civilian objects are **all objects which are not defined as military objectives** under IHL. Military objectives in turn are those objects which by their nature, location, purpose or use make an effective contribution to military actions and whose total or partial destruction, capture or neutralization offers a definite military advantage. Their identification must be done under the circumstances ruling at that time, to avoid an assessment *in abstracto*. In case of doubt whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Civilian objects **shall simply not be made the object of attacks or reprisals**.

Moreover, AP I provides **special protection to some objects** (most of which usually civilian objects in any case), such as medical facilities, cultural objects and places of worship, objects indispensable to the survival of the civilian population and works and installation containing dangerous forces. AP I requires states controlling those objects to avoid using them for military purposes; even if this happens and those objects meet the criteria of a military objective, they shall either not be

attacked or only attacked if a higher threshold than those qualifying military objectives is met.

! **Personnel of companies providing security services abroad** normally are not integrated into the armed forces of the state that contracted them and do not fall in any other category defining combatants under IHL. According to the full complementarity rule, they must therefore be considered **civilians**. They may nevertheless realise conducts that make them directly participate in hostilities [⇒ Chapter V.1](#) and, therefore, lose protection from attacks in the conduct of hostilities [⇒ Chapter V.5](#) and being prosecuted for their participation [⇒ Chapter V.4](#).

! Clearly, civilians (as well as combatants) retain, even in situations of armed conflict, the inherent right of self-defence, i.e. the right to protect themselves against an imminent threat of death or serious bodily injury, or a reasonable perception of such threat. Indeed, the right of self-defence does not depend on the status of the person defending him- or herself. It is also independent from the existence of a situation of armed conflict. Therefore, personnel in the service of companies providing security services abroad, regardless of their function or tasks, are always entitled to use force in personal self-defence, including during armed conflicts. Such conduct does not constitute DPH [⇒ Chapter II.3.b](#) and [Chapter V.5](#).

6. PRINCIPLES FOR PERMISSIBLE ATTACKS UNDER IHL

The principles of IHL regulating the conduct of hostilities and defining permissible attacks rest on a **basic rule** of both treaty and customary IHL: the obligation of all parties to a conflict to **distinguish at all times** between civilians and combatants and between civilian objects and military objectives and to accordingly direct operations only against military objectives.

Military operations must be understood first and foremost as referred to **attacks**. Attacks under IHL consist of **acts of violence against the adversary**, both in offence or in defence, in whatever territory conducted, including on one party's own territory under the control of the enemy. Attacks so defined include all attacks from land, sea or air affecting the civilian population on land

The principles of targeting in military operations

IHL of the conduct of hostilities is governed **by three main principles**:

- **distinction**: only military objectives shall be the object of attacks. Individual civilians and the civilian population shall never be the object of attacks;
- **proportionality**: even when an attacks is directed against a military objective, it is prohibited if it may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof (the so-called "collateral damage"), which would be excessive in relation to the concrete and direct military advantage anticipated;
- **precautions**: since constant care shall be taken to spare civilians and civilian objects, even when an attack is directed against a military objective and it may not be expected to cause excessive collateral damage, all feasible precautions must be taken to minimise that damage.

7. PROHIBITED ATTACKS UNDER IHL

IHL provides several rules prohibiting certain types of attacks.

Prohibited attacks under IHL are first and foremost those that **do not comply with the three principles of targeting** explained above [⇒ Chapter III.7](#).

- Attacks **against the civilian population as such, individual civilians** (including those the primary purpose of which is to spread terror) and **civilian objects**.
- **Indiscriminate attacks**. They include firstly attacks that strike military objectives and civilians or civilian objects **without distinction**:
 - attacks not directed at a specific military objective;
 - attacks employing a method or means of combat which cannot be directed at a specific military objective;
 - attacks employing a method or means of combat the effects of which cannot be limited as required by AP I;

- attacks treating as a single military objective a number of different objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects. Moreover, indiscriminate attacks include those that, even if directed at a military objective and employing means and methods capable of being directed at a military objective, **do not respect the principle of proportionality in attack**, i.e.
- attacks which may be expected to cause an excessive collateral damage compared to the concrete and direct military advantage anticipated.
- Attacks **violating the principle of precautions in attack**. IHL prescribes the following precautionary measures:
 - the obligation for those who plan or decide on an attack to a) take all feasible measure to verify that the objective is lawful, b) choose means and methods with a view to avoid or minimise collateral damage, c) refrain from launching an attack which might be expected to be disproportionate;
 - the obligation to cancel or suspend an attack if it becomes apparent that it violates the principle of distinction or proportionality;
 - the obligation to give effective advance warning, unless circumstances do not permit;
 - the obligation to choose the military objective causing the least collateral damage when a choice is possible between several military objectives resulting in a similar military advantage.

In addition, other attacks are prohibited because they breach other IHL rules.

- Attacks against the civilian population or civilian objects by way of **reprisals**.
- Attacks **against a person who is hors de combat**, i.e. a person who is in the power of the enemy, or a person who wants to surrender or a person who is unconscious or incapacitated by wounds or sickness.
- Attacks using a **prohibited means or method of warfare**. These include the following:
 - attacks using means and methods which are specifically outlawed by treaty or customary law;
 - attacks using a means or method which by their nature cannot comply with the principles of IHL, including the principles of distinction and precaution and the prohibition to cause unnecessary suffering or superfluous injury to combatants. Examples of specifically prohibited weapons are chemical weapons and biological weapons; examples of specifically prohibited methods of war are denial of quarter and perfidy;
 - attacks using a means or method or warfare in a way that otherwise violates the principles of IHL.

8. RESPECT FOR THE PRINCIPLE OF HUMANITY AND HUMANE TREATMENT

IHL is one of the most codified areas of public international law. In addition, a large set of rules have been recognised a customary character. Nevertheless, their application and interpretation, as well as the behaviour of the parties where no specific rule is applicable, must be oriented to always uphold the **principle of humanity** and recognise everybody the right to **humane treatment**. As an overarching principle of the law of armed conflict, the principle of humanity **balances** the concept of **military necessity**, on whose basis IHL recognises that weakening the enemy can make it militarily necessary to cause death, injury, damage and destruction.

According to the **principle of humanity**, as expressed in the Martens clause, in cases not covered by treaties or customary law, **civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience**. Accordingly, not everything that is not expressly prohibited is lawful in warfare; conversely, all those taking part in a conflict must always assess their actions against elementary considerations of humanity.

 While avoidance of DPH abroad remains a precise obligation under the PSSA and therefore a primary concern for companies providing security services abroad, it is strongly recommended that personnel sent on mission abroad, especially to countries currently engaged in armed conflict, or at higher risk of becoming engaged in armed conflict, is provided with a minimum set of basic rules

defining behaviour which violates the basic principles of IHL, including the principle of humanity.

As an expression of the principle of humanity, IHL prescribes parties to an armed conflict to always guarantee the **humane treatment** of all those who have fallen into the power of the enemy. Such obligation applies equally in IAC and NIAC and finds its source in both customary IHL and treaty law.

The principle of humane treatment in IHL treaties

Common Article 3, which lays down minimum guarantees applying in both IAC and NIAC, gives substance to the principle of humanity in the following terms:

“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, **shall in all circumstances be treated humanely**, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”

Both **AP I**, applicable to IAC, and **AP II**, applicable to NIAC, reaffirmed the general principle of humane treatment, making explicit a list of **fundamental guarantees inherently attached to the principle of humane treatment**. These catalogues of minimum guarantees are to be found in Article 75 AP I and Article 4 AP II.

The general principle of humane treatment is restated and finds particular application with respect to the treatment of **wounded, sick and shipwrecked** in the hands of a party to the conflict, **prisoners of war**, and **protected civilians** (both in territories of the parties to the conflict and in occupied territories).

IV. Human Rights and International Humanitarian Law: A Dynamic Interplay

The potential concurrent application of International Human Rights Law (IHRL) and International Humanitarian Law (IHL) to the same situation raises the question of their mutual relations and the choice of the norm to implement. This choice must always take into account the complementarity of these two branches (sub-chapter 1) and respect the non-derogable character of some human rights (sub-chapter 2) and the non-derogability of IHL (sub-chapter 3).

1. COMPLEMENTARITY OF IHRL AND IHL

IHRL and IHL are two branches of public international law which, when both are applicable, **potentially apply at the same time** to the same situation.

IHRL applies at all time. Previous views advocating for a strict separatism between these two branches, limiting the application of IHRL to peacetime and denying it during wartime, when IHL only would be applicable, have been set aside.

IHL applies to armed conflict. Its material, as well as temporal scope of application are defined by the existence of an International Armed Conflict (IAC) or a Non-international Armed Conflict (NIAC) or a situation derived from it, and of a nexus with the armed conflict  [Chapter III.1](#) and [Chapter III.2](#).

Today, the majority opinion describes IHL and IHRL as **complementary**, rather than mutually exclusive. In peacetime, IHRL guarantees the human rights of everyone. **When an armed conflict starts, IHL applies** and introduces specific protection tailored to the needs of persons affected by armed conflicts, **but IHRL remains applicable as well.**

Yet, **complementarity** between IHL and IHRL is **imperfect**. **IHRL**, with the exception of some rights, may be subject to **derogations** in times of emergency. Armed conflicts represent precisely one situation allowing for human rights derogations. However, derogations can already be adopted in situations of **internal disturbances and tensions which do not meet the threshold of an armed conflict**. Also for this reason, it has been argued in the past that a gap in protection exists in situations where (derogable) human rights have been derogated, yet IHL is not (yet) applicable. Today however the extensive interpretation of the notion of non-derogable rights arguably leaves **no substantive legal gaps in the protection of individuals in situations of internal violence.**

Derogations in any case are only allowed to the extent required by the situation and provided the derogation is consistent with other international obligations of the derogating state.

That said, the complementary application of IHL and IHRL raises in turn the question of **regulating their interplay**, in particular to define which rule (the IHL or the IHRL rule, if not both) are applicable to a given situation. While multiple solutions are proposed, including the cumulative application of both branches or the cross-interpretation of IHL in light of IHRL, a more complex scenario is the one in which the **two rules are inconsistent with each other**. This may occur in particular for the use of force against fighters in NIAC and the procedural guarantees attached to detention in NIAC. One commonly adopted solution relies on the **principle of *lex specialis***: according to this principle, the **most detailed rule** prevails over the most general. This does not mean that IHL will always prevail because its rules are specifically conceived to apply in armed conflict. If used when two rules concurrently apply to the same set of facts, the *lex specialis* norm will help identify the one which has the greatest adherence to a given scenario; eventually, the prevailing rule could also be one of IHRL. Alternatively, IHRL and IHL could be considered as **cumulatively applicable**, subject to the need to **interpret IHRL norms by reference to IHL.**

2. NON-DEROGABLE HUMAN RIGHTS

Despite allowing derogations, IHRL instruments also identify a number of human rights which are **non-derogable**, i.e. may never be subject to derogations.

Rights that are non-derogable include:

- the **right to life**, the only exception being represented by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which allows derogations for lawful acts of war (no state has done it up to now);
- the prohibition of **torture** and other **cruel, inhuman and degrading treatment**;
- the prohibition of **slavery** and **servitude**;
- the principles **nullum crimen sine lege** (no criminal offence without law) and **nulla poena sine lege** (no punishment without law).

Other rights which can be considered as non-derogable, depending on the applicable instruments, are:

- the prohibition of imprisonment for failure to fulfil a contractual obligation;
- the right to recognition as a person before the law;
- the right to freedom of thought, conscience and religion.



Derogation clauses in IHRL instruments applicable to Switzerland

Both the International Covenant on Civil and Political Rights (CCPR) and the ECHR include a clause defining rights which may not be subject to derogations. These clauses are respectively:

- Article 4 CCPR;
- Article 15 ECHR.

3. NON-DEROGABILITY OF IHL

Since IHL is a branch of law already conceived to be applied to an exceptional situation, i.e. to armed conflicts, it generally does not provide for derogations. **Contrary to IHRL**, that identifies which rights are non-derogable, **IHL defines in which limited set of cases derogations are allowed**. They concern the rights of civilians in the hands of a party to the conflict of which they are not nationals. Two kinds of derogations are allowed:

- **in the territory of a party to the conflict**, if a **protected civilian is suspected of, or engaged in, activities hostile to the security of the state** – in this case, the protected person shall not be entitled to claim rights and privileges that would be prejudicial to the security of such state;
- in an **occupied territory**, if a **protected civilian is detained as a spy or saboteur, or suspected of activity hostile to the security of the occupying power** – in this case, the protected person can be denied his or her rights of communication.

In each case, such persons shall nevertheless be treated with **humanity**, and in case of trial, shall not be deprived of the rights of fair and regular trial.

IHL treaties remain of course subject to reservations, which can have, in some cases, effects similar to that of derogations.

V. Direct Participation in Hostilities: The Line Not to Be Crossed

The avoidance of Direct Participation in Hostilities (DPH) is, together with the respect of human rights law and international humanitarian law, the third fundamental requirement for conducting activities subject to the Federal Act on Private Security Services provided Abroad (PSSA) of 27 September 2013. The rules regulating DPH and its consequences are important to companies and their personnel sent on mission abroad to countries which are either engaged in an armed conflict or at higher risk of becoming involved in an armed conflict. To support companies and their personnel in avoiding DPH, this chapter defines first and foremost the concept and criteria of DPH and continuous combat function (CCF) in NIAC (sub-chapter 1), clarifying the difference between DPH and general assistance to parties to armed conflicts (sub-chapter 2) and between direct and indirect participation in hostilities (sub-chapter 3). It then brings light to the consequences of DPH, in terms of loss of protection from attacks and potential prosecution under domestic law (sub-chapter 4). Finally, it assesses the relevance of these norms to companies providing security services abroad (sub-chapter 5) and recommends avoidance of activities considered DPH (sub-chapter 6).

1. CONCEPT AND CRITERIA OF DPH AND OF CONTINUOUS COMBAT FUNCTION IN NIAC

As explained above  [Chapter III.5](#), civilians in armed conflicts enjoy general protection against the dangers arising from military operations. The most relevant consequence of such protection is that civilians shall never be made the object of direct attacks.

IHL however also provides a limit, and therefore an exception, to this rule: civilians enjoy general protection **unless and for such time as they take a direct part in hostilities**. In other words, IHL foresees the possibility that civilians, by taking a part in hostilities, directly cause harm to the detriment of a party to the conflict and in support of another. In this case, **civilians relinquish their protection** and, consequently, **can be attacked**. Remarkably, this can happen **in both IAC and NIAC** (while of course the notion has no application outside armed conflicts).

DPH is a constant and growing feature of modern conflicts. Nevertheless, **IHL** only provides the exception, but **falls short of giving a definition** for what constitutes DPH. For this reason, the **International Committee of the Red Cross (ICRC)**, at the outcome of an expert process, issued an **Interpretive Guidance on the Notion of Direct Participation in Hostilities**, reflecting the organisation's view on the criteria of DPH. Besides describing the constitutive elements of DPH, the ICRC Interpretive Guidance also advances a proposal to identify the members of organised armed groups in NIAC, based on the notion of Continuous Combat Function.

a. The constitutive elements of DPH

The notion of DPH is intrinsically linked to the existence of armed conflicts and has the same meaning in both IAC and NIAC,

DPH refers to **activities** carried out by individuals in the context of the **conduct of hostilities** between parties to the armed conflict. It is determined by **specific acts** of hostilities realised by a civilian and therefore does not depend on the status, function or affiliation of that person. Several acts of DPH by a single individual must always be considered individually to decide whether that person is temporarily engaging in DPH for the relevant time, and cannot be summed up to allow a continuous loss of protection.

DPH is defined by **three constitutive elements**. Such criteria must be **cumulatively** met in order for a specific act to qualify as DPH:

1. **threshold of harm**: the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack;
2. **direct causation**: there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part;
3. **belligerent nexus**: the act must be of a nature to cause the required threshold of harm in support of a party to the conflict and to the detriment of another.

Threshold of harm

The **threshold of harm** can be reached by putting in place conducts of a substantially different nature. Two kinds of acts are considered:

- the act produces a **harm of a military nature**: in this case, no particular intensity or gravity of the harm is needed in order to meet the threshold. Also, unarmed activities such as sabotaging military infrastructures, capturing military personnel, and even protecting military property of the enemy, guarding military prisoners or transmitting targeting information for an attack would cause a sufficient harm;
- the act inflicts **death, injury, or destruction on protected persons or objects**: this includes, evidently, attacks directed against civilians.

In order to be reached, the threshold of harm does not require the production of harm, but only its **likelihood**, i.e. that it may be reasonably expected that the harm will result from the conduct.

Direct causation

Direct causation represents probably the central and key element of the notion of DPH, because it allows distinguishing DPH from conducts that, despite resulting in a sufficient harm, do not directly contribute to its production and therefore cannot justify the loss of protection.

A contribution to the hostilities can be deemed to be direct only when it meets the threshold of harm **in one causal step**.

 Some acts might be necessary to produce the required harm but still not amount to direct participation. This is notably the case for **financial support** to a party to the conflict: while providing economic resources may well be indispensable to enable a party to fight the conflict, it does not bring about the harm in one causal step.

 Similarly, an act might be connected to causing the final harm by an **uninterrupted chain of events**, but still fall behind the one causal step necessary to recognise participation as direct. This is the case for the design, production, storage and shipment of weapons.

At the same time, acts cannot be assessed in isolation if they are part of a **collective operation**. In collective operations, a few persons realise acts that, individually considered, would amount to DPH. Yet, other persons carry out acts that constitute an **integral part of a concrete and coordinated tactical operation that directly causes the required harm**.

 A classic example of a collective operation requiring the evaluation of various conducts as part of a coordinated effort is represented by targeted operations: the identification of targets, the transmission of intelligence to attacking troops, the provision of instructions do not individually constitute DPH, but qualify as such if considered as part of the collective operation.

It should not be forgotten that the requirement of direct causation rests on a causal relation. Therefore, considerations concerning the **geographical** or **temporal proximity** of an act to the production of harm are not relevant to assess whether the conduct constitutes DPH.

 Planting an explosive device which is planned to detonate only at a later moment in time (landmine, booby-traps) clearly brings about the harm in one causal step, regardless of the time needed.

 Operating a drone from a control centre removed from the zone of combat also allows direct causation of the harm.

Belligerent nexus

DPH always comes into being in relation to an ongoing conflict. In order for a specific act to qualify as DPH, it must not only cause harm and do it in a direct manner; it must also be **designed** in order to do so as a way to participate in the conflict, i.e. **to support a party to the detriment of another**.

The existence of a belligerent nexus must be assessed in relation to the **objective purpose of the act**, deduced from the way an operation is planned and implemented. **No relevance should be attributed to the subjective intent of the actor**; neither should his or her state of mind, willingness or mental ability have a bearing on the assessment of the belligerent nexus. Arguably, only in limited cases (total unawareness, physical coercion), where no proper action can be said to be realised by the actor, shall the mental state be taken into consideration to deny that the relevant conduct amounts to DPH.

 From the point of view of companies providing security services abroad, it is extremely relevant to be aware of the fact that actions undertaken in **self-defence or defence of others** preclude the existence of a belligerent nexus. As seen above  [Chapter II.3.b](#) and [Chapter III.5](#) given its nature of inherent right of all persons, the right of self-defence is obviously retained in the conduct of hostilities in armed conflict (as well as outside armed conflict situations) and prevents the establishment of a belligerent nexus since acts realised in self-defence are clearly not designed to support one party against another.

 Personnel in the service of companies providing security services abroad, regardless of their function or tasks, are always entitled to use force in personal self-defence, including during armed conflicts. Such conduct does not constitute DPH  [Chapter II.3.d](#) and [Chapter V.5](#).

Finally, as stated at the outset of this sub-chapter, DPH is always connected to specific acts. It is however necessary to clarify that an act of DPH is not limited to the execution phase and that **measures preparatory to the execution, as well as the deployment to, and return from**, the location of its execution are an **integral part of that act**.

Clearly, preparatory measures belong to the specific act as long as they are put in place to carry out that act. Conversely, preparatory measures simply aiming to build a party's capacity to carry out unidentified hostile acts do not constitute DPH. Once again what matters is the causal relation, not the geographical or temporal proximity to the execution phase. Therefore, arming a weapon in order to allow its use in a specific operation does constitute DPH, even if the weapon will be used somewhere else and after a certain amount of time.

The same criteria help define the temporal limits of deployment and return. Deployment already amounts to DPH when it implies physical displacement in order to carry out a specific operation. Similarly, the return extends only to the time necessary to end the operation and resume another activity.

 Although the ICRC Interpretive Guidance lays down precise criteria, their correct implementation will be made harder or easier depending on the concrete factual circumstances at any given time. For this reason, in case of doubt, **presumption should always be in favour of excluding DPH**.

b. The notion of Continuous Combat Function

In IAC the classification of persons is based on the full complementarity  [Chapter III.5](#) between civilian and combatant status and civilians are all persons who do not meet the criteria prescribed for combatants.

In NIAC, conversely, no combatant status is recognised, under both customary and treaty IHL. This choice is the result of states' firm opposition to everything that could be interpreted as legitimizing rebel groups. It should however not lead to the conclusion that in NIAC all those who are not members of the armed forces of the state are civilians, protected from attacks unless, and for such time, as they are directly participating in hostilities. This would clearly create an imbalance between state and rebel forces, and an operational advantage for rebels who could attack state forces at all times but would only lose protection during an act of DPH.

For this reason, in IHL of **NIAC**, civilians are defined in opposition not only to state armed forces, but also to **members of an organised armed group**, understood as the armed forces of the non-state party to the conflict.

Yet, IHL falls short of providing a definition enshrining the criteria to classify individuals as members of organised armed groups in NIAC. The availability of such criteria is extremely relevant not only to distinguish rebel fighters from the civilian population in general terms, but, even more importantly, to distinguish those who belong to the armed faction of a rebel movement from the civilian (political, educational, humanitarian) wing of the non-state party to the conflict.

To solve this classification problem without resorting to abstract criteria of affiliation, which are impracticable in the field, the ICRC Interpretive Guidance proposed the notion of **Continuous Combat Function (CCF)**. By applying CCF, an individual would be recognised as member of an organised armed group if he or she **assumes the continuous function of directly participating in hostilities on behalf of the armed group**. In other words, CCF implies the lasting integration of an individual in an armed group, and already materialises when an individual has been trained and equipped to assume a CCF, even before any actual engagement.

The notion of CCF allows distinguishing members of the armed group from civilians who might still take a direct part in hostility, but only on an occasional basis that would not be sufficient to deduce the exercise of a CCF. They include the civilian wing of the non-state party: trainers, recruiters, financiers, political leaders, medical personnel and so on.

2. DIFFERENCE BETWEEN DPH AND GENERAL ASSISTANCE TO PARTIES TO ARMED CONFLICT

Correct application of the criterion of **direct causation** allows distinguishing between DPH and **general assistance to parties to armed conflict**. While DPH is based on a contribution to hostilities which is sufficiently direct, general assistance includes activities that merely support the **general war effort** and other **war-sustaining activities**. Such activities, despite actually harming the enemy and being sometimes even indispensable to this purpose, **are not designed to produce the required harm**, but merely maintain or build up the capacity to cause harm. They therefore are not part of the hostilities. Such conclusion is crucial; otherwise there would be a risk of bringing activities supporting the war effort in the category of DPH, depriving a large number of civilians of their protection.

Examples of general assistance to parties to armed conflict

The ICRC Interpretive Guidance provides a few examples of activities amounting to general assistance:

- **general war effort:** activities objectively contributing to the military defeat of the adversary, like design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations;
- **war-sustaining activities:** political, economic or media activities supporting the general war effort, like political propaganda, financial transactions, production of agricultural or non-military industrial goods.

 **Most activities performed by companies providing security services abroad** addressed by this Training Guide (operation and maintenance of weapons systems, provision of installation services, training on equipment and systems, and/or operational or logistical support to armed forces) qualify as activities contributing to the **general war effort**. It is therefore crucial for companies' leadership to understand the dividing line between general assistance and individual conduct that would fall in the category of DPH, and for companies' personnel to be instructed on avoidance of DPH, expressly prohibited by the PSSA  [Chapter 1.3](#) and [Chapter V.5.c](#).

3. FINE LINE BETWEEN DIRECT AND INDIRECT PARTICIPATION IN HOSTILITIES

General assistance to parties to armed conflict shall not be qualified as DPH because it falls below the threshold of direct causation. At the same time, many services performed by companies providing security services abroad to states party to an armed conflict contribute to the general war effort and, in certain circumstances, might risk overstepping the limit of indirect causation, and cause company personnel to actually engage in DPH.

To clarify any doubt and orient behaviour accordingly, it becomes crucial to correctly identify the **dividing line between direct and indirect participation** in hostilities. A number of examples concerning services provided by companies addressed by this Training Guide are described below.

Below and above the line between direct and indirect participation

- **Financing the production of weapons, ammunition and weapons systems:** this is a clear example of **war-sustaining activity** contributing to the conflict without directly bringing about the required harm in one causal step.
- **Factoring weapons, ammunition and weapons systems:** civilians working in an ammunition factory only build up the military capacity of a party to the conflict. They do not DPH; therefore they do not lose protection from attacks and cannot be directly targeted.
- **Selling and shipping weapons, ammunition and weapons systems:** mere provision of military equipment contributes to the **general war effort** but is not DPH.
- **Delivering weapons, ammunition and weapons systems:** this case shows the fine line between direct and indirect participation. If a civilian truck driver transports a cargo of weapons and ammunition to a collection point for further shipping, such conduct does not amount to DPH, since its fulfilment is **causally removed from the actual use** of those weapons and ammunition (the truck and the weapons inside are a military objective per se, therefore targetable, but the collateral damage represented by the driver would need to be considered). Conversely, if the delivery is made to an active firing post, such behaviour would be an **integral part of a specific combat operation**, and therefore qualify as DPH.
- **Recruiting and/or training military personnel:** such an activity offers yet another example of the fine line between direct and indirect participation. General recruitment to join the ranks of a party to the conflict and general training on the conduct of military operations merely **builds up the capacity** of that party, but does not bring in one causal step to realisation of the harm. Conversely, if personnel is recruited to take part in a specific mission and trained to execute a predetermined operation, both recruitment and training are an **integral part of the operation**.
- **Operating weapons systems:** operating a weapon system will qualify as DPH depending on the factual circumstances. If the weapon system is operated for a programming or testing purpose, it will merely contribute to **build up the military capacity** of the party that will operate the system in combat. If the system is operated as a component of a collective operation, it will, conversely, **reach the threshold of direct participation**.

4. LOSS OF CIVILIAN PROTECTION AND POTENTIAL PROSECUTION OF CIVILIANS UNDER DOMESTIC LAW DUE TO DPH

DPH entails two main consequences related to protection against the dangers of hostilities and lack of combatant privilege.

The first consequence of **DPH** is the **loss of civilian protection against direct attacks**. Civilians who choose to directly participate in hostilities relinquish their protection and become **lawfully targetable**. Their loss of protection is **temporary** and **activity-based**. It lasts only for such time as they actually participate in the hostilities (including preparatory measures, deployment and return) and must be determined by reference to the specific conduct, as opposed to the status enjoyed or the function exercised. This also implies that civilians **regain protection** as soon as their engagement in a hostile act ends and they resume their normal activities (so-called “**revolving door**” mechanism).

Conversely, loss of civilian protection in case of exercise of a **CCF** is **continuous, status** or **function-based**. It does not require proof that the conduct at the relevant moment met the criteria of DPH, but only that the concerned individual exercised a function consisting in the continuous availability to engage in DPH, thereby acquiring the status of member of the organised armed group of a non-state party to the NIAC. Individuals exercising a CCF are therefore targetable at all times, as long as their membership in the group continues. Yet, like civilians, members of organised armed groups can **regain protection**. In their case however, it is necessary to prove **lasting disengagement** and the reintegration into civilian life (or of course the status of person *hors de combat* after wounding, sickness, capture or surrender).

 Even when an individual participates in hostilities meeting the criteria of DPH or CCF and becomes lawfully targetable, any use of force against him or her will obviously need to comply with the rules and principles of IHL and other applicable international law.

Secondly, it is possible for both civilians who engage in DPH and fighters exercising a CCF to **regain protection**. Even when this happens, civilians **remain subject to prosecution**:

- under international law, which does not prohibit either DPH or CCF, they will only be liable **if they committed violations of the law of armed conflict amounting to international crimes**;
- **under domestic law the same fact of engaging in DPH or assuming a CCF** is sufficient basis for **prosecution**. Indeed, no state in the world recognises the right of their citizens to take up arms against their own or other states.

In other words, neither DPH nor CCF grants combatant privilege. Therefore, no immunity from prosecution can be claimed.

 Companies providing security services abroad are advised to clearly represent to their employees the consequences of DPH and CCF and to instruct them to avoid both, in line with the prohibition set out by the PSSA  [Chapter I.3](#) and [Chapter V.5.c](#).

5. ASSESSMENT OF THE PROVISION OF CERTAIN SERVICES DURING ARMED CONFLICT AGAINST THE BACKGROUND OF DPH, IN PARTICULAR SERVICES FOR PROTECTION, GUARDING OF PLACES OR PERSONS THAT ARE LEGITIMATE TARGETS UNDER IHL

Companies providing security services abroad have seen their role increase steadily over the last decades. Their services have been hired by states engaged in armed conflicts and their personnel have often been sent on missions geographically or functionally close to the conduct of hostilities. Arguably, the growing involvement of companies providing security services abroad in conflict zones is yet another component of the general trend towards **civilianization** of armed conflict, i.e. of the greater participation of civilians in the conduct of hostilities.

This already gives a first answer on the status of companies providing security services abroad amidst an ongoing conflict. Although they seem, at first glance, to escape the classification rules described above  [Chapter III.4](#) and [Chapter III.5](#), the status of the companies' personnel will on the contrary be determined by **applying the classic standards** distinguishing between civilians and combatants in IAC and between civilians, members of the armed forces and members of organised armed groups in NIAC.

Remarkably, this also implies the full **application** to companies providing security services abroad of the **criteria to identify DPH**. Given the particular nature of most services provided by private companies, their personnel is at higher risk of meeting the DPH criteria, with resulting increased risk of incidental death due to attack and domestic prosecution. When this happens, the consequences in terms of compliance with the PSSA must also be assessed.

The Montreux Document

The risk of DPH is surely one of the main issues raised by the use of private security services in armed conflicts. It is however not the only one: the exercise by private security personnel of functions proper to state forces poses the question of their compliance with IHL and IHRL obligations.

In 2009, the **Montreux Document** addressed this question providing a restatement of existing legal obligations of contracting states, territorial states, home states, all other states and companies providing security services. The document is based on the assumption that states remain bound by international law when they contract out security services; as for international law, such obligations must be drawn from IHL and IHRL. The Montreux Document also lists good practices to promote compliance with international law during armed conflicts. It has been endorsed by most of the concerned states.

a. Criteria regarding the status of private security service providers or their personnel in armed conflict

Personnel of companies providing security services abroad, in the absolute majority of cases, will be **civilians** under IHL. Indeed, they normally are neither *de jure* nor *de facto* incorporated into the armed forces of a state. They do not fall in the Geneva Conventions criteria defining mercenaries. In NIAC, it is extremely unlikely that they assume a CCF within an organised armed group belonging to a non-state party. Therefore, **they are protected against direct attacks** as all other civilians under IHL applicable to the conduct of hostilities.

 Nevertheless, the nature of certain private security services may bring personnel close to armed forces and other military objectives, and may in general require them to operate in an area where hostilities are ongoing or likely to suddenly erupt. As a result, even when personnel of companies providing security services do not directly participate in hostilities and are not lawful targets, **they are at increased risk of incidental death or injury due to attacks**, as allowed by the principle of proportionality.

 Companies providing security services abroad shall **inform their personnel of the risks** related to the provision of security services in proximity to hostilities and shall **take all necessary precautions** to avoid incidents.

b. Likelihood of DPH during the provision of certain services in armed conflict, with resulting increased risk of death due to attack and domestic prosecution

Personnel of companies providing security services **may**, as any other civilians, realise acts that **meet the criteria of DPH**. In this case, they **lose protection from attacks** if, and for such time as, they directly participate in hostilities and, since they do not enjoy combatant privilege, **may be prosecuted** according to the domestic legislation of the state where the conduct was performed.

The risk of this happening will be higher during the provision of certain services. This might be especially the case for defensive services. To draw a clear dividing line between defensive services which amount to DPH and those that do not, the following criteria shall be used:

- the **defence or protection of military personnel and objectives or other legitimate targets (for example civilians directly participating in hostilities) against enemy attacks** will meet the three criteria of **DPH**;
- the **protection of military personnel and objectives** and of **other legitimate targets against common crime** unrelated to the hostilities will **not qualify as DPH**;
- the **protection of civilians (as far as they do not directly participate in hostilities) and civilian objects against unlawful acts of violence (even carried out by enemy combatants)** will **not qualify as DPH** and normally constitute the exercise of law enforcement functions and, in some cases, self-defence or defence of others.

✔ It will be difficult, if not impossible, for personnel of companies providing security services in the field to have access to, and evaluate, all intelligence necessary to determine which of the three situations above materialises at a given time. For this reason, companies providing security services abroad are generally **advised to avoid** tasking their personnel with **defensive or otherwise operational services likely to turn into DPH**. Moreover, they should issue clear directive to the same personnel detailing which defensive tasks will surely or likely lead to engagement in DPH and therefore be prohibited under the PSSA ⇒ [Chapter 1.3](#) and [Chapter V.5.c](#).

c. Compliance risks associated with the provision of services supporting one party to a conflict under the PSSA

Article 8 PSSA introduced a **prohibition on DPH** addressed to **both companies** and **persons** domiciled in Switzerland. While all details are provided elsewhere in this Training Guide ⇒ [Chapter 1.3](#), it is important to recall that the PSSA forbids not only activities of companies aimed to recruit, train and provide personnel for the purpose of DPH abroad, but also the performance of individual activity amounting to DPH by persons who are domiciled, or have their habitual place of residence, in Switzerland and are in the service of a company providing security services abroad.

6. COMPANY PERSONNEL AVOIDANCE OF ACTIVITIES CONSIDERED DPH

Given the express prohibition on DPH introduced by the PSSA, **companies** domiciled in Switzerland **are obliged to avoid** any business activity entailing the recruitment, training and provision of personnel for **DPH abroad**.

Similarly, **company personnel** deployed on mission for services which do not necessarily entail DPH is still at risk of engaging in activities that meet the criteria explained above ⇒ [Chapter V.1](#). For this reason, they also remain under **personal obligation to avoid DPH**.

⚠ A person who, in violation of Article 8 PSSA, carries out an activity in connection with DPH, or who directly participates in hostilities, commits a **criminal offence under Article 21(1) PSSA**, and is liable to a custodial sentence not exceeding three years or to a monetary penalty.

VI. Preventing and Reporting Human Rights and International Humanitarian Law Violations

To improve and facilitate compliance with the international and domestic law described in this Training Guide, applicable norms should be incorporated into the internal policies of private security companies to ensure that their activities abide by the Federal Act on Private Security Services provided Abroad (PSSA) and the dictates of both international humanitarian law and human rights law. This Chapter provides a concise list of essential rules that a private security company policy on overseas activities should include. It addresses both the roles and responsibilities of personnel (sub-chapter 1) and managers (sub-chapter 2).

1. GENERAL BEHAVIOUR

A series of recommendations and good practices concern the conduct of personnel at various levels of private security companies, and specifically of employees on mission abroad or planning officers organising missions abroad.

a. Importance of individual identification to promote accountability

Individual identification is a key measure to foster respect for and protection of human rights. Although it is not a human rights obligation per se, it **is conducive to the full implementation of human rights obligations**. This objective is reached in a twofold manner:

- Directly, because identification promotes accountability, as mentioned in  [Chapter II.3.a:](#)
 - a. In case of human rights violations committed by state officials, personal identification helps recognise the perpetrator as a state agent. Under international law, the conduct of state agents is attributed to their state, and attribution is a key requirement to establish **state responsibility**. State responsibility allows redress, and therefore allows to fulfil the right to a remedy;
 - b. Even when perpetrators are not law enforcement officials, personal identification allows investigating the **individual criminal responsibility** of alleged perpetrators, thereby promoting justice and redress.
- Indirectly, because identification and prospect of individual responsibility induce restraint on those who exercise authority over persons and are in a position to violate their human rights. It therefore fulfils a **preventive function**.

 Personal identification can be realized in two alternative ways: by wearing **name tags**; by wearing **serial numbers** univocally corresponding to a person's identity in the company's registries. It is recommended for all personnel of security companies as a matter of general policy, because it establishes a working environment inspired to the principle of accountability. It is however particularly relevant in two cases:

- For employees carrying arms and all those who can find themselves in situations requiring the **use of force**;
- For employees carrying on **apprehension and detention** tasks.

 For the reasons stated above, in some domestic legal systems individual identification is **compulsory** for law enforcement officials. Depending on the national legislation, it may be a requirement for personnel of private security companies.

 Individual identification is also an express requirement set out in Principle 43(a) of the  [International Code of Conduct for Private Security Service Providers](#) (ICoC), which applies to all personnel whenever they are carrying out activities in discharge of their contractual responsibilities.

b. Requirement to report orders beyond the mission or set tasks immediately to headquarters and superiors

The planning of missions abroad should always bring to the adoption of a detailed *cahier de charge* listing required, allowed and forbidden conducts. Availability of a *cahier de charge* facilitates the transfer of legal obligations and internal policies into mission plans. It moreover helps ensure consistent behaviours and provides directions in case of doubt.

Any order beyond the mission or set tasks should be **promptly reported** to headquarters and superiors. This allows planning officers (and, if necessary, company leadership) to assess the order against applicable legal obligations and internal policies.

 For employees of private security companies functionally integrated into a chain of command, this requirement is even more crucial. Indeed, **obedience to superior orders is no longer recognized as a valid defence** in case of commission of international crimes, at least when the order is manifestly unlawful. To this end, orders to commit genocide or crimes against humanity are generally considered a priori as manifestly unlawful.

c. Responsibility to immediately inform superiors and/or management of on-the-ground situational changes that could turn previously permissible activities into DPH

This recommendation complements the previous one and is rooted in the same logic. It allows planning officers (and, if necessary, company leadership) to reassess the factual situation on the ground against the criteria leading to DPH, as explained in  [Chapter V.1](#). Indeed, as evident from those criteria, **equal conduct may potentially entail different legal qualifications**, alternatively amounting to DPH or not, **depending on the circumstances in which the conduct takes place**.

 This can be the case for the transport of weapons and ammunition, which can be considered DPH depending on the place of delivery  [Annex 2, Scenarios 12-16](#).

d. Requirement to report incidents or known or suspected violations of national law, human rights and IHL (including those committed by colleagues and public security officials) to superiors, authorities, and/or confidential reporting services

To promote accountability and prevent the commission of further violations, personnel of private security companies should also promptly report on witnessed or learned incidents involving the breach of national law, human rights law and IHL.

Reporting to superiors or to internal confidential services allows company leadership to reconsider the mission and give further instructions on how to carry on or interrupt planned activities. This decision leaves to superiors the choice on whether to report incidents to the competent authority.

Reporting violations to the competent authority strengthens the rule of law and fosters accountability because it immediately allows the exercise of jurisdiction over unlawful conducts. This option should always be preferred.

The obligation to report violations of IHL and human rights across different legal regimes

International law on state responsibility

When individual conducts can be attributed to states according to the International Law Commission's  [Draft Articles on State Responsibility](#), the responsibility of states can be engaged also by a failure to take every possible measure to prevent violations of international norms or suppress and repress them.

Command responsibility in the Rome Statute

In the **Rome Statute**, reporting the commission of international crimes to the competent authorities is an obligation for all those in command positions, including non-military superiors. According to the doctrine of so-called '**command responsibility**', failure to report to the competent authority international crimes committed by subordinates entails the individual responsibility of superiors. To establish command responsibility, it must be proven that the superior knew or should have known that the subordinates were committing or about to commit such crimes. Moreover, the crimes must concern activities that were within the effective responsibility and control of the superior. This could also apply to superiors in private security companies, if their conduct falls within the jurisdiction of the International Criminal Court, as established by the Rome Statute.

Domestic law

Depending on the domestic legal system, reporting crimes or other breaches of the law to the competent authority might be a legal obligation that applies generally or to specific categories of persons (e.g. law enforcement officers, other state officials).

Incident reporting in the ICoC

Principle 22 of the  [ICoC](#) introduces a general requirement for signatory companies to report any incident or known or suspected violation involving any national or international crimes including but not limited to war crimes, crimes against humanity, genocide, torture, enforced disappearance, forced or compulsory labour, hostage-taking, sexual or gender-based violence, human trafficking, the trafficking of weapons or drugs, child labour or extrajudicial, summary or arbitrary executions.

Moreover, Principle 63 requires reporting any incidents involving companies' personnel that concern the use of weapons, the firing of weapons (except in authorized training), any escalation of force, damage to equipment or injury to persons, attacks, criminal acts, traffic accidents, incidents involving other security forces. It also requires an internal inquiry. Several other Principles establish reporting obligations in case of incidents concerning torture or other cruel, inhuman or degrading treatment or punishment (Principle 37); sexual exploitation and abuse or gender-based violence (Principle 38); human trafficking (Principle 39); and the worst forms of child labour (Principle 41).

2. COMPANY RESPONSIBILITIES

a. Obligation to align activities with national and international control systems and regulations for the transfer of arms

The **arms trade** is today subject to multiple **legal frameworks**, operating both at the national and the international level. Most legal regulations applicable to the transfer of arms are implemented through the establishment of control systems. Control systems are oftentimes also in charge of monitoring compliance by private companies with existing law.

Private security companies trading in arms are therefore required to **align their activities with** the requirements enshrined in both **national and international law**. While national law on the arms trade applies to private security companies directly, international law, and in particular the **Arms Trade Treaty (ATT)** binds only states who are party to it. Private actors should however be aware of obligations and limitations established at the international level if they want to avoid their activities to fall among those that states are required to forbid according to their international obligations.

Swiss legislation on the transfer of arms

- Federal Act on War Material (War Material Act, WMA) of 13 December 1996;
- Ordinance on War Material (War Material Ordinance, WMO) of 25 February 1998;
- Federal Act on the Control of Dual-Use Goods, Specific Military Goods and Strategic Goods (Goods Control Act, GCA) of 13 December 1996;
- Ordinance on the Export, Import and Transit of Dual Use Goods, Specific Military Goods and Strategic Goods (Goods Control Ordinance, GCO) of 3 June 2016;
- Federal Act on the Implementation of International Sanctions (Embargo Act, EmbA) of 22 March 2002.

The Arms Trade Treaty

The ATT is a multilateral treaty regulating the **international trade in conventional weapons**, to which Switzerland is a state party since 30 April 2015. The ATT seeks to prevent and eradicate the illicit trade in conventional arms and to prevent their diversion to the illicit market. To this end, it introduces **two main obligations** on states parties:

- Under **Article 6**, a prohibition to authorize any transfer of conventional arms covered by the treaty which would violate the state's obligations established by Resolutions of the UN Security Council under Chapter VII of the UN Charter; or which would violate international agreements to which the state is a party; or if the state has knowledge at the time of authorization that the arms would be used in the commission of international crimes;
- Under **Article 7**, an obligation, when the export is not prohibited under Article 6, to assess the potential that the arms would contribute to or undermine peace and security; or could be used to: (i) commit or facilitate a serious violation of international humanitarian law; (ii) commit or facilitate a serious violation of international human rights law; (iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting state is a party; or (iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting state is a party.

To foster implementation of its provisions, the ATT requires states parties to establish and maintain a **national control system**, including a national control list, in order to implement the provisions of the ATT.

b. Best practices for appropriate and stringent human rights/IHL-based risk management and due diligence procedures prior to, and during, the provision of services.

Appropriate risk management in the provision of security services is based on best practices that have been recalled in multiple parts of this Training Guide. They include:

1. appropriate **planning** and **monitoring** of missions;
2. **training** of personnel, including both employees sent on mission abroad and those involved at various levels in the planning and monitoring of missions;
3. provision of necessary defensive **equipment** and of less-lethal weapons and ammunition;
4. availability of **written rules** on the use of force;
5. **reporting** of incidents involving the violation of domestic or international law or of internal policies.

c. Information requirements for deployed personnel

Deployed personnel should always be aware of the following:

1. **basic human rights and IHL standards**, as outlined in [Chapter II](#) and [Chapter III](#);
2. the concept of DPH, as described in [Chapter V](#);
3. **instructions not to go beyond mission *cahiers de charge***, for the reasons stated in [Chapter VI.1.b](#);
4. **obligation to report incidents** or known or suspected violations of national law, human rights and IHL, as explained in [Chapter V.1.d](#);
5. **obligation to report orders** beyond set tasks or *cahier de charge*, as explained in [Chapter V.1.b](#);
6. **potential consequences of human rights and IHL violations, DPH, or going beyond the mission.** Violations of human rights and IHL obligations entail state responsibility in all cases where the conduct can be attributed to a state according to the general principles established under the international law of state responsibility [Draft Articles on State Responsibility](#). When violations of human rights and IHL amount to international crimes, they lead to the individual criminal responsibility of the perpetrator, regardless of the establishment of state responsibility [Chapter II.2](#) and [Chapter III.3](#). They can also amount to violations of domestic civil and criminal law, additionally entailing the responsibility of the agent under domestic norms. DPH is not prohibited under international law; yet, as explained in [Chapter V.4](#), it entails the loss of civilian protection against direct attacks, making the person who directly participates in hostilities a lawful target. Moreover, DPH is usually prohibited under domestic law, and therefore brings about the likely criminal prosecution of the person who directly participates in hostilities. Finally, all activities amounting to violations of human rights or IHL or to DPH, or facilitating such result are prohibited by the PSSA, under the conditions outlined in [Chapter I.3](#).

d. Best practices for developing and distributing written rules on the use of force

In [Chapter II.3.e](#), it has been explained that the availability of **written rules on the use of force facilitates decision-making** on the use of force which complies with international legal obligations and standards. This is even more so in critical situations, where the immediate reliability on written statements serves the purpose of orienting behaviours towards lawful outcomes.

✔ Written rules on the use of force should be developed on the basis of both legal obligations and internal policies. They should include a general part applicable to all kinds of private security services and specific parts varying depending on the planned mission. They should be distributed in a pocket-sized version before commencement of the mission. They should serve as terms of reference for both employees involved in the provision of security services and those in monitoring positions.

e. Importance of reporting known or suspected violations of national law, human rights and IHL (including those committed by colleagues and public security officials) to the client, a competent authority and/or a country with jurisdiction

As explained in [Chapter VI.2](#), reporting known or suspected violations promotes accountability and prevents the commission of further violations.

Reporting violations to the client gives the client the opportunity to adopt remedies, correct unlawful behaviours, interrupt planned activities and prevent future violations.

Reporting violations to the competent authority and/or a country with jurisdiction strengthens the rule of law and fosters accountability because it allows the exercise of jurisdiction over unlawful conducts. This option should always be preferred.

! What explained in [Chapter VI.1](#) on **command responsibility** is even more relevant for private security companies' leadership, whose members can fulfil the criteria for the establishment of this mode of liability.

! Depending on the domestic legal system, **reporting crimes** or other breaches of the law to the competent authority **might be a legal obligation**.

Annex 1. Applicable Regulatory Framework

This annex clarifies the applicable regulatory framework and lists relevant provisions in Swiss national law applicable to private security services provided abroad.

National legislation

1. Federal Act on Private Security Services provided Abroad (PSSA) of 27 September 2013
2. Ordinance on the Use of Private Security Companies by the Federal Government (OUPSC) of 24 June 2015
3. Ordinance on Private Security Services provided Abroad (OPSA) of 24 June 2015

National regulations

1. Guidelines to the Federal Act on Private Security Services provided Abroad (PSSA), Private Security Service Section (PSSS), Federal Department of Foreign Affairs, adopted in May 2016
2. Training Requirements according to the Federal Act on Private Security Services provided Abroad, Private Security Service Section (PSSS), Federal Department of Foreign Affairs, adopted in December 2017
3. Fact sheet regarding the relation between the PSSA and the WMA-GCA, Private Security Service Section (PSSS), Federal Department of Foreign Affairs, adopted in April 2016

International norms and standards

1. 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 of 17 September 2008
2. International Code of Conduct for Private Security Service Providers of 9 November 2010
3. Protect, Respect and Remedy. A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General John Ruggie of 7 April 2008

Reports on private security and military companies by the Swiss authorities

1. Report by the Swiss Federal Council on Private Security and Military Companies (report to the parliament in response to the Stähelin Postulate 04.3267 of 1 June 2004) of 2 December 2005
2. Activity report 2015/2016 on the implementation of the Federal Act on Private Security Services Provided Abroad (1 September 2015 – 31 December 2016), Private Security Service Section (PSSS), Federal Department of Foreign Affairs, adopted on 26 April 2017
3. 2017 annual report on the implementation of the Federal Act on Private Security Services Provided Abroad (1 January 2017 – 31 December 2017), Private Security Service Section (PSSS), Federal Department of Foreign Affairs, adopted on 11 April 2018

Relevant provisions in national legislation

1. Definition of *private security service*: PSSA, Article 4(a)
2. Definition of *service in connection with a private security service*: PSSA, Article 4(b)
3. Definition of *direct participation in hostilities*: PSSA, Article 4(c)
4. Definition of *complex environment*: OPSA, Article 1
5. Definition of *maintenance and reparation or operation of weapon systems*: Fact sheet, para. 2.1
6. Definition of *logistical support to armed or security forces*: Fact sheet, para. 2.2
7. Definition of *advice and training of armed or security forces*: Fact sheet, para. 2.3
8. Definition of *operational support to armed or security forces*: Fact sheet, para. 3
9. Prohibition on direct participation in hostilities: PSSA, Article 8
10. Prohibition on serious violations of human rights: PSSA, Article 9
11. Obligation to provide training to personnel or to inform on training provided to personnel: PSSA, Article 10(1)(c), Article 14(2)(b), Article 32, Article 35(2); OUPSC, Article 4(1)(a), Article 5, Article 9(2), Article 10(2), Article 11(g); OPSA, Article 4(b)(5), Article 4(c)(4).

Annex 2. Scenarios for Training on Direct Participation in Hostilities

Article 8 of the Federal Act on Private Security Services provided Abroad (PSSA) of 27 September 2013 introduces a prohibition on Direct Participation in Hostilities (DPH). It forbids both the provision in Switzerland of activities enabling and assisting DPH abroad as well as DPH in a foreign country by persons who are domiciled, or have their habitual place of residence, in Switzerland and are in the service of a company providing private security services abroad. This annex describes possible scenarios presenting a risk of DPH to be used as potential case studies and provides solutions (see the green, yellow or orange icons). The scenarios are tailored to the business environment of companies addressed by this Training Guide, i.e. companies operating and maintaining weapons systems and/or providing installation services, trainings on equipment and systems, and/or operational or logistical support to armed forces abroad.

Assumptions

DPH cannot occur outside situations of armed conflict. Moreover, the notion only applies to actions realised by civilians. Hence, two legal conditions need to be met for the purpose of the following scenarios.

- An armed conflict is taking place between two or more parties. This can be an International Armed Conflict (IAC) or a Non-international Armed Conflict (NIAC). The armed or security forces to which security services are provided can indifferently belong to a state, an international organisation, or a non-state party to a NIAC (hereinafter the term “entity” is used comprehensively).
- All individuals concerned are civilians. In an IAC, they have neither been integrated into the armed forces of a party to the conflict, nor have they been given a continuous combat function. In a NIAC, they have neither been integrated into state armed forces nor do they perform a continuous combat function in an organised armed group or as an independent organised armed group.

A. SUPPLYING, MAINTAINING AND OPERATING WEAPONS SYSTEMS

Company A is a big weapons manufacturer, with a long expertise in research, design and production of handguns and related ammunition. The company also produces bombs, grenades and missiles on a smaller scale, and recently decided to expand its business to the design and production of unmanned aerial vehicles, including armed remotely piloted aircrafts.

Scenario 1 – Supply of weapons systems and ammunition (I)

Company A concluded an important supply agreement with Entity X, covering the whole range of weapons and ammunition the company manufactures. According to the agreement, part of the relevant technology will be transferred to Entity X on an exclusive basis. The agreement provides for periodical shipments to the ports of Entity X, where cargoes are collected by logistics officers. After the agreement enters its implementation phase, an armed conflict breaks out between Entity X and Entity Y.

-  The design, production and trade in weapons, ammunition and weapons systems do not imply acts of DPH. All these activities **lack** the necessary requirement of **direct causation** to become DPH and merely contribute to the **general war effort**, representing an **indirect participation in hostilities**.
-  For the same reasons, shipment of weapons, ammunition and weapons systems in this scenario does not amount to DPH.
-  Delivery of weapons, ammunition and weapons systems to active firing positions (different from the scenario provided) does **amount to DPH** as shown below  [scenario 14](#), being it an **integral part of a specific combat operation** and therefore meeting the requirement of **direct causation**. In order for DPH to be proven, the action should also be likely to realise the necessary threshold of harm. It objectively supports one party to the detriment of the other, thereby showing **belligerent nexus**.

Scenario 2 – Supply of weapons systems and ammunition (II)

Entity X's armed forces were able to locate the military leadership of Entity Y in an underground system of bunkers. Entity X asks Company A to research, design and manufacture a bomb able to impact the bunkers in a precise point, producing a massive blast and causing their collapse. The bomb is specifically meant to be used in the targeted operation to kill the leadership of Entity Y.

-  When they are an **integral part of a specific military operation** which is per se **designed to realise** the required **threshold of harm** (as in the present scenario), even research, design and production might qualify as DPH, since they become **components of a collective operation**. In this case, they would obviously lead to a harm meeting the required threshold and are evidently realised with belligerent nexus.
-  Outside the case shown in this scenario, research, design and production of weapons must always be considered part of the **general war effort**, as activities directed to build-up the military capacity of a party, **without meeting** the requirement of **direct causation**.

Scenario 3 – Supply of weapons systems and ammunition (III)

According to Company A's trade secret protection policy, technology transfer can only be realised directly by its technical personnel. While travelling on a mission to Entity X, Company A's technical experts are captured by Entity Y. Required to collaborate as informants, they refuse.

-  The refusal to collaborate with one party to the conflict by providing information does not amount to DPH because it **does not meet** the required **threshold of harm**.

Scenario 4 – Supply of weapons systems and ammunition (IV)

Company A's technical experts travel to Entity X to perform an important technology transfer. The experts install new software and update those already in use. To ensure full operational capability, they programme the software to control and operate all defence systems of Entity X.

-  Transfer and programming of weapons technology does not differ from any other form of weapons transport and positioning; these acts merely build up the military capacity of a party to the conflict **without meeting** the criterion of **direct causation**. They therefore are not DPH.
-  If performed **with the purpose of allowing the execution of a specific hostile act**, even transport and positioning of weapons, as well as programming of weapons technology for the conduct of a specific military operation, would qualify as **preparatory measures**, which would constitute an **integral part of a DPH conduct**. The act shall in any case bring about harm sufficient to meet the required threshold. Belligerent nexus in the present scenario is also objectively present.

Scenario 5 – Supply of weapons systems and ammunition (V)

Company A's technical experts install and programme the fire control software of a missile defence system with autonomous targeting capacity. They also programme target parameters for automated firing. They then conduct a live-fire exercise to test the system's operability.

-  This scenario seems to fall in between the two answers provided in  [Scenario 4](#), but arguably goes beyond the line of direct participation because it amounts to operation of weapons systems. Indeed, despite its temporal distance from the moment of the engagement, the act of programming a weapon with autonomous capabilities and target parameters for automated firing equates to its actual operation. It is therefore no longer a preparatory measure (to which the criterion shown in  [Scenario 4](#) must be applied) but an **execution of the hostile act**. Clearly, the act is likely to realise the required threshold of harm and shows belligerent nexus, supporting one party to the detriment of the other. Conversely, the **live-fire exercise does not constitute** per se **DPH**, since it enhances the military capacity of the party but does not directly cause harm to the enemy.

Scenario 6 – Maintenance of weapons systems (I)

According to its agreement with Entity X, Company A also provides maintenance for all weapons systems it supplies. Maintenance services include repair, upkeep and periodic overhaul of weapons and parts thereof. In some cases, weapon components are disassembled and shipped back to Company A for maintenance. When necessary, maintenance is provided by Company A's technical personnel during periodic missions to Entity X.

- General maintenance of weapons outside specific operations does not amount to DPH. While it can **contribute to the war effort**, it does not directly bring about the threshold of harm, therefore **lacking** the necessary **direct causation**.

Scenario 7 – Maintenance of weapons systems (II)

During a maintenance mission to Entity X, Company A's technical experts are summoned to an air base. The pilotage software which allows the operation of Company A's unmanned aerial vehicles has broken down. The air force demands its immediate repair in order to conduct a signature strike against the military leadership of Entity Y.

- Maintenance services provided in this scenario, different from above, are provided **with regard to a specific combat action**, of which they constitute an **integral part**. They therefore **amount to DPH**, since they meet the criteria of **direct causation** as a component of a **collective operation**. The combat action would meet the required threshold of harm. The maintenance service also clearly occurs in support of one party against the other.

Scenario 8 – Maintenance of weapons systems (III)

When Company A's technical experts reach Entity X's air base, they are informed that Entity Y's air force is planning an operation against Entity X's military depots. The experts are required to repair the software controlling surface-to-air missiles necessary to repel the attack.

- This scenario is not different from the previous one and should lead therefore to the same conclusion: the maintenance services provided **amount to DPH**. Indeed, the defensive or offensive motives behind the act have no bearing on the assessment of DPH. Threshold of harm and belligerent nexus are proven as in the previous scenario.

Scenario 9 – Operation of weapons systems (I)

Company A is able to supply Entity X with new software for its remotely piloted aircrafts. At the moment, only Company A's technical experts are able to operate the software. Entity X asks Company A to provide personnel in order to navigate the aircraft in an imminent strike against Entity Y's military bases.

- Operation of the pilotage software **constitutes DPH**. Even if Company A's personnel do not realise any function other than navigation (i.e. they do not identify targets or release the weapon), their conduct would be integral part of a coordinated tactical operation that **directly causes** the required **threshold of harm**, as a **collective operation** of a party against the other. Therefore, all three criteria for DPH are met.

Scenario 10 – Operation of weapons systems (II)

Entity Y is about to conduct extensive strikes on military installations, including the same base where Company A's personnel are located. Entity X therefore asks again Company A to provide personnel operating the pilotage software of its unmanned aerial vehicles, which will only be used to repel the attack.

- This scenario arguably does not present any difference from the previous one, since (as seen in [Scenario 8](#)) the defensive or offensive motives behind the act do not change its assessment against the criteria to identify DPH. Yet, to the extent company personnel only take part in the operation with the aim to repel an attack against their person (and not, for example, on other parts of the air base) they are actually acting in self-defence. **Acts realised in self-defence lack**

belligerent nexus and therefore **do not amount to DPH**. However, in this scenario, mind the risk of being attacked nonetheless because the attacker cannot distinguish between acts of self-defence and DPH.

Scenario 11 – Operation of weapons systems (III)

Company A developed a cyber tool able to realise computer network attacks and infiltrate military infrastructures for computer network exploitation undetected. The tool can both sabotage military operations of the adversary and collect data on military targets. Company A does not release patents to operate the tool, but proposes to provide personnel to Entity X to operate it. The personnel will only be employed in collective operations to disable enemy military infrastructures, collect and transmit tactical intelligence and identify targets, without controlling or operating any firing system.

🎯 All actions described in this scenario **qualify as DPH**. Both computer network exploitation (CNE) and computer network attacks (CNA) **meet** the required **threshold of harm**, since they affect the military operations and military capacity of the opposing party. The act resulting from the CNA (disable enemy military infrastructures) directly contributes to bring about harm as an integral part of a collective operation. The actions resulting from the CNE (collect and transmit tactical intelligence and identify targets) are also an integral part of a coordinated tactical operation that directly causes the harm. All actions are realised to support one party to the detriment of the other, showing **belligerent nexus**.

B. OPERATIONAL OR LOGISTICAL SUPPORT TO ARMED OR SECURITY FORCES

Company B is a large military service provider operating in complex scenarios. It is specialised in operational and logistical support to armed forces. Its main services are directed to secure both weapons and provisions supplies to armed forces in the battlefield. Given its expertise in handling emergency situations, the company sporadically performs enhancement of equipment.

Scenario 12 – Transport, storage and trans-shipment of goods (I)

Company B's services are contracted by Entity X. According to the agreement, Company B provides transport, storage and trans-shipment to Entity X of weapons and ammunition produced by Company A. Company B's fleet transports cargoes to the ports of Entity X, located in an area removed from the hostilities, where they are collected by Entity X's logistics officers for further shipping to military storehouses in the conflict area. Company B occasionally stores cargoes for limited amounts of time necessary to secure the shipping route.

🎯 All actions described in this scenario **do not amount to DPH**. As seen above ➡ [Scenario 1](#), delivery to places other than active firing positions does not constitute integral part of a combat action and is only a form of **indirect participation contributing to the war effort**. Storage of weapons, ammunition and weapons systems, although connected to the actual operation of such systems by an uninterrupted chain of events, does not bring about the harm in one causal step, therefore **lacking direct causation**.

Scenario 13 – Transport, storage and trans-shipment of goods (II)

Entity X decides to concentrate all its forces in the conflict zone. Since it can no longer guarantee the safe collection and transport of war materials from its ports to the area of combat, Entity X asks Company B to deliver its shipments directly at military storehouses close to the combat zone, where fighting units will be able to retrieve weapons and ammunition according to necessity.

🎯 Although involving an increased risk of incidental harm for Company B's personnel, this scenario is not different from the previous one. Although delivery is done to a storehouse in the conflict zone, military materials will need to be collected from there for unspecified use in future combat operations. The required **direct causation** is therefore **lacking** and the act **does not amount to DPH**.

Scenario 14 – Transport, storage and trans-shipment of goods (III)

With the hostilities coming closer to the port cities of Entity X, Company B is asked to deliver its shipments directly to the combat posts of Entity X's armed forces, where ammunition are urgently needed for immediate use in hostilities.

- ① Shipment and delivery to firing positions of one party to the conflict will certainly constitute an integral part of an ongoing combat action, therefore contributing to realise the threshold of harm in one causal step. Since the act meets the requirement of **direct causation** and supports one party to the detriment of the other, it **qualifies as DPH**.

Scenario 15 – Transport, storage and trans-shipment of goods (IV)

Company B has been delivering weapons and ammunition to Entity X's front line during the last few weeks. Company B's truck drivers are afraid of being targeted by Entity Y's helicopters when driving to the firing posts or while driving back to the port.

- ① Driving to the firing posts to realise a delivery already meets the criteria for DPH even before the delivery is realised. Deployment to the location of execution is already an **integral part of the act amounting to DPH**.
- ② Return to the port after the delivery does not always amount to DPH. Arguably, the action of **driving away immediately after delivery** is still **part of the DPH**. Conversely, once the driver has **physically separated from the operation** (i.e. is far from the area of hostilities) return ends, and the driver **regains protection**.

Scenario 16 – Transport, storage and trans-shipment of goods (V)

After the killing of one of its employees by Entity Y's helicopters, Company B decides to suspend deliveries of war materials to Entity X. It agrees however to keep delivering fuel, clothes and food provisions to troops at the front line.

- ① The delivery of fuel, clothes and food provisions to troops at the front line **does not meet the threshold of harm**; it neither affects the military capacity of the opposing party to the conflict nor it inflicts death, injury or destruction on persons or objects protected from attacks.

Scenario 17 – Transport, storage and trans-shipment of goods (VI)

During the hostilities, Company B started managing a storehouse containing weapons and ammunition. After Entity X's forces retreat and Entity Y takes control over the area, Company B's personnel decides to hide undelivered weapons and ammunition in its storehouse, to prevent them from falling into Entity Y's hands.

- ① If Company B's personnel guards and protects the weapons and ammunition against a seizure attempt of the enemy, these actions would surely **meet the required threshold of harm**, since they adversely affect a specific military operation of the enemy. They would moreover cause the related harm in one causal step and do so in support of a party to the detriment of the other, thereby meeting all the criteria for DPH.
- ② The action of hiding weapons and ammunition to prevent them from falling into the enemy party's hands, although supporting one party against the other, **does not cause harm** to the military capacity or to a specific military operation of the enemy. It should therefore not be qualified as DPH. Such conclusion might however be disputed, given the ambiguity concerning the harm actually caused.

Scenario 18 – Enhancement of military equipment and vehicles (I)

Entity X is running out of supplies and decides to make use of any available means to keep fighting. Company B is contracted to convert civilian aircrafts for military usage. This will require equipping private aircrafts and civilian surveillance drones with missile systems. The vehicles so enhanced will be delivered to Entity X's air force which will operate them.

-  Military enhancement is subject to the same evaluation criteria already shown for weapons production. If military enhancement contributes to simply building up the military capacity of a party, as in the present scenario, it **supports the general war effort without** meeting the requirement of **direct causation**. It therefore **does not amount to DPH**.

Scenario 19 – Enhancement of military equipment and vehicles (II)

The emergency situation does not allow time for the planned enhancement of civilian aircraft. Entity X asks Company B to just load bombs and explosive devices onto any available civilian aircraft which has been requisitioned by the air force and will be used to conduct attacks on Entity Y's military objectives.

-  Although this scenario is ambiguous, the criteria of DPH should always be applied narrowly to grant that, in case of doubt, presumption is in favour of civilian protection. Indeed, if the attack consists of **a number of future operations not specifically foreseen** during the loading operation, then such activity would merely contribute to establishing the capacity to carry out unspecified military actions in the future. It would therefore **not constitute a preparatory measure** integral part of the act of DPH. If however bombs are loaded with a view to enable the aircraft **to carry out a specific hostile act** (a direct attack), this form of enhancement would constitute a **preparatory measure integrating DPH**.

Scenario 20 – Set-up, maintenance and operation of infrastructure (I)

Since Company A developed new pilotage software to control its remotely piloted aircraft, training for Entity X's air force members became necessary. Entity X turns to Company B to set-up and manage a training centre in an area away from current hostilities. In order to connect the training centre with the area of deployment, Company B also commits to build a road.

-  The construction or repair of facilities and infrastructure only contribute to the **general war effort**, **without** meeting the necessary criterion of **direct causation**. They therefore **do not amount to DPH**.

Scenario 21 – Set-up, maintenance and operation of infrastructure (II)

When hostilities move to a region nearby the location of the training centre, Company B decides to secure transit on the connecting road by deploying armed security personnel. The armed contractors are mandated to protect all friendly persons and goods using the road, including civilian trainers, Entity X's armed forces, food and clothes provisions and ammunition shipments.

-  This scenario exemplifies precisely the kind of private security services which are at higher risk of turning into DPH. Indeed, company B's personnel will **engage in DPH** every time they **protect military personnel and objectives against enemy attacks**. Applied to the scenario, this would be the case if personnel of a company providing security services protect Entity's X armed forces or ammunition from attacks of Entity Y. Such protection certainly **affects the military operations of the enemy in one causal step and is designed to support one party to the detriment of the other**.
-  Conversely, if the same **military persons** (armed forces) and **objectives** (ammunition) are **protected against** looting and other **criminal acts**, this conduct would **not amount to DPH, lacking belligerent nexus**.
-  Finally, the **protection of civilians** (civilian trainers in this case, as far as they do not directly participate in hostilities) **and civilian objects** (food) **against unlawful attacks** (even carried out by Entity Y) will **not qualify as DPH, lacking belligerent nexus**. The action is not designed to support Entity X against Entity Y and has no connection to the conflict.

C. ADVISING OR TRAINING MEMBERS OF ARMED OR SECURITY FORCES

Company C is a small security company offering consulting services to both larger firms and armed forces. It has a solid reputation for the provision of advice and training to armed forces in arms-related matters. In addition, given its privileged position as intermediary between weapons manufacturers and their clients, it also facilitates negotiations and brokers supply agreements.

Scenario 22 – Advising armed forces on arms-related matters (I)

Entity X is interested in reinforcing its armaments after the conflict with Entity Y broke out. Company C personnel travels to Entity X to broker the purchase of Company A's weapons systems. For the purpose of customer acquisition, Company C's personnel distribute standardised information and realise demonstrations on the operation of some weapons systems.

-  The business activities mentioned in this scenario do not realise any harm relevant for the purposes of DPH: they neither affect the military capacity of the opposing party nor do they result in death, injury, or destruction of persons or objects protected against direct attack. The necessary **threshold of harm** is therefore **not met**.

Scenario 23 – Advising armed forces on arms-related matters (II)

Company C is chosen as intermediary between Entity X and Company A for all customer service associated with the sales agreement. This includes sending manuals and instruction updates produced by Company A.

-  This scenario, although arguably implying a greater involvement of Company C, **does not meet the threshold of harm**, for the reasons explained in the previous scenario. It therefore **does not amount to DPH**.

Scenario 24 – Advising armed forces on arms-related matters (III)

Rapid technological advancement in the weapons industry has made it progressively challenging for Entity X's armed forces to use Company A's weapons with efficacy. Entity X turns to Company C asking to provide advice and counselling on better use of its weapons.

-  General advice on the use of weapons **does not meet** the required **threshold of harm**, and therefore will **not qualify as DPH**. Even when the advice amounts to the issuance of precise directives on the most effective use of weapons, such contribution would be **too indirect to realise** the necessary requirement of **direct causation**. Only if personnel of a company providing security services give instructions on the use of weapons for the purpose of a specific military operation would such action amount to DPH, as part of a collective operation. It would however no longer be advice proper, but should be better described as training, addressed in the following scenarios.

Scenario 25 – Training armed forces on arms-related matters (I)

Facing repeated complaints by troops on the lack of technical capacity to operate the complex weapons systems purchased from Company A, Entity X asks Company C to provide training courses to its armed forces for the maintenance and operation of newly acquired weapons. Courses will have to include general training to programme weapons software, training to repair weapons systems and training to train recruits, but not training for a specific operation.

-  Even though the training of military personnel might be crucial and indispensable to conduct hostilities, the link between training and infliction of harm is normally indirect, and therefore **does not meet** the requirement of **direct causation**. **General training** on the use, programming and repair of weapons systems **does not amount to DPH**.

Scenario 26 – Training armed forces on arms-related matters (II)

Despite training, Entity X has not yet reached initial operational capability to fly unmanned aerial vehicles autonomously. Its air force therefore asks Company C's trainers to prepare blueprints

with flight plans to reach Entity Y's territory and conduct aerial strikes. The trainers will also give instruction on mission strategies and tactics.

-  This scenario shows even better how relevant military training can be without being sufficiently direct to meet the requirement of direct causation. All actions described will surely allow the armed forces of Entity X to conduct effective military operations in the future. Arguably, without Company C's training, Entity X would not have had any military capacity to carry out the strikes. However, since training is aimed to build up the armed forces military capacity for unspecified future operations, it remains an **indirect participation** which **does not meet** the requirement of **direct causation**.

Scenario 27 – Training armed forces on arms-related matters (III)

Entity X purchased a new prototype of precision-guided missile to conduct a targeted strike on the control centre of Entity Y's armed forces. Its air force however still lacks technical expertise to operate the new missile. Entity X therefore asks Company C to train two pilots to arm and direct the missile towards the desired point of impact.

-  The training described in this scenario goes beyond the threshold of indirect participation, meeting the requirement of **direct causation**. Since in this case training is **aimed to the execution of a predetermined hostile act** it constitutes an **integral part of that act** and, therefore, **DPH**.

Scenario 28 – Training armed forces on arms-related matters (IV)

Entity X is now planning to target directly Entity Y's Ministry of Defence. Since its pilots have not yet developed the necessary skills to operate the precision-guided missile, Entity X asks again Company C to train two pilots for the mission. Training is provided, but the operation in the end is cancelled.

-  This scenario allows illustrating the meaning of **likelihood** in the **realisation of harm**. As explained in the Training Guide, harm does not need to materialise in order for a conduct to meet the related threshold, but only be likely to happen. For the opposing party to the conflict to decide on a direct attack **at the moment when training is taking place**, it is impossible to know that the operation will be cancelled. Hence, the conduct already meets the required threshold of harm. It does so with direct causation and belligerent nexus. It therefore **amounts to DPH**.

Scenario 29 – Training armed forces on arms-related matters (V)

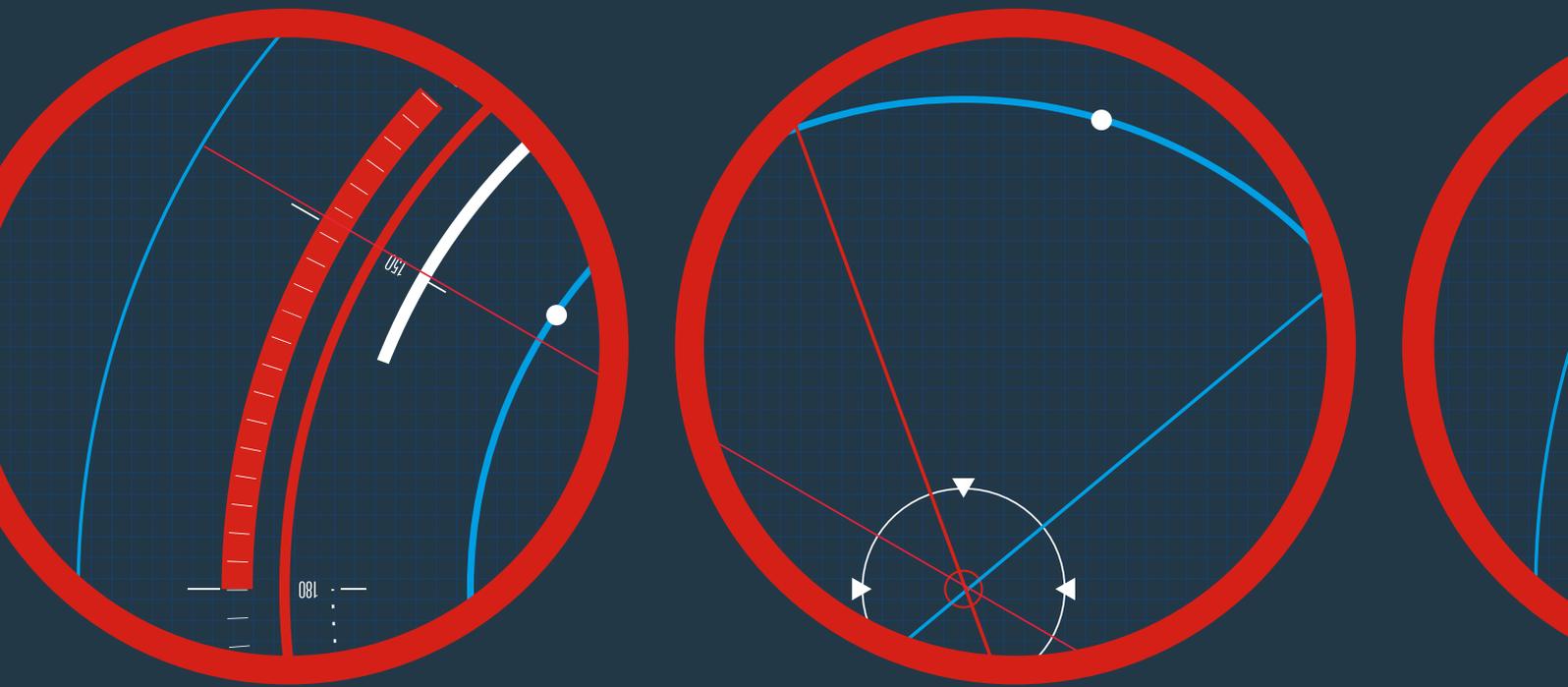
Company C has been providing training to Entity X's armed forces on specific combat actions. Training therefore does not take place on a regular basis. During a break of several days between two training courses, Company C's personnel is targeted by Entity Y's helicopters while walking out of the training centre. To defend themselves, the trainers take a rocket-launcher available in the training centre and shoot down the helicopter.

-  Loss of protection in case of DPH is **temporary** and **activity-based**. Personnel providing training to conduct specific combat actions do engage in hostilities as shown in previous scenarios. However, the loss of protection must be limited to the time the relevant action takes place, and can only extend to deployment and return from the location of execution. Hence, trainers are not targetable in this scenario, because they were not directly participating in hostilities when attacked. Moreover, their reaction only amounts to **self-defence**, and therefore **lacks belligerent nexus**.

Scenario 30 – Training armed forces on arms-related matters (VI)

One of Company C's trainers is seen leaving the training centre carrying an automatic gun. He drives to the closest city in Entity Y's territory, where he bursts into a jeweller, kills the owner and steals some valuables.

-  This scenario allows showing a case evidently **lacking belligerent nexus**. The action, although taking place in an area affected by the hostilities, is not realised to support a party to the conflict against another. It therefore **does not constitute DPH**.



ISBN: 978-2-88947-104-1



GCSP
Geneva Centre for
Security Policy