

## Interview with Andrew Bearpark\*

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### ***Do you see a tendency towards the increased use of private companies during armed conflict?***

Well, it's only really been since the Iraq and Afghanistan campaigns, where we have seen significant growth in the industry. Security has been so bad there that private security companies had a true role to play in order to help aid agencies and even the military to achieve tasks that could not have been done without any external support.

\* Andrew Bearpark was interviewed by Toni Pfanner (editor-in-chief of the *International Review of the Red Cross*) in London on 17 October 2006.

***In Somalia and other African countries, many security companies have been operating for decades in very precarious security situations.***

Yes, these companies have been around for ten, twenty, thirty years. But the real growth started at the end of the 1990s. By that time the international aid business, however you define it, was perceived as a neutral endeavor in which armed companies did not want to get involved. Throughout the Balkans wars the tradition was that aid workers were a specifically protected group of people. Some of them were injured and killed by landmines, but combatants rarely deliberately targeted them. At the end of the 1990s and the beginning of the 2000s, aid workers stopped being perceived as neutral and were rather seen as legitimate targets in their own right. That is why the need for protection arose. The ultimate illustration is Iraq, where aid agencies, even though purely helping the Iraqi people and without any other agenda whatsoever, became a specific target. During 2003/2004 you saw the tragic bombing of the UN, and a few weeks later you had the attack on the ICRC office and the kidnappings and murders of individual aid workers, with the tragic death of Margaret Hassan from CARE as one example. There was a total change in atmosphere – from being neutral do-gooders the aid workers had suddenly become perceived as part of the war environment, and that’s where the need for security arose.

***Despite this hostile environment, more and more humanitarian organizations are getting involved in conflict situations.***

What you observe is a change in the political dynamic. If you go all the way back to the Cold War and the 1980s, with the sole exception of the ICRC, no international humanitarian organization was present on the battlefield. They waited for the war to be over and only then moved in. Since the end of the Cold War, however, western governments have required aid agencies to be there even at time of conflict. Therefore, they do need protection from attacks.

***You were engaged with the Coalition in the reconstruction of Iraq.***

Indeed, it was the first time private security companies were used in such numbers on such a scale. You had the world’s largest-ever reconstruction program being financed with \$18.6 billion from the US taxpayers and protected by private security companies. Elsewhere in the world you may find an individual aid project being protected by a private security company, but there has never ever been anything on the scale of the Iraqi operation before.

***What are usually the main areas of operation of private security or military companies?***

Armed private actors provide an increased range of activities, from protecting buildings and installations to supporting humanitarian aid and state-building and performing purely military activities that used to be the prerogative of states alone. Besides the traditional security and risk management for other private businesses, there are three main areas of operation. The first includes protective security services, from close protection and asset protection by professionals, convoy security and evacuation planning to asset tracing and recovery, dealing with hostage crises

and pre-employment screening. Secondly, private security companies increasingly support post-conflict reconstruction efforts by giving advice and providing services for personal and site protection. They are thus trying to open business opportunities by moving into new fields such as state-building, supporting and even providing humanitarian and disaster relief, which includes logistics, communications and energy services. Finally, they carry out activities previously performed by national militaries. These range from military training to the provision of personal security for senior officials and site and convoy protection.

***The United States is at the forefront in outsourcing activities during armed conflict.***

The US military outsources vast activities to companies such as the engineering and construction company KBR (formerly Kellogg, Brown and Root), which provides housing for soldiers and constructs support facilities both in Iraq and in Afghanistan, to mention an example. That's the way in which western European militaries are now heading, but they haven't really gone so far yet. For example, the British army contracts out and privatizes activities like the static guarding of its bases, but it doesn't privatize much more than that as of now. There is, in fact, a fundamental difference in the scale and degree of use and development of private security firms. In the United States, whole parts of the war-fighting effort are contracted out to the private sector. The distinction between the ways the US and the European militaries operate is great today, but that distinction will decrease year by year. I think that in ten years the British model will come to look a lot more like the American model.

***Are there competitive advantages for security activities to be carried out by private security companies instead of armed forces of states?***

Private security companies have a number of competitive advantages. One of them is efficiency. Standing militaries have large built-in costs that cannot be avoided, whereas a private security company, because it recruits staff for a specific operation, doesn't have to pay for staff not in operation. This lowers the overall cost.

***Your association distinguishes between military activities and activities carried out by private military companies.***

In the UK, we refer to private security companies rather than private military companies. It better expresses the wide range of services companies are offering, but it also obviously has to do with cultural reservations with the term private military companies, which may imply that services at the front lines in conflicts are included.

***Traditionally, an army cook was a member of the armed forces and legally speaking a combatant. In times of war, he was a lawful target. Now the cooking is outsourced to the private sector. Doesn't this confuse the issue of direct participation in hostilities and threaten the protection of civilians?***

What we're seeing is indeed the increasing outsourcing of what you call combat support activities. It is cheaper and more cost-effective for the private sector to employ the cooks than it is for the army. They'll become a privatized part of the

armed forces of that country. In that sense it's no different from the outsourcing and privatization of state activities that have taken place more and more extensively in many European countries. In legal terms, that issue becomes more complicated. Who can then be defined as a combatant? Who is a non-combatant and who has what protection under the Geneva Conventions? This is a difficult area where even the best legal minds have not yet really achieved consensus, because the Geneva Conventions were written for traditional armed confrontations. They were written at the time of world wars, at the time of large standing armies. However, the principles they enshrined are as applicable today as they ever were. There's no problem whatsoever with the principles, but the detailed legal rules are becoming increasingly difficult to apply in this growing privatized world.

***Most of the people active in that field are former combatants. Where do your members normally recruit them? Are there specific recruitment techniques?***

Individual companies will behave in different ways, but there are a couple of straightforward principles. A British company will tend to recruit former British soldiers and combatants because they will know what training those people have had. It is a question of interoperability: they'll know that those people can work with their colleagues. Obviously, because of the long historical tradition, the UK companies will also recruit Ghurkhas. Even if a Ghurkha has been trained in the Indian army, the fighters still have strong cultural ties and similar traditions.

***Do your members enter into competition with the British army, as you may offer better salaries than the armed forces and benefit from their costly training as elite soldiers?***

The private security industry tends to require experienced people. Therefore, it is not in competition with the British army in any way for the basic level of recruits. Where the element of competition would come is if you've been in the British army for several years and you would have the choice of staying in the army for some additional years or of working for a private security company. With the tremendous increase of work in Iraq it was anticipated that there would be a major problem with the British army losing soldiers more quickly than it otherwise would. In fact, it has been a problem for only a few individual units. The turnover in the British military is such that there is a constant stream of people coming on to the job market. So if you look forward to a massive expansion of private security companies it could become a problem, but it is not so far.

***Your members recruit professional soldiers but other companies may not proceed in that way, deploying less trained and disciplined combatants.***

I don't think that is a problem for the British companies. It may be an issue in some other countries, and that's why they may require new legislation on that issue. Like I said, the British market has been able to operate successfully. It could be that there are other countries where there is an excess of undisciplined troops who may want to go into commercial work as offensive forces as well.

***Certain developing countries fear (and often use) private military actors. In the eyes of the public, their activities are often equated with those of mercenaries.***

There is an enormous degree of muddled thinking. People seem to be implying that it is in some way immoral for a private security company to make a profit. If you look at humanitarian aid, which is my background, the trekking companies that drive the food around the world, the airplanes that do the food drops in Somalia, in Sudan, wherever it may be, are all commercial entities. They're commercial airlines, they're commercial ships, they're commercial trucks, so they have to make a profit. I really don't see why suddenly people get so morally uptight about the fact that a private security company needs to make a profit. That's what businesses do. They then muddle that with a concept of "mercenary". But, in fact, that is not the case. Mercenary activity is something that has existed in the past and will continue to exist. The private security industry has to be distinguished from mercenaries. We all know what is meant by that. We think of Biafra and *coups d'états*. These are bad things, but there is no connection between mercenary activity and business activity.

***Military specialists also claim that private military companies will increasingly carry out covert operations.***

That's not an issue for the UK private industry at the moment. The UK industry is purely defensive. It is private security and it is perfectly transparent. However, that's not to say that there aren't other countries, including Western governments, who may decide that they would prefer to have some activities undertaken by private military companies rather than the armed forces. They may ask private military companies to do jobs that they don't want to do with their own militaries for reasons of secrecy or even deniability. That's not the case in the United Kingdom, but that's not to say it doesn't happen or couldn't happen.

***Every business is self-supporting and looks for new business opportunities. Is there a danger that private military companies may extend their activities both in nature and in duration, and that even the violence would be extended in order to keep the business going?***

That's the danger proper contract control must guard against. The private security company will only operate if it's being paid. Therefore, there must be a client, either a government client or a legitimately recognized client – an engineering company that is actually paying the bill. It is in the interest of that client to ensure that the private security company is not extending the contract just to make more money. It is the same with any form of contract anywhere. What you require is good contractual controls.

***Does this make war a "business"?***

Yes, you can certainly talk about business opportunities arising out of a lack of security and that's the reason why we, as the British Association of Private Security Companies, are so keen on international regulation. That's why we support the different initiatives taken by the Swiss government, the ICRC and the United Nations. Insecurity is a global business, and is being driven by different agendas in

different countries. We may feel comfortable in the United Kingdom that through our methods of self-regulation we are able to ensure that people only behave in a certain fashion. What we do in the United Kingdom doesn't necessarily have any effect on what some other countries are doing. Ultimately and ideally, it can only be international regulation that solves the issue.

***In Iraq private contractors may have interrogated detainees, contrary to humanitarian law or human rights law. Which activities would you exclude, for moral or legal reasons, from the operations of private security companies?***

Activities that we would never accept in any way are those which necessarily involve breaches of international humanitarian law, international human rights law or international law generally. We as association members have no right to interfere in the internal politics of a country. For instance, to train a group of Special Forces that would lead to a military coup in the country would be unacceptable. All activity must be legal in the country it takes place, regardless of that country's ability to actually enforce the law. In a sense the companies have to impose upon themselves a higher standard than the country they are working in can afford to do.

***States have the monopoly of violence in that they are the only ones authorized to use force. Are private security companies threatening this principle?***

States will always want to exercise that control. They don't want to give up their monopoly on violence. If states privatize the use of force, they ultimately hold the contracts and should have the adequate control mechanisms. Whether a state exercises that use of force through its own forces or through a private company is irrelevant. It is still the state exercising that force; it is still the state deciding under what circumstances force can be used.

The difficulty would come if private companies were able to do that without the cover of state authorization and guidance. Then difficulties would most definitely arise. If you look at western countries, they have strong government functions, checks and balances through democracy and through the court system to be able to cope with such a threat. A war-torn society, even though there may be a legitimate government in place wanting to exercise various controls, often doesn't have the capacity to exercise them. A classic example would be Iraq, where in theory the Coalition forces handed control back to the Iraqi people on 30 June 2004, but the Iraqi state is still incapable of actually exercising that degree of control. Private security companies, therefore, can operate in a way that is not necessarily preferred by the Iraqi government. You have no problems with a government that is strong enough to perform its functions. You do have a problem with war-torn and post-conflict societies where the government may not be strong enough to exercise its own legitimate functions, much as it would wish to.

***Might private military companies develop their own rules and become nearly as powerful as traditional military actors?***

There are some American private military companies that may be prepared to move into that area. But looking at British private security companies, the answer

is that they want to stay in the defensive area. It implies that in certain circumstances they will not want to operate at all. They cannot operate successfully unless they do so in partnership with the British military. The British military performs the offensive service, and the private security company provides the defensive service. But I don't see any tendency on the part of British companies towards a move into that offensive area.

***Nevertheless, these actors may be trapped into fighting. In Iraq, for example, private security companies had, ironically, to protect the military.***

The difference between defensive and offensive operations is absolutely clear when you start off. Defensive is not the same as offensive. When you come under attack, however, you have to defend yourself, and the way of defending yourself is indeed sometimes by becoming offensive. The practical reality on the ground determines the activity that takes place. British private security companies, all of them, will only ever wish to be involved in defensive operations. If you give them the choice they will prefer to get away from fighting, get their clients away from difficulties, not to be where combat operations are taking place. But when they come under attack, they have no choice but to defend themselves, and the Iraqi example where a British private security company was protecting the Ukrainian army against attacks is indeed an illustration of this.

***Are private companies stretching their military capacity to such an extent that it reaches far beyond what was initially foreseen? Are they acquiring a larger arsenal of weaponry for self-protection only?***

Any military would argue that offence is often the best form of defense. The private security companies don't have that luxury; they are defensive forces, so they are not fighting a war and they don't have the ability to do so. But depending on the degree of the threat, you may need bigger and better weapons for defensive purposes. If you look back to what happened in Iraq, the private security companies started off by operating with their weapons of choice, mainly hand pistols and AK-47s. The degree of threat was such, or is such, however, that many of them had to start using 50-calibre weapons. They've gone up a step, a change in terms of the size of the weapons they need to use, but those are still being used in a purely defensive role rather than an offensive role.

***Some countries have enacted legislation on private security or military companies. Others have not. The UK does not at present have any specific legislation, but a Green Paper began to be written, was stopped and now is again on the books. Are states in general enacting specific regulations to deal with private security companies?***

There is a tendency towards that, and the most recent example is the South African bill approved a couple of months ago. And you're right, the British government is still considering whether or not it will legislate itself. The problem is that the countries with the ability to legislate like the British government would be legislating events that happen overseas. This is legally a very difficult issue. Use of

force in the UK is very controlled. Even our police don't carry guns most of the time. Therefore, we have a very heavy regulatory regime covering the use of private security in the UK. However, private security companies operate in Third World countries and the question is: How easy is it for an individual country to regulate companies that primarily operate in a foreign jurisdiction? The international nature of our activities allows individual companies to relocate their business at any time to avoid constraints to their operations and to work with the least arduous regime.

***Your association is promoting a rather multi-faceted approach, including self-regulating mechanisms.***

We believe that there is no silver bullet. There is no one activity that would provide the requisite degree of control. We are in favor of a whole series of regulations and legislations at the voluntary level, at the national and international levels. We believe it's only through a combination of all of those layers that you actually get the result you want, which is to balance the provision of security services with the legitimate concerns of those affected by the delivery of those services. Self-regulation is important since it can, through a voluntary code, change behavior that cannot be changed efficiently by compulsory regulation.

***Does this mean that compulsory regulation is inadequate or difficult to achieve?***

Exactly. It is very difficult to have British legislation covering a firm based in another country and operating in a third country simply on the basis that the directors of the firm happen to be born or its direction happens to be exercised in the UK. Here self-regulation can be more efficient because the companies voluntarily submit to self-regulation. The other issue is what to do cowboys? That's what I call them. There is a limit to what we can do. We can essentially identify and stigmatize them and make it clear to the world that that's what they are. They are outlaws.

***Is that the goal of your association?***

Precisely, that is what we are trying to do. There will always be people who are prepared to break the law. No standard will eradicate this behavior entirely because by definition they don't care about regulation, they are criminals who are operating outside the law. But an aggressive self-regulation can drive up standards in the industry.

***Do you propose preventive or repressive action?***

We propagate both approaches. We already have taken the first step by introducing transparency to the industry. We created a point of contact where people can come along and say they want to expose certain abuses. Part one is transparency and providing the observers of the industry with a point at which they can complain. The second step is the idea of forming an evaluation facility ourselves, where we monitor the industry, including with on-the-spot checks.

***Will that be accepted by the companies?***

The companies are absolutely delighted to accept this.

***Is this the case because they wish to promote their image?***

By definition the bad companies don't want to join us, and the good companies that want to adhere to our association want to improve their image. The issue at the moment is simply one of funding. If the companies funded control mechanisms themselves, which they are prepared to do, nobody would trust them. People would say: "How can that be an independent verification mechanism when it's being paid for by the companies themselves. Surely they're biased." The problem is finding ways of funding an activity, whether through governments or through international mechanisms, so as not to be dependent on the companies themselves.

# The global reorganization of legitimate violence: military entrepreneurs and the private face of international humanitarian law

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## **Abstract**

*Although long hidden from the public gaze of international humanitarian law, military entrepreneurialism has played a key role in the global organization of legitimate violence. By examining historical changes in the role and legal treatment of military entrepreneurs, the author sheds light on the contemporary “resurfacing” of privately organized violence in the form of private military companies, and its broader implications for international humanitarian law.*

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## **Introduction**

There is nothing either timeless or natural about the way that violence is organized in today’s world. Yet the system of public territorial states, recognized and constituted by international law, is so central to our lived experience that it is very difficult to imagine how violence might otherwise be organized. Likewise, the law we know – a law of, within and between states – is so central to how we “imagine

the real” that we can hardly conceive of law without states.<sup>1</sup> But the global organization of legitimate violence appears to be changing. Private actors operating through global networks – whether pursuing profit or power – now rival states in their ability globally to mobilize and project violence. In some cases, these actors may attract aspects of legitimacy allowing their privately organized violence to rival or even resemble law.

Traditionally, international humanitarian law has been conceived as a system regulating violence between states and/or organized armed groups that shared many of the territorial, administrative and “public” characteristics of states. How, then, will international humanitarian law deal with this new, private face of organized violence?

In this essay I suggest that one way to answer this question is to reconsider the novelty of this “private face” of organized violence. Private entrepreneurialism, although long hidden from the public gaze of international humanitarian law, has, I suggest, long played a key role in the organization of legitimate violence. Although privately organized violence has taken many forms, in this essay I focus on military entrepreneurs – commercial organizers of military-scale violence. By examining the broad historical outlines of the changing role of military entrepreneurs, I hope to shed light on the contemporary “resurfacing” of privately organized violence, in the form of private military companies, and its broader implications for international humanitarian law.

In the first section of the paper, I briefly examine the role of military entrepreneurs in the production of a pan-European system organizing violence into public and private realms. Next, I sketch the role of military entrepreneurs in exporting this organizational system through colonialism, before turning to the reflection of this hidden, private face of organized violence in the mirror provided by the *jus in bello*. I suggest that certain changes in the *jus in bello* may reflect largely hidden shifts in the relationship between the public and private realms in international society.

This uncovering of the role of military entrepreneurs in the global organization of legitimate violence also illuminates how the conceptual foundations of international humanitarian law orient its gaze towards groups organized on territorial and hierarchical lines. In a third section, I briefly examine the challenges which the contemporary system of international humanitarian law faces, confronted by the resurfacing of legitimate violence which is deterritorialized and non-hierarchical – and thus both private and global. I characterize this as a challenge of adapting international humanitarian law to accommodate a new and more complex understanding of the relationship between public and private authority in the organization of violence – and in law. I suggest that whereas in the past it was the “private” which receded from the international gaze, in the future it may be the “public” which recedes in international practice as private authorities proliferate and compete, the “public” dissolves into the “private” and swathes of territory fall

1 The phrase is that of Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology*, Basic Books, New York, 1983, p. 187.

under private control into which humanitarian actors cannot effectively or securely penetrate. But I also suggest that it is possible to avoid this “loss of the public” by extending arrangements for the responsible provision of public goods beyond states to civil society and business. Reincorporating private entrepreneurs into arrangements for the provision of public goods is thus crucial for ensuring that the reorganization of legitimate violence does not descend into a perpetual war, a continuous, violent competition for global profits, legitimacy and rule.

A word of warning is warranted. This essay is deliberately impressionistic: I offer a sketch, a synthetic thinkpiece which deliberately strives to portray *longue durée* developments in broad brush-strokes. Like an impressionist piece, my sketch may miss some details and elide or even fail to depict others. Like an impressionist piece it seeks to provide a plausible if not always unassailable sense of the whole, rather than a meticulous inventory of the individual parts. This is an inherently risky exercise, especially in a professional journal, and one that I anticipate may attract – and perhaps warrant – considerable criticism. Nonetheless, I consider such a thought experiment inherently valuable – not so much for any sudden revelation of new historical detail or for its incremental addition to a scientific literature, but as an attempt critically to reconsider dominant conceptual paradigms (of law, humanitarianism and international society) as a whole. It is only by occasionally stepping back – even to a distance at which important details may become indistinct – that we can begin to recognize deeper patterns in the details among which we normally move, and find ways to “reimagine the real”.

## Military entrepreneurs and the state system

Military entrepreneurs pose deep challenges to the way in which we understand and conceive “law”. Conditioned by our socialization in the state system, we (by which I mean those of us born in, inhabiting, educated in or otherwise acculturated to industrialized countries, who I take to be the primary readership of this *Review*) can struggle mentally to accommodate systems of violence and legitimacy organized beyond the state. Military entrepreneurs have posed a particular challenge in conceptualizing “law”, because like the brigands and highwaymen who have troubled legal positivists from Aquinas to H. L. A. Hart to Hans Kelsen, they might – at least in theory – impose a monopoly of violence which rivals or even supplants that of the state, but which seems to lack its legitimacy. Are the edicts of such a non-state monopolist of violence, if effective in producing obedience by its subjects, law? Additionally, military entrepreneurs pose a strategic and practical problem in defending “law”, because where state authority is weak such theoretical similarity can quickly translate into practical usurpation. This was the case when Machiavelli warned his Prince of the dangers of the treachery of – or even usurpation by – *condottieri* in early modern Italy,<sup>2</sup> and

2 Niccolò Machiavelli, *The Chief Works and Others*, trans. Allan H. Gilbert, Duke University Press, Durham, N.C., 1965, Ch. XII.

remains the case in many parts of the world today where state authority is dependent on protection by and from private military companies, warlords and predatory criminal networks.

The distinction between military entrepreneurs and sovereign states can be understood in part as a distinction between the private, commercial nature of the violence military entrepreneurs organize, and the public nature of the coercive force of the state. It is public legitimacy (both local and systemic) that transforms private control of a defined territory into state sovereignty.<sup>3</sup> Because the line between private influence and public authority is fine and elusive, much ink has been spilt in trying to trace it. But in focusing on the conceptual boundary separating public and private, we risk losing sight of how the private and the public are linked and, in particular, how private social activity generates and sustains the public state. This oversight is particularly deeply institutionalized in the field of international law, with its rigid differentiation of the international (the inter-sovereign public) and the national (the private realm of the sovereign), the political (public) and the commercial, religious and familial (private). This conceptual bifurcation is replicated in the international regulation of violence, through distinctions between commerce and war and between non-international and international armed conflict. As a result, in our accounts of the organization of violence, we easily lose sight of how privately organized violence has helped to produce and support the “public”-based organization of legitimate violence constituted by the state system. So obscured have the deep connections between social organization and public institutions become that when, now, we are confronted by a phenomenon – private military companies – which seems to straddle the public and the private, the military and the commercial, we struggle to find a place for it within our conceptual maps and institutional practices, instead suggesting that it must fall within some “vacuum”.<sup>4</sup>

In this section I attempt to begin to correct this oversight by uncovering some of these hidden connections. I commence with an examination of the role of military entrepreneurs in the birth of the public state in early modern Europe, and then move to look at military entrepreneurs’ role in the export of this organizational and regulatory system around the world.

### Military entrepreneurs as catalysts for the emerging public/private distinction

Private, commercial organizers of violence played a key role in the generation of state sovereignty, and its legalization, in early modern Europe. Commercially organized violence was, in many ways, the midwife to publicly organized law, catalyzing the precipitation of public institutions out of the private mix of feudal,

3 Cf. Max Weber, “Politik als Beruf” (Politics as a vocation), repr. in H. H. Gerth and C. Wright Mills (eds.), *From Max Weber: Essays in Sociology*, Oxford University Press, New York, 1958, p. 78.

4 See, e.g., Peter W. Singer, “War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law”, *Columbia Journal of Trans-national Law* (Spring 2004).

religious, kinship and other social arrangements, and the emergence of a continent-wide constitutional settlement balancing private influence and public authority.

One historical explanation of the emergence of the state describes the centralization of economic power in the hands of a few feudal lords, transforming their relational, land-based entitlement to their tenants' and vassals' labour (whether in combat or in productive industry) into contractual employment relations based on a monetized economy underpinned by universally enforceable private property and a mobile wage-labour force.<sup>5</sup> As this "modern" arrangement emerged, entitlements to organize and regulate violence were surrendered increasingly to centralized authorities – territorial states in most places, but also associations of merchants and townsfolk in some places – who could enforce these arrangements and guarantee property rights.<sup>6</sup> In return, noblemen, the emerging merchant class and other lower social strata received greater commercial, religious and personal freedom. Society transformed from a heteronomous system of overlapping status groups and authority systems into two increasingly distinct realms, one commercial, familial (and to an extent religious) and "private", and one political and "public". It was the public realm which was exposed to the gaze of the state – and other states – while the private realm was increasingly hidden from this gaze.

This precipitation of the public did not occur all at once, and private military entrepreneurs in fact played a key role in catalyzing the process by facilitating the centralization of political and legal authority which underpinned emerging legal technologies and systems necessary to sustain new forms of commerce. All of the different social actors in pre-modern European society – lords, vassals, serfs, tenants, merchants, emerging burghers and townsfolk – existed in translocal social networks. These social networks and status groups took a number of forms: personal tributary relationships, commercial associations and trading networks, and the continental spiritual hierarchy of the Roman Catholic Church. But during the twelfth and thirteenth centuries two major legal reform processes set in train a slow transformation of this plural system of rule, authority and influence, providing the basis for land-rich feudal lords to work with merchants and military entrepreneurs to consolidate their power.

### *Commercial interests*

First, commercial interests – particularly in Italian trading centres, but gradually throughout Europe – promoted the revival and adaptation of Roman law. This

5 See Michael Mann, *The Sources of Social Power: Volume 1, A History of Power from the Beginning to 1760 A.D.*, Cambridge University Press, Cambridge and New York, 1986, pp. 410–11; Karl Marx, *Capital*, New World Paperbacks, London, 1972, vol. III, pp. 860–1; M. Dobb, "A reply. From feudalism to capitalism", in R. Hilton (ed.), *The transition from Feudalism to Capitalism*, New Left Books, London, 1976, pp. 57–97.

6 Mann, above note 5, pp. 420–1; Anthony Giddens, *The Nation-State and Violence. Volume Two of A Contemporary Critique of Historical Materialism*, Polity Press, Cambridge, 1985, p. 100.

significantly facilitated translocal commerce by standardizing contractual relations, adjudication and remedies, simplifying the convertibility of private property throughout Europe.<sup>7</sup> Roman law's textuality allowed continent-wide commerce to overcome the orality of many indigenous traditions, facilitating the transmission of economic value across space, independent of trust and status group relations. The advent of paper (considerably cheaper than parchment) and, later, printing enhanced this legal deterritorialization further, improving the speed of communication of judicial decisions and legal codes and the development of decentralized administrative surveillance through written reporting to superiors located elsewhere.<sup>8</sup> As Roman law was "recovered", it was simultaneously adapted and combined with indigenous forms of law; the rise of trans-continental trading networks even fostered cross-fertilization with legal systems outside Europe, particularly Arabic law.<sup>9</sup> In this way, local communities were slowly connected into an expanding legal web, producing a deepening continental market.

This system bracketed political and military questions off from commerce – whereas in the feudal system they had been inherently intertwined through relations of fealty. The spread of these legal technologies reduced commercial risk and transaction costs, providing entrepreneurs access to deeper pools of finance and other production inputs – including emerging wage labour forces. In these ways, the re-emergence of Roman law across Europe facilitated the emergence of mobile capital and other production inputs and assisted the development of continental commercial networks, collapsing the time in which finance, labour and *matériel* – and thus organized violence – could be mobilized, and enlarging the territory over which military power could effectively be projected by entrepreneurial noblemen, towns and groups.

### *Legal and administrative practices*

At the same time, secular political authorities were slowly adopting rationalized legal and administrative organizational practices first developed in the Church through Gregorian reforms.<sup>10</sup> This particularly transformed their ability to tax populations, allowing them to develop the infrastructure sought by town merchants: the policing of traffic and borders, a reliable coinage and measurement system, and the enforcement of market transactions.<sup>11</sup> The city-state's role in enforcing private title, and in providing judicial and other forms of administrative

7 Perry Anderson, *Lineages of the Absolutist State*, Humanities Press, Atlantic Highlands, N.J., 1974, pp. 24–9; P. Vinogradoff, *Roman Law in Medieval Europe*, Clarendon, Oxford, 1929.

8 M. H. Mills and C. H. Jenkinson, "Rolls from a sheriff's office of the fourteenth century", *English Historical Review* (1928), p. 43; Giddens, above note 6, p. 179.

9 Giddens, above note 6, pp. 99–100, 150.

10 Harold Berman, *Law and Revolution in the Formation of the Western Legal Tradition*, Cambridge, Mass., Harvard University Press, 1983, p. 276; Wolfram Fischer and Peter Lundgren, "The Recruitment and Training of Administrative and Technical Personnel", in Charles Tilly (ed.), *The Formation of National States in Western Europe*, Princeton University Press, Princeton, N.J., 1975, pp. 456–561, 471, 475–80.

11 Gianfranco Poggi, *The Development of the Modern State: A Sociological Introduction*, Stanford University Press, Stanford, 1978, p. 42.

infrastructure, thus became central to the emerging capitalist economy.<sup>12</sup> Administratively centralized towns allied with emerging capital to regulate violence, separating the public from the private, the political from the economic. There were both winners and losers in this separation of economic value from political allegiance; it represented a profound epistemological shift.<sup>13</sup> The social underpinnings of legitimacy and their superstructural manifestations in law were radically reoriented; the very concepts of “proof” and “truth” shifted,<sup>14</sup> with faith-based proof through combat being overtaken by rationalist mechanisms such as written evidence and oral testimony.<sup>15</sup> The immanent, rational, human state began to replace transcendent divinity and social loyalty as the sources of normative authority and rule. These profound social shifts did not go without resistance, provoking a number of popular rebellions.<sup>16</sup>

### *Military entrepreneurs*

Simultaneously, these shifts offered military entrepreneurs an opportunity: to use the emerging European commercial system to develop for-hire military capacity available to cities, noblemen and other clients throughout the continent to conduct hostile takeovers of their rivals or to pacify their urban hinterlands. This was essentially the deal that produced the German *Landsknechte*, the Swiss *Reisläufer*, the Italian *condottieri* and the English mercenaries – although the structures of co-operation between public authorities and military entrepreneurs differed somewhat from case to case, depending in part on the bargaining power between those who controlled the capital and those who controlled the coercion.<sup>17</sup> Military entrepreneurs’ bargaining power was weakest in what Charles Tilly identifies as “coercion intensive states” such as Brandenburg and Russia, heavily reliant on direct coercive extraction of funds from civil society; it was moderate in Tilly’s “intermediate capitalized-coercion” states, such as England and France, where states sought to integrate private capitalists into state structures, but could not adopt a baldly coercive approach; and it was greatest in the “capital intensive” states such as Italy and the Netherlands, where states partnered with private financiers.<sup>18</sup> Some states became increasingly dependent on the taxation of strong capitalist groups, which in turn developed an interest in the demand supplied by

12 Mann, above note 5, pp. 422–3, 431–2.

13 Georges Duby, *The Early Growth of the European Economy: Warriors and Peasants from the Seventh to the Twelfth Centuries*, trans. Howard Clarke, Cornell University Press, Ithaca, 1978, p. 261; Henri Pirenne, *Medieval Cities: Their Origins and the Revival of Trade*, Princeton University Press, Princeton, N.J., 1952, p. 118.

14 Hendrik Spruyt, *The Sovereign State and its Competitors*, Princeton University Press, Princeton, N.J., 1994, p. 103.

15 For a different perspective on the relationship between trial by court and by combat, see Evgeny Pashukanis, *Law and Marxism: A General Theory*, trans. B. Einhorn, intro. and ed. C. Arthur, Ink Links, London, 1978, p. 118.

16 See Charles Tilly, *Capital, Coercion and European States, AD 990–1990*, Blackwell Publishers, Malden, Mass., 1990, pp. 100–2.

17 Tilly, above note 16.

18 *Ibid.*, p. 30.

state war-making activities,<sup>19</sup> producing what one writer has labelled a “military-commercial complex” (with deliberate reference to President Eisenhower’s warning on leaving office in 1961 of the dangers of an emerging military-industrial complex in the United States of America).<sup>20</sup> Along the trading corridor of the Rhine the bargaining power of merchant classes may in fact have been so high that centralized states were *unable* to develop, until the territorial states which had developed outside that trading corridor in neighbouring France and Prussia encroached.<sup>21</sup> The parallel with contemporary corridors, such as the west African hinterland and the eastern Democratic Republic of Congo, where responsible states are weak and military entrepreneurs numerous and powerful, is unmistakable.

### *Reinforcement of state monopoly on violence*

What was common to the various modes of state development in early modern Europe, though, was that all essentially involved an underlying competition between states and military entrepreneurs to form “protection bargains” with merchants and emerging capitalists, even though in some cases states and military entrepreneurs formed strategic alliances which obscured that competition.<sup>22</sup> States were prepared to accommodate mercenarism because mercenaries provided a cost-effective means for states to defend their monopoly on legitimate violence from other states and internal rivals – just as private military companies do for weak states today. At the same time, the mercenary trade reinforced states’ monopolies in a number of ways: the requirement to raise funds to pay mercenaries forced states to find ways to increase taxation and penetrate their own societies. Over time, this improved states’ positions in their own constitutional settlements with internal, “private” rivals. The most famous evidence of this dynamic is the settlement in clause 50 of Magna Carta, under which the English crown agreed to give up its use of mercenaries against English nobles, while they in turn recognized the central authority of the state and its entitlement to ensure collective protection from external threats.<sup>23</sup>

Yet mercenaries represented a constant risk to states, especially if they developed territorial ambitions of their own. Some small states avoided that risk

19 Mann, above note 5, pp. 431–2.

20 Samuel E. Finer, “State- and Nation-Building in Europe: The Role of the Military” in Tilly, above note 16, p. 115. See Farewell Address by President Dwight D. Eisenhower, 17 January 1961; Final TV Talk 1/17/61 (1), Box 38, Speech Series, Papers of Dwight D. Eisenhower as President, 1953–61, Eisenhower Library; National Archives and Records Administration.

21 See Stein Rokkan, “Dimensions of State Formation and Nation-Building: A Possible Paradigm for Research on Variations within Europe”, in Tilly, above note 16, pp. 562–600.

22 The term is that of Spruyt, above note 14, pp. 84–6; see also Michael Mann, “The Autonomous Power of the State: its Origins, Mechanisms and Result”, in Michael Mann, *States, War and Capitalism: Studies in Political Sociology*, Basil Blackwell, Oxford and New York, 1988, p. 27. For an analysis of protection bargains in contemporary state-formation, see Vadim Volkov, *Violent Entrepreneurs: The Use of Force in the Making of Russian Capitalism*, Cornell University Press, Ithaca, 2002.

23 Mann, above note 5, p. 431.

by turning themselves over to act as bases for mercenary activity and sources of mercenary manpower, in effect corporatizing the state. But, over time, mercenarism slowly receded under a combination of two pressures: state pressure, as states sought more systematically to ensure that mercenary groups did not become rivals to their own power; and the advent of firearms and disciplined military training, which favoured territorialized armed forces over itinerant mercenaries because of territorial forces' ability to raise funds to sink into the construction of defensive installations and into peacetime training, and because of their possession of land into which (literally) to sink those costs.<sup>24</sup> The cost structures of war-making increasingly favoured states over private entrepreneurs, allowing them to attract the best professionals, so that, as Hintze put it, "colonels ceased being private military entrepreneurs, and became servants of the state".<sup>25</sup>

Perhaps equally significantly, nascent public rulers' control of a fixed territory and development of hierarchical administrative machinery allowed them to offer a range of public infrastructures to commercial clients which military entrepreneurs could not.<sup>26</sup> These infrastructures were institutionalized as the state and its system of public rule: law. As Michel Foucault put it,

Law was not simply a weapon skilfully wielded by monarchs: it was the monarchic system's mode of manifestation and the form of its acceptability. In Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law ... . [This was a] juridical monarchy.<sup>27</sup>

The concepts and practices of law thus became ineluctably intertwined with the concept of the public, as the great Marxist theorist of law, Evgeny Pashukanis, understood:

[T]hanks to its new role as a guarantor of the peace indispensable to the exchange transaction, feudal authority took on a hue which had hitherto been alien to it: it went public.<sup>28</sup>

## Military entrepreneurs and the global export of the public/private distinction

Commercial security providers were not only key in spreading this public/private distinction across Europe, but also in exporting it around the world. While mercenarism receded in Europe as states entrenched their territorial monopolies on legitimate violence, military entrepreneurialism played a key role in colonialism

24 Tilly, above note 16, pp. 83–4; Herfried Münkler, "The wars of the 21st century", *International Review of the Red Cross*, Vol. 85, No. 849 (March 2003), p. 14.

25 Otto Hintze, in F. Gilbert (ed.), *The Historical Essays of Otto Hintze*, Oxford University Press, New York, 1975, p. 200.

26 Cf. Giddens, above note 6, pp. 151–2.

27 Michel Foucault, *History of Sexuality Volume 1: An Introduction*, ed. Robert Hurley, Penguin, Harmondsworth, 1978, pp. 87, 89.

28 Pashukanis, above note 15, p. 136. Cf. Spruyt, above note 14, p. 165.

and the extra-European projection of – and competition between holders of – state power.

### *The emergence of trans-national commercial law*

The emergence of the legal state created a separation between a legal public, regulating politics through a monopoly on legitimate violence, and private law, in which the state protected commercial, familial and religious orders while exercising only limited normative authority within those realms. The private law which ordered domestic and commercial affairs was dependent on the state for the administrative technologies and practices which gave it life, including the enforcement of property rights and contracts, and the creation of protected spaces available for the free practice of one's religion and exercise of familial authority. States were able to provide that public legal infrastructure, partly due to their alliance with a trans-national merchant class; in part, the protection of European commercial activities was not in fact the province of any one state, but a common activity of all states. The result was the emergence of a trans-national commercial law:

[T]he historical rise of the sovereign state is thus one aspect of a comprehensive reorganization of the forms of social power. The change that it works in the form and content of the international society is no less startling. For under this new arrangement, while relations of citizenship and jurisdiction define state borders, any aspects of social life which are mediated by relations of exchange in principle no longer receive a political definition (though they are still overseen by the state in various ways) and hence may extend across these borders.<sup>29</sup>

Here were the first outlines of the split, by now so axiomatic, of “international law” into two branches: public international law, dealing with the relations between public entities, and private international law, dealing with trans-national exchange relations. Yet this did not mean that private commercial relations, and private international law, were unrelated to the state:

Transnational elements of the early medieval economy had depended on Christian normative regulation. As the economy became more extensive, it depended more on alliance with the state.<sup>30</sup>

By the time of the discovery of the Americas, the major Atlantic European states had developed sufficient administrative machinery to allow them to act as what Michael Mann describes as “monopoly licensers of international trade”.<sup>31</sup> As he explains, the result was that “international trade would not necessarily reduce the economic salience of national states”.<sup>32</sup> If anything, the discovery of the New

29 Justin Rosenberg, *The Empire of Civil Society: A Critique of the Realist Theory of International Relations*, Verso, London, 1994, p. 129.

30 Mann, above note 5, p. 473.

31 *Ibid.*, p. 472.

32 *Ibid.*

World and the opening of maritime routes to Asia in fact increased the reliance of private capitalists on states, because they required access to large-scale organized violence and state-controlled military technologies and access to the shared regulatory framework offered by international law in order to reduce the commercial risks of undertaking foreign commercial expeditions:

Trade also depended on state regulation. Expansion onto other continents enhanced the state-boundedness of capitalist developments. No prior regulation of international relations among European powers, and between them and other powers, existed there ... The expansion out of Europe thrust trade and warfare, merchants and the military arm of the state, even closer together.<sup>33</sup>

### *Shaping public international law*

Thus while imperialism was theorized and justified as an affair of state – a political, military affair – it was financed and organized through private capital, licensed and chartered by the state in forms such as the Dutch and British East India Companies. A vivid account of the varying forms this alliance took has been provided by Janice Thomson, in her exceptional volume *Mercenaries, Pirates and Sovereigns*.<sup>34</sup> Thomson's account demonstrates how states tolerated and engaged mercenaries and other military entrepreneurs, harnessing them to consolidate, protect and project their own monopolies on legitimate violence. These military entrepreneurs in turn continued to play a role in the development of the international legal system – although it was now hidden from formal theorizing, with debates being framed in terms of national interest and *raison d'état*. Commercial interests played a significant influencing role in shaping public international law. The most famous case is that of Hugo Grotius, commissioned by the Dutch East India Company to advocate interstate legal rules – the freedom of the seas – which served Dutch merchants' and the Dutch state's strategic interests by contesting the monopoly on Asiatic trade claimed by the Portuguese.<sup>35</sup> In a less well-known case, the English crown cut off trading privileges to the Hanseatic League – a territorially discontinuous trading and political alliance of merchant towns across northern Europe – because the League's inability effectively to enforce compliance with its international obligations by its members was creating significant costs for the English Merchant Adventurers association – and, they argued, reducing English taxation revenues. Other states quickly followed suit

33 Ibid., p. 473.

34 Janice Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe*, Princeton University Press, Princeton, N.J., 1994; see also Janice Thomson, "Sovereignty in Historical Perspective: The Evolution of State Control over Extraterritorial Violence", in James Caporoso (ed.), *The Elusive State*, Sage Press, New York, 1989, pp. 227–54; Janice Thomson, "State Practices, International Norms, and the Decline of Mercenarism", 24 *International Studies Quarterly* (1990), pp. 23–48.

35 C. van Vollenhoven, *The Framework of Grotius' Book De Iure Belli ac Pacis*, Noord-Hollandsche uitgeverijmaatschappij, Amsterdam, 1932, p. 103.

under similar pressure from their own domestic commercial lobbies, leading to a pattern of circumvention of the League as states dealt directly with League members. When it came to the negotiations at Osnabrück and Münster which ultimately produced the Peace of Westphalia, the European states denied the Hanseatic League legal standing to be represented at the conferences. Twenty years later the Hansa dissolved itself.<sup>36</sup>

The significance of these anecdotes is not only that they reveal the subterranean influence of commercial interests on the formation of basic aspects of public international law – such as international legal personality, in the case of the Hansa, or freedom of the seas, in Grotius’s case – but also the direction of this revealed influence. In both these cases domestic commercial interests sought to organize international spaces in a way that left private commerce relatively free from foreign state intrusion, but at liberty to organize violence through a partnership with states. They sought, in other words, to work through their home state to shape international legal rules in a manner that reproduced the public/private distinction at the global level, masking the role that private actors played in organizing “public” violence. With the private face of organized violence thus legitimized and hidden by emerging public international law, states and capitalists were free to work with military entrepreneurs to expand their power globally.

### *State organization*

One result of this exporting of the public/private distinction was that the conceptual foundations of international law increasingly oriented its gaze towards “public” organizations that resembled states, specifically sharing states’ territoriality and administrative hierarchy.<sup>37</sup> Organizations that could not offer global commerce the same administrative effectiveness as the territorial, hierarchical organization of the state, such as the Hanseatic League – or city states such as Venice and Hamburg, and archipelagic states such as the Duchy of Burgundy – were slowly excluded from the system.

This pattern of exclusion was not confined to Europe: in their colonial enterprises the manner in which European states tended to deal with the indigenous groups they encountered depended in large part on the territorialization and hierarchy of those groups. Those with a monopolistic control of a fixed territory, enforced through hierarchical political authority, were often recognized as formally sovereign and were treated with, as occurred throughout north America and in many parts of Asia and the Pacific. Often, however, in pursuit of equal treatment and through engaging with the rules of international law, these indigenous groups were forced to transform their own systems of social rule to

<sup>36</sup> Spruyt, above note 14, pp. 170–1.

<sup>37</sup> This orientation is ultimately and most clearly reflected in Article 1 of the Montevideo Convention on the Rights and Duties of States, signed on December 26, 1933, which states, “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”

resemble public, legal states on the European model, by more precisely defining the limits of their territorial jurisdiction and by establishing complex, hierarchical administrative bureaucracies – as did Siam, China and the Ottoman Empire.<sup>38</sup> But where colonial states encountered social groups whose social systems were not based on territorialization and hierarchy – and who could not or would not transform their systems of rule to operate on such bases – equal treaties did not follow. Instead, the European states, unable to identify any “public” entity with which to engage in international relations, either treated such territories as *terra nullius* (the territory of no one) and therefore open to colonization and settlement, as occurred in Australia,<sup>39</sup> or delegated responsibility for the pacification, administration and commercial exploitation of the territory to commercial agents (usually chartered companies, such as the British South Africa Company), thus confining the organization of violence within the territory to the “private” realm. Particularly in Africa, European states saw this as a means to balance the costs and benefits of establishing their own territorial and administrative control in foreign lands, while their commercial, military entrepreneur agents benefited from the “privatization” of governmental power through reduced accountability and increased administrative discretion.<sup>40</sup>

Whereas towns and nascent states in early modern Europe worked with military entrepreneurs to establish the monopoly control which allowed them to develop the legal and administrative infrastructure needed to attract and tax commercial flows, states were now working with military entrepreneurs to project power extra-territorially, reaping the benefits of commercial flows projected into these new spaces, but without offering the public benefits of law to local populations. Military entrepreneurs thus facilitated the export of the public/private distinction, but in ways that benefited private commerce and often disadvantaged local populations by exposing them to unaccountable organized violence. So well-masked was this privatized violence that Europeans could, as Lord Lugard put it, “persuade themselves that the omelette had been made without breaking any eggs”.<sup>41</sup>

### *Domestication of private military entrepreneurs*

But just as the power of military entrepreneurs in Europe declined relative to that of the states they had helped to form, so the power balance between military entrepreneurs and states in also shifted in the global projection of military power.

38 Richard S. Horowitz has demonstrated the role that treaties of friendship and commerce played in transforming the internal rule structures of Siam, China and the Ottoman Empire in “International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century”, *Journal of World History*, vol. 15, no. 4 (December 2004).

39 See Stuart Banner, “Why *Terra Nullius*? Anthropology and Property Law in Early Australia”, *23(1) Law and History Review*, vol. 23, no. 1 (2005), p. 95.

40 See, e.g., Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control*, Princeton University Press, Princeton, 2000, pp. 61–80.

41 Lord Lugard, *The Dual Mandate in British Tropical Africa*, 5th edn, Frank Cass and Co., London, 1965, p. 15.

As the twentieth century progressed and the sunk costs of military technology once again rose, states took over the global projection of military power from military entrepreneurs, as they had earlier taken over the projection of military power within their own borders. The alliance between states and capital continued to operate through the technologies of international law and international organization, as Anthony Anghie has demonstrated in his account of how the Mandate system of the League of Nations introduced administrative technologies and governmental practices into Mandate territories, preparing them for penetration by global commerce.<sup>42</sup> Military entrepreneurs dropped out of this picture, relegated to the margins, to the domestic weapons factories and commercial supply lines of large, globally mobile national armed forces – but no longer mounting their own expeditions. Increasingly, military entrepreneurs were viewed as frightful anomalies (*les affreux*) in international society, which was increasingly conceived as a purely interstate system. The private face of the organization of legitimate violence was increasingly domesticated, in every sense of the word. As had occurred in Europe, military entrepreneurs had now assisted states to expand their power to such a degree that their own role in the organization and execution of legitimate violence was not simply obscured but jeopardized. Only with the privatization (both intentional and unintentional) of governmental functions in the late twentieth century would that role once again begin to expand.

### Military entrepreneurs and the development of the *jus in bello*

The changing role of military entrepreneurs in the global organization of legitimate violence has been reflected in shifts in the international law governing the conduct of hostilities – the *jus in bello*. In this section I suggest that states appear to have found ways of absorbing the impact of commercially organized violence into their inter-public liability and responsibility systems, while leaving each other room to work with military entrepreneurs, so long as those partnerships do not challenge systemic interests. By tracing the trajectory of the development of these rules we may, therefore, be able to trace changing conceptions of these systemic interests. That, in turn, may offer a window onto the gradual reorganization not only of violence but legitimacy, within international society, allowing us to trace shifts in the balance between private and public authority in international society.

### *The limits of permitted military entrepreneurialism*

States have used international law to limit, control and co-opt – but not eradicate – military entrepreneurialism, subordinating it to and aligning it with the state

42 Anthony Anghie, “Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations”, *New York University Journal of International Law and Politics*, vol. 24 (2002), p. 513; see also Anthony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law”, in *Harvard Journal of International Law*, vol. 40 (1999), pp. 1–81.

system. The international legal system has traditionally left the means of organizing violence within the state largely to states to decide for themselves, permitting them to purchase military power from commercial entrepreneurs. However, over time, rules have developed, often in response to social and technological change, attributing liability to states in certain cases for the acts of private groups with which they are associated, to ensure that private actors cannot destabilize or even unravel the state system. As technology has changed, allowing private agents to project violence with increased ease from a state's territory, states have agreed more restrictive interstate liability rules (moving from a weaker position on attribution of responsibility to more intrusive due diligence and effective control requirements). Yet states have never chosen to outlaw commercial military activity per se as they have chosen to outlaw some other types of privately organized violence (such as piracy and certain types of terrorism). Instead, they have bargained to a complex set of voluntary norms ensuring that military entrepreneurs do not escape control by the state system as a whole.

Because no state was able to exercise effective monopoly control over the high seas, one of the earliest sets of international rules affecting military entrepreneurialism emerged there. Janice Thomson has described how sovereign states at first tolerated private entrepreneurs using violence to turn a profit on the high seas, so long as they did not threaten states' own interests, including in stable trade; where they did, they were declared "pirates", subjected to universal state jurisdiction, *hostes humani generis*. But the rule against piracy was originally only intermittently applied, and states were often happy simply to participate in naval protection rackets, for example through the tributes paid to the Barbary pirate states – a practice ended only by the first American Marine expedition in the early 1800s.<sup>43</sup> However, as states became more dependent on maritime trade, particularly as they moved to colonial political economies, their hostility to piracy grew, and the rule against piracy was enforced with increasing alacrity.

### *Maritime neutrality*

In some cases, however, states nationalized high seas entrepreneurialism by commissioning private actors (even former pirates) as "privateers". This had not only individual but also systemic benefits, since it facilitated other states' identification of a peer state from whom the costs of unlawful privateering activity could be recovered, creating greater transparency and promoting state control of private agents operating from their territories. But it also risked unravelling international trade by turning it into a violent mercantilist competition for national domination of global markets. States' interest in

43 See, e.g., US–Tunisia, Treaty of Peace and Friendship, August 28, 1797, printed in Hunter Miller (ed.), *Treaties and Other International Acts of the United States of America*, vol. 2, Government Printing Office, Washington, D.C., 1931.

maintaining international trade led, therefore, to a complex legal system protecting the concept and practices of maritime neutrality, separating “neutral” commerce on the high seas from “political” warfare. Commercial interests relied on states to provide them with a framework of law within which they could operate as they conveyed goods by sea, and to protect their property from predatory sovereigns and private military entrepreneurs such as pirates. Out of this grew a complex legal regime governing maritime neutrality, co-ordinating the interests of states and capitalists through such doctrines and legal technologies as stop-and-search, character of the cargo, continuous-voyage doctrine and embargo. This system encouraged states to enforce common rules regulating organized violence directed against trade by creating mechanisms for recognizing actual and constructing putative hierarchical relations between maritime actors and territorial states. These rules depended on and moved with the changing character of trade and warfare – and particularly the changing administrative and technological capacities of states effectively to police maritime commerce.<sup>44</sup> The trajectory of the development of maritime neutrality law thus served as an artefact of the shifting boundaries between private commerce and public warfare and law enforcement on the oceans.

### *Terrestrial neutrality*

By the end of the nineteenth century a similar need had emerged for a regime to prevent trans-boundary military entrepreneurs from dragging neutral states into conflict through their terrestrial activities. A range of precedents and doctrines emerged, creating attributed state liability and due diligence obligations, incentivizing action by states to control private military entrepreneurs to protect the stability of the state system, though that control might fall short of eradication.<sup>45</sup> In 1907, for example, European colonial powers rejected a German proposal for a total ban on the service of foreigners in national militaries (i.e. a ban on a global military labour market), and instead opted merely to require neutral states to prevent commercial recruiting on their territory. This left commercial recruiters free to operate within belligerent states, or within the overseas territories of European empires, corraling the global military labour market within conflict zones to avoid spillover into neutral states.<sup>46</sup>

As national armed forces grew through the first half of the twentieth century, states worked with domestic and foreign industry to underwrite and organize weapons production and, on the battlefield, logistics support – a role which was validated when the 1949 Geneva Conventions afforded military

44 See James Cockayne, “Stephen C. Neff, *The Rights and Duties of Neutrals: A General History* (Book Review)”, *Leiden Journal of International Law*, vol. 17, no. 1 (2004), pp. 203–10.

45 See generally Montgomery Sapone, “Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence”, *California Western International Law Journal*, vol. 1 (Fall 1999), pp. 32–33.

46 Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention No. V), 18 October 1907, 36 Stat. 2310–31; 1 Bevans 654–68, Art. 4.

contractors prisoner-of-war status, but only if they possessed a state-supplied identification card.<sup>47</sup> Military entrepreneurialism was once again permitted – as long as it was state-controlled.

### *Decolonization*

In the 1960s the private face of organized violence began to resurface. As colonial states pulled back their administrative apparatus from former colonies, the private, social violence underneath, which had been obscured by the veil of state sanction from the gaze of international law – and to an extent, of international society – became more clearly discernable. In 1961 the Belgian government chose not to enforce Belgian laws against mercenary recruiting (required by the 1907 Hague Convention discussed above), but to allow Belgian corporations to back an attempted secession by Katanga, a mineral-rich Congolese province, from newly independent Congo. This revealed the exploitative nature of Belgian commercial interests in Congo, and mercenaries and other entrepreneurs figured prominently in the military confrontation which ensued, as well as in a number of subsequent postcolonial confrontations on the continent. Just like their European forebears half a millennium earlier, cash-rich but coercion-poor African elites saw hiring military entrepreneurs as a means to gain, consolidate and hold power.

The similarities did not end there. Just as nascent European states had earlier turned to law to ensure that the military entrepreneurialism they were stoking did not ultimately undermine their own power, so newly decolonized states turned to law to limit the legitimacy of contemporary military entrepreneurialism. Newly decolonized states quickly took action on the issue in the General Assembly<sup>48</sup> and Security Council of the United

47 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted 12 August 1949, 75 UNTS 31, Art. 13(4) (applying the Convention to supply contractors and members of labour units); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted 12 August 1949, 75 UNTS 85, Art. 13(4); Geneva Convention (III) relative to the Treatment of Prisoners of War, adopted 12 August 1949, 75 UNTS 135, Art. 4(4) (granting certain contractors PoW status).

48 See the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, GA Res. 2131, UN GAOR, 20th Sess., Supp. No. 14, p. 11, UN Doc. A/6014 (1965); GA Res. 2465, UN GAOR, 23d Sess., Supp. No. 18, p. 4, UN Doc. A/7218 (1968), para. 8 (“the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act”, calling on Governments to outlaw mercenarism through national legislation); Principles of International Law Concerning Friendly Relations and Cooperation Among States, GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, p. 123, UN Doc. A/8028 (1970) (“every state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State”; characterized by the ICJ as reflecting customary international law in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 ICJ 14, pp. 187–92 (June 27) (Merits)); Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, GA Res. 3103, UN GAOR, 28th Sess., Supp. No. 30, p. 142, UN Doc. A/9030 (1973), par. 5 (“The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of Colonialism and alien domination is considered to be a criminal act and these mercenaries should accordingly be punished as criminals”); GA Res. 51, UN GAOR, 44th Sess., 78th mtg., UN Doc. A/RES/44/51 (1989) (referring to the 1988 attempted invasion of Maldives); GA

Nations,<sup>49</sup> the Organization for African Unity<sup>50</sup> and other multilateral treaty-negotiating forums,<sup>51</sup> developing norms criminalizing certain forms of military entrepreneurialism – specifically, military entrepreneurialism directed against them. But at the same time these states ensured that they retained a free hand to use military entrepreneurs to consolidate their own hold on power, against rebel movements or to promote self-determination and decolonization. Here were the outlines within the *jus in bello* of a subtle shift in the treatment of privately organized violence, narrowing the private freedoms offered to military entrepreneurs to ensure they did not work against the global public interest of self-determination.

### *A space for contemporary entrepreneurialism*

Nevertheless, the *jus in bello* allowed military entrepreneurs considerable space to harness emerging global communications and transport advances and the increased availability of experienced personnel and weaponry after the end of the Cold War, under a corporate veil. In the late 1980s and 1990s entrepreneurial networks developed, linking current and former government and military officials and commercial speculators to take advantage of these business opportunities, often operating through corporate nodes – today’s private military companies. Most of the commercial military activity which these companies undertake falls well within what is permitted by the *jus in bello*.<sup>52</sup> States and commercial suppliers

Res. 31, UN GAOR, 49th Sess., 83rd mtg., UN Doc. A/Res/49/31 (1995) (emphasizing the vulnerability of small states to the external threat of mercenaries and “[c]ondemning all such acts of aggression”); GA Res. 33, UN GAOR, 45th Sess., 44th mtg. p. 17, UN Doc. A/Res/45/33 (1990); GA Res. 79, UN GAOR, 44th Sess., 78th mtg. p. 34, UN Doc. A/Res/44/79 (1989); GA Res. 89, UN GAOR, 46th Sess., 74th mtg., UN Doc. A/Res/46/89 (1992).

49 Resolution 239 (1967), UN Doc. S/INF/22/Rev.2, 1967 (condemning “any State which persists in permitting or tolerating the recruitment of mercenaries... with the objective to overthrow the governments of the United Nations”; calling on governments “to ensure that their territory as well as their nationals are not used for the planning of subversion, recruitment, training and transit of mercenaries”); UNSC Res. 289 (Nov. 1970) (demanding withdrawal of mercenaries from Guinea); UNSC Res. 405, 32 UN SCOR, UN Doc. S/INF/33 (1977) (in light of the invasion of Benin, condemning states that continued to permit and tolerate the recruitment of mercenaries “with the objective of overthrowing the Government of Member States”, and calling upon all states to take all “necessary measures” to prevent the use of their territory by mercenaries or recruiters so as to prevent “the planning of subversion and recruitment, training and transit of mercenaries designed to overthrow the Government of any Member State.”) See also UNSC Res. 226, UN SCOR, 1306th mtg. (1966); S.C. Res. 239, UN SCOR, 1367th mtg. (1967); UNSC Res. 241, UN SCOR, 1378th mtg. (1967).

50 OAU Convention for the Elimination of Mercenaries in Africa, initialled Libreville, July 1977, entered into force 22 April 1985, reprinted in Gino J. Naldi (ed.), *Documents of the Organization of African Unity*, Mansell, London and New York, 1992, p. 58. See also OAU Doc. ECM/Res. 5 (III) (1964) (Addis Ababa); OAU, Resolution on the Activities of Mercenaries, AHG/Res. 49 (IV) (1967); OAU Doc. ECM/Res. 17 (VII) (1970) (Lagos); OAU, Declaration on the Activities of Mercenaries in Africa (June 23, 1971), all reprinted in Robert E. Cesner, Jr. and John H. Brant, “Law of the Mercenary: An International Dilemma”, *Capital University Law Review*, vol. 6 (1990), pp. 363–6.

51 See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

52 See the discussion in ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987, at para. 1806 et seq.

deliberately exploit legal loopholes, as Sandline's contract with the Papua New Guinea government made clear.<sup>53</sup> The result of postcolonial bargaining over military entrepreneurialism has thus been not so much a "vacuum" as a "patchwork" of international regulation that leaves states free to harness private military companies in a manner that renders them free agents within – but very much of – the state system.

At the same time, however, we can discern a subtle shift even in the last two decades in how states have conceived the systemic legitimacy which military entrepreneurs ought to serve, increasingly seeking to align military entrepreneurialism with concepts of humanitarianism. In the 1990s humanitarian activity grew in scale and reach, just as states scaled down and pulled back their overseas military presences following the end of the Cold War, leaving a security "gap" which military entrepreneurs have filled.<sup>54</sup> The increasing reliance of states, international organizations and private actors in conflict zones on commercial military entrepreneurs points to a deepening normalization of the market form of regulation at the international level. Although the discussion of mercenarism initiated within the Commission on Human Rights in the mid-1980s developed out of an attempt by anti-market socialist and anti-colonial non-aligned states to portray commercial military entrepreneurialism as a per se human rights violation,<sup>55</sup> discussion within the Commission gradually shifted to focusing on how to ensure military entrepreneurs' protection of human rights and compliance with international humanitarian law. This is the approach which underpins the current Swiss-ICRC initiative detailed elsewhere in this issue of the *Review*, in the ICRC's own work with private military companies (PMCs),<sup>56</sup> and in other regulatory initiatives focused on military entrepreneurialism.

### *Extending existing rules*

These approaches focus on extending existing norms governing the organization of legitimate violence, developed in interstate settings, to private actors. But it is worth considering the limits of such an approach. Traditionally, the *jus in bello* has started from a *jus ad bellum* presumption that "private" actors are not legitimately entitled to organize violence on a military scale, absent state consent, and that where they do so such actors are, in fact, properly the object of state-organized violence (whether military or criminal) aimed at their repression or criminal sanction. Many of the controversies in the development of the *jus in bello* and

53 See *Sandline International Inc. v. Papua New Guinea*, in (1999) 117 ILR, pp. 552–65, 565–93 (in the Queensland Supreme Court). Sandline employees were sworn in as members of PNG armed forces, thereby circumventing rules against mercenarism.

54 See James Cockayne, *Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study*, International Peace Academy, New York, March 2006.

55 See generally International Alert, *The Mercenary Issue at the UN Commission on Human Rights: The Need for a New Approach*, International Alert, London, 2001.

56 See Claude Voillat, "Private Military Companies: A Word of Caution", *Humanitarian Exchange*, no. 28 (2005), p. 33.

related fields such as counter-terrorism in the last thirty years have hinged precisely on the extent to which norms governing and legitimizing interstate hostilities ought to be extended to non-state actors. The 1977 First Additional Protocol to the Geneva Conventions famously extended the system to situations involving peoples “fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”,<sup>57</sup> thus suggesting that legitimacy for the organization of violence might be drawn not only from state consent, but also (or even, perhaps, “rather”) from its alignment with larger global public interests such as self-determination. The same approach seems to underpin more recent discussion of the Responsibility to Protect. These issues are controversial at least in part because it is not always entirely clear that non-state actors have the same capacity for responsible participation in the systems developed in interstate contexts. Merely bringing them into the existing system may not be adequate; it might stretch the skin of international humanitarian law so thin that it could ultimately break.

To see why this is the case, it is worth looking in more detail at how the *jus in bello* has been extended to cover “private” actors in these last thirty years. Since 1907 all the major international instruments governing the *jus in bello* have restricted the organization of legitimate violence to groups exercising effective territorial control<sup>58</sup> and organized through hierarchical administration (reflected in the doctrine of responsible command<sup>59</sup>) – regardless of whether their legitimacy was drawn from concepts of belligerency, statehood or self-determination and other global norms. While the characteristics of groups recognized as subjects of the *jus in bello* have changed with altering social and technological conditions, in particular the rise of guerrilla warfare, the underlying orientation in favour of hierarchical administration and territorial control has endured. International humanitarian law relies on territorial control and hierarchical administration as the cornerstones of the system of responsible provision of humanitarian goods, services and treatment. Simply extending existing rules of international humanitarian law to deterritorialized, non-hierarchical non-state actors risks reducing the effectiveness of the system, because those actors may be unable (or unwilling) effectively and responsibly to deliver those humanitarian goods, services and treatment.

The challenge for international humanitarian law, then, is to find ways to incorporate deterritorialized, non-hierarchical organizations, which previously have been treated as “private” actors – including private military companies, but

57 API Art. 1(4).

58 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 26 Martens Nouveau Recueil (ser. 2) 949, 187 Consol. T.S. 429, 4 September 1900, Art. 42; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Art. 154; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 7 December 1978, Art. 1(1).

59 See especially API, Arts 86, 87; Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), entered into force 1 July 2002, Article 28.

arguably also including the armed wings of global social movements such as Hizballah and Al Qaeda, and globally organized criminal enterprises – into the system regulating public goods such as access to security and to humane treatment. But to find these ways, we must first understand why and how violence is once again being organized and legitimized privately.

## The return of the private in the global organization of legitimate violence

For most of the last millennium, social and technological developments have ultimately favoured states over private military entrepreneurs in the organization of legitimate violence. States have – sometimes by forming tactical alliances with military entrepreneurs – established, deepened and exported their own monopolies on legitimate violence. Territorialization and hierarchical organization have habitually won out over other organizational forms. This has led to a system in which both law and war are constituted as global and state-centric systems, slowly hiding the private activities which underpin public, coercive power. But the balance between the private and the public in the global organization of violence (whether legitimate or illegitimate) seems once again to be shifting.<sup>60</sup> What we are witnessing may be a return of the private.

## Contemporary military entrepreneurialism

Take piracy. Despite co-ordinated efforts by states, it remained ubiquitous until the nineteenth century, when the advent of the steamship raised the sunk and operating costs of piracy higher than pirates, given their itinerancy, low social position and general lack of political power, could meet.<sup>61</sup> Piracy has now, however, re-emerged both in south-east Asian waters and off the Horn of Africa, where barriers to market entry are once again low: the vessels and small arms and light weapons needed are cheap and easily available on the market, and valuable assets sail through the Strait of Malacca and around the Horn of Africa every day – while state policing power is often weak and corruptible. Under the prevailing technological – and regulatory – conditions, it has once again become financially feasible for small-scale naval entrepreneurs to organize violence outside the state system.

The resurfacing of military entrepreneurialism is not confined to the seas. Military entrepreneurialism has also resurfaced on land – and even taken to the air.<sup>62</sup> Military entrepreneurialism has flourished where (i) local state enforcement

60 A good introduction is provided by Bjørn Møller, “Privatisation of Conflict, Security and War”, DIIS Working Paper no. 2005/2, Danish Institute for International Studies, Copenhagen, 2005.

61 See Ethan A. Nadelmann, “Global prohibition regimes: the evolution of norms in international society”, *International Organization*, vol. 44 (1990), pp. 479–526.

62 Aerial examples include the key role commercial aviation operators have played in conflicts in west Africa and the Great Lakes region, both as transport and as combat capacity providers. This activity is limited by comparatively high barriers to entry (the costs of acquiring the helicopters and aeroplanes) and high operating costs (especially repairs, fuel and the salaries of skilled pilots).

power is functionally weak or perceived to be illegitimate, or supportive of or acquiescent in such private activity; (ii) demand for organized violence is high; and (iii) other sources of organized violence (such as foreign states or international organizations) are not available or are perceived to be less efficient or legitimate. The relative gap in the strength of state and private forces has also narrowed as state forces have been downsized following the end of the Cold War and under the global financial discipline of the Washington consensus, and with the proliferation of small arms and light weapons, motor vehicles and other means of contemporary asymmetric warfare.

Existing regulatory conditions favour the corporate organization of such military entrepreneurialism by offering legal tools through which to protect the fruits of the trade from intrusive state regulation. First, global commercial arrangements encourage military entrepreneurs to organize as conglomerates of limited liability corporations, distributing risk, shielding assets from seizure and profits from taxation, and allowing regulatory arbitrage. Commercial confidentiality and the protection of profits through state judicial enforcement of international arbitral awards further assist military entrepreneurs, increasing their power relative to states.<sup>63</sup> Military entrepreneurs use multi-sectoral alliances with natural resource extractors, construction companies, risk consultants and moonlighting governmental elements to achieve economies of scale and distribute risk.<sup>64</sup>

### The decreasing importance of territorial and hierarchical characteristics

The net result of contemporary technological and regulatory conditions is that territorialization and hierarchical administration are becoming decreasingly important in the organization of violence – not only for licit commercial military entrepreneurs, but also for those military entrepreneurs driven by illicit profit motives, ideology or lust for power. It is not only legitimate private military companies, but also terrorists, organized crime and other non-state armed groups that have taken advantage of these conditions, using global financial, transport and communications networks and legal tools to finance, organize and provide legal cover for violence. As the Kurdish rebel leader, Abdullah Öcalan, has put it, “If you have money you can find anything on the market.”<sup>65</sup> Many of these private organizers of violence also use global media to try to build a global constituency for their activities, justifying their various forms of non-state violence through

63 On arbitration see D. Sturzaker, “The Sandline affair: illegality and international law”, *International Arbitration Law Review*, vol. 3 (2000), p. 164.

64 Herbert Howe, “Private security forces and African stability: the case of Executive Outcomes”, *Journal of Modern African Studies*, vol. 36, no. 2 (1998), pp. 307–31; Pratap Chatterjee, “Mercenary Armies and Mineral Wealth”, *Covert Action Quarterly Magazine* (Fall 1997); Pratap Chatterjee, “Guarding the Multinationals, DSL and the International Private “Security” Business”, *Multinational Monitor*, 1 March 1998.

65 Hamit Bozarslan, “Kurdistan: économie de guerre, économie dans la guerre”, in François Jean and Jean-Christophe Rufin (eds.), *Économie des guerres civiles*, Hachette, Paris, 1996, p. 137.

appeals to a variety of norms such as humanitarianism (e.g. Blackwater) and *jihad* (e.g. Al Qaeda).

The increasing penetration of cyberspace into social life is also likely to facilitate the privatization of violence. Cyberspace will serve for private actors both as a space in which violence can be organized and as a location of valuable assets which may be targeted for control or destruction. It will allow predatory groups to organize and operate, although dispersed across the globe, making counter-attack by territorial, hierarchical entities such as states difficult. It will also allow private actors to strike at valuable assets located in cyberspace, doing not only economic damage to societies (e.g. by destroying financial records or stealing financial value) but also political and even physical damage (e.g. by shutting down infrastructure or even hacking into and controlling conventional weapons). While this may seem removed from the type of physical violence which international humanitarian law has regulated, in a sense that only goes to show how the existing regulatory system may struggle to cope with new deterritorialized, non-hierarchical social realities: both the concepts and the practice of international humanitarian law will need to be adjusted to encompass such dispersed groups, if cyber-violence is effectively to be regulated.

Together, these technological and regulatory shifts seem to herald a fundamental shift in the balance of power between “public” and “private” authority in international society, presenting fundamental challenges for the existing system of international humanitarian law, which continues to be largely oriented towards a Weberian–Clausewitzian conception of war as a competition between centralized hierarchies seeking to exert political power over a defined territory. Today’s social and technological systems – underpinned by a globalizing law sustaining global private commerce – instead make the financing, staffing, resourcing and legitimization of violence, and its projection around the world, unimaginably democratic, and decidedly global.<sup>66</sup> As violence is deterritorialized and organized less hierarchically, legitimacy will likely also change, producing a law which is increasingly social, not statist, and shared, not monopolized. Applying the existing tools of international humanitarian law may become increasingly difficult.

## Challenges for international humanitarian law caused by the return of the private

### Scope and universality

The first challenge posed by the return of the private for theorists and practitioners of international humanitarian law is to know where and when that law applies: to know, in other words, its scope.

66 Cf. Program on Humanitarian Policy and Conflict Research, *Transnationality, War and the Law*, Harvard University, Cambridge, Mass., April 2006, p. 19.

The modern conception of war as an extension of public, interstate politics by other means has allowed the evolution of a *lex specialis*, a regulatory system confined within the temporal and spatial scope of “war”, or, as it is conceived within contemporary international humanitarian law, “armed conflict”. The determination of whether protracted armed violence amounts to a situation of armed conflict, and whether this regulatory system therefore applies, rests on determinations of fact about the extent of violence within a specific locale and about the participation of responsible (i.e. hierarchically organized) armed groups within it. Armed conflict is presumed to involve a struggle for political and military control over territory.

The “new wars”, as Mary Kaldor has described them,<sup>67</sup> problematize such determinations.<sup>68</sup> In such conflicts violence is often territorially dispersed and participation carried out remotely, through intercontinental satellite transmissions and cash remittances, media messaging and mobile-phone calls. Violence is increasingly organized through contractual agents, networks of charismatic and social influence and even inspirational example, rather than direct command and control. Determinations of when and where armed conflict is taking place, what it means to “actively participate in hostilities”, and when violence is “associated” with armed conflict become increasingly problematic. As a result, it is difficult to know when and where international humanitarian law applies, and when some other legal regime such as human rights, refugee law or criminal law applies. It is also increasingly difficult to determine which national jurisdictions ought to exercise prescriptive and sanctioning power, or which of many competing jurisdictions ought to take precedence.

At some levels this appears to be driving convergence, particularly among national and international criminal jurisdictions. But at other levels there is a risk of fragmentation and competition, leading to conceptual confusion or even a race to the bottom. Seen in this light, the US Supreme Court’s recent decision in *Hamdan v. Rumsfeld* that Common Article 3 applies to all detainees in the United States’ war with Al Qaeda may in fact herald a rather pyrrhic victory in the defence of international humanitarian law against its detractors, since it may cut off Guantánamo and CIA detainees from stronger protections to which they might otherwise be entitled.<sup>69</sup> What is already clear from debates in the United States and beyond is that humanitarian law’s detractors will view its statist orientation – and the consequent difficulties in adapting and applying it to emerging private forms of violence – as leverage for arguing that it does not, or should not, apply to conflicts with private groups. These detractors have sought, in the last half-decade since 9/11, both literally and figuratively to locate private organizers of violence in

67 Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, Polity Press, Cambridge, 1999.

68 Program on Humanitarian Policy and Conflict Research, above note 66, p. 19.

69 *Hamdan v. Rumsfeld*, No. 05-184, Supreme Court of the United States of America, 29 June 2006. The recent Military Commissions Act (2006) indeed points to *Hamdan* being used as the occasion for US Congress to remove detainees’ access to stronger legal protections, such as US constitutional rights and *habeas corpus* remedies.

international humanitarian law's apparent "holes" in coverage. Sometimes this works to the benefit of the private actors – as for US military contractors in Iraq (immunized from Iraqi law, in the vast majority of cases beyond the jurisdiction of US criminal law, and only in rare cases violating international prohibitions on mercenarism) – and sometimes to their detriment – as it has for Guantánamo and CIA detainees.

In the longer term this confusion over scope may fragment the legitimacy of international humanitarian law, in particular undermining its claim to universality. As the application of international humanitarian law is corralled or even wound back, the system's conceptual coherence and practical relevance may be challenged. The central distinction between *jus ad bellum* and *jus in bello* which underpins humanitarian law's universalist humanism may erode, and with it the notion of humanitarianism as a universal public good. Access to more than the absolute minimum levels of humane treatment as a prisoner, or to humanitarian relief as a victim of armed conflict, may no longer be viewed as a right accruing to all humans, but as an entitlement conditional on membership of a status group, or possession of something of private value – whether a nationality, a creed, a race or cold hard cash.

## War, law enforcement and humanitarian action

In such a climate, as legitimacy becomes more and more difficult to discern, the line between war, law enforcement and humanitarian intervention may become increasingly blurred.

Civilian contractors provide a good example of the increased difficulty of applying the principle of distinction when violence is organized not through an administrative hierarchy, but through transactional and private social relations. Is a civilian analyst contracted to decipher images from unmanned aerial devices relayed from Fallujah to Florida, where he sits, responsible for inaccurate bombardment based on his image analysis? Is he a legitimate military target? Is the managing director of a civilian language firm responsible for grave breaches that occur during interrogations made possible by interpreters supplied by her firm? Is she a legitimate military target? There certainly are legal answers to these questions, but they are often difficult to discern – particularly for military commanders and other combatants who confront severe time and expertise constraints.

Similar interpretive difficulties arise in relation to other forms of private violence. Deterritorialized network wars do not offer clean-cut distinctions between civilians and participants in responsible armed hierarchies as have, supposedly, interstate wars for the last century and a half. As the recent conflict in southern Lebanon demonstrates, the dispersal of participation in the organization of the financing, staffing and resourcing of violence by private actors throws an ever-widening net over "civilian" society, increasing the temptation of – and perhaps the legal scope for – state counter-attacks on dual-use facilities under Articles 50–54 of the First Additional Protocol. With participation in hostilities

dispersed through contractual and social networks, distinctions between lawful collateral damage inflicted by states, non-state terrorism and militias' ravishing of civilian communities become increasingly difficult to sustain. Not only the fact of distinction, but ultimately the very principle of distinction might risk collapse.

Another example of how the legitimacy and relevance of the principle of distinction is being challenged by the dispersal of participation in armed conflict – or at least, by increased media reporting and public awareness of that dispersal – is the discussion around the involvement of children in armed conflict. Children provide cheap and easily manipulated labour, in war just as in productive industry. Children are often participants in contemporary hostilities or are essential to the viability of military and criminal enterprises for which they are coerced to work. This involvement of children as actors in the organization of violence problematizes our instinctive combatant/civilian and perpetrator/victim dichotomies, undermining the principle of distinction and striking at the social legitimacy of existing legal frameworks.

While theorists and jurists may find creative ways to adapt the existing mechanisms of international humanitarian law to these new social realities, as did the International Criminal Tribunal for the former Yugoslavia (ICTY) in adapting the concept of “protected persons” in Article 4 of the Fourth Geneva Convention to situations where allegiance rather than nationality determined group membership,<sup>70</sup> such theoretical nimbleness may not be replicable in the unwieldy and often rather conceptually inert bureaucracies of military command structures. The challenges for military commanders in developing and consistently implementing such theoretical innovations are manifold, particularly where states are engaged in asymmetrical warfare with private actors. Military commanders need clear guidance before the fact, if there is to be consistency in their approach and discipline in their forces. Without that clear guidance the temptation for armed forces is, of course, to abandon existing norms – wholesale. Even where private actors have the organizational wherewithal reciprocally to provide the protections which international humanitarian law currently demands (such as the detailed detention arrangements mandated for prisoners of war by the Third Geneva Convention), they often lack the necessary motivation or incentives. And much emerging “private” violence simply lacks that organizational capacity, because it lacks territory on which to hold prisoners, or the hierarchical relations needed responsibly to administer other obligations under existing international humanitarian law – such as suppression of grave breaches.

This leads us to another central challenge to international humanitarian law posed by the contemporary reorganization of legitimate violence: the dispersal of responsibility for enforcing the law. The prevalence of non-hierarchical organization problematizes the application of command responsibility. On the battlefield this leads military commanders increasingly to rely on “draining the

70 *Prosecutor v. Tadic*, Judgement, Case No. IT-94-1-A, ICTY, 15 July 1999, repr. in (1999) 38 *International Legal Materials*, vol., p. 1518.

pool” strategies, sometimes verging on collective punishment. The principle of proportionality is stretched (as it was in the recent conflict in southern Lebanon) and the humanitarian space is shrunk as military commanders seek to weaponize humanitarian aid, and as humanitarian groups become unwitting or reluctant associates of parties to armed conflict.<sup>71</sup> The concepts and practices of humanitarian neutrality, impartiality and independence risk slowly being obscured.

In the process the previously differentiated activities of states which we have known as military action, law enforcement, humanitarian assistance and development aid may blur into complex projections of a particular form of social rule.<sup>72</sup> A number of actors already question the secular universalist agenda of contemporary humanitarianism itself, some questioning the validity of its secularism, some questioning whether it is truly universalist or in fact a vehicle for the transformative social agendas of the liberal West.<sup>73</sup> In fact, this description – of a competitive, intrusive projection of a complex system of rule – seems equally plausibly applied to a range of contemporary initiatives, from the “global war on terror” to multilateral peacebuilding to certain contemporary interpretations of *jihad*. The advent of each renders the theory and practice of international humanitarianism, and its protection through law, more problematic.

### Competition to rule?

The risk is of the emergence of a regulatory competition: an ongoing violent struggle – not quite peace and not quite war – between contending systems of rule promoted by rival coalitions of states and non-state actors, with no clear front lines.

At present that competition may seem most closely to resemble the contention between the Enlightenment-derived, rationalist humanism of Western states and societies, and the theological rule of some contemporary brands of political Islam. I have written previously in these pages about this relationship and its implications for the historical development of international humanitarian law, so I will not revisit those issues here.<sup>74</sup> Instead, I simply note that while much contemporary discourse frames this as a “clash of civilizations”, what the analysis above would suggest is that the challenges that international humanitarian law confronts arise at least equally from clashes within civilizations, between different discourses, political agendas and even epistemologies.

71 See Cockayne, above note 54. In 2001, US Secretary of State Colin Powell famously described NGOs in Afghanistan as a “force multiplier” and an important part of the US “combat team”: Colin Powell, Remarks to the National Foreign Policy Conference for Leaders of Nongovernmental Organizations, 26 October 2001.

72 See Mark Duffield, *Global Governance and the New Wars: The Merging of Development and Security*, Zed Books, London, 2001.

73 See Birgitte Refslund Sørensen, “Violence and humanitarian assistance: Reflections on an intricate relationship”, *Journal of Humanitarian Assistance* (September 2006), pp. 14–19.

74 See James Cockayne, “Islam and international humanitarian law: from a clash to a conversation between civilizations”, *International Review of the Red Cross*, Vol. 84, No. 847, September 2002, pp. 597–626.

What unifies contemporary debates over private military companies, terrorism, organized crime and even the Responsibility to Protect is a profound reconsideration within and among numerous global communities over the extent to which violence ought be organized and regulated by public – and in the global context, universal – standards of legitimacy and organizational systems. It is a debate over the scope and content of the social responsibilities of a variety of organizational forms, whether states, business, religious institutions or civil society organizations, in particular the extent to which they ought be responsible for providing physical and social protection to human beings – particularly those outside their groups or exchange relationships – and over the question of to whom they ought be accountable for the provision of that protection. This is, in other words, in part a quest to find a new constitutional settlement at the global level between the public and the private in the organization and regulation of legitimate violence. It is a struggle over the global reorganization of legitimate violence.

## **Reimagining international humanitarian law**

What would a system of globally organized legitimate violence be like, and where would international humanitarian law figure in it? To answer this question we must grapple with the role of the international, the humanitarian and the law in such a system.

### **From the international to the global**

First, we must consider whether humanitarian action in such a deterritorialized setting can continue to rely on state consent alone as the basis for its legitimacy. What sources of legitimacy are required to underpin humanitarian action worldwide in a setting populated by military entrepreneurs ranging from private military companies to global terrorist networks and local warlords, all fuelled by access to global markets?

Interstate reciprocity alone seems insufficient as a basis for a humanitarian law that enmeshes all these actors. Confronted by adversaries who are unwilling or unable to offer state personnel the same protections that international humanitarian law requires states to offer each other and to offer to non-state actors, many states will continue to be tempted to corral or to avoid altogether the application of international humanitarian law. Many of those non-state actors will, themselves, justify their actions not by reference to state sanction but by reference to “global” norms such as humanitarianism, shareholder value and divine authority.

Given these vulnerabilities, humanitarian law will need to find additional sources of legitimacy, for example by drawing in global business, civil society and even trans-national armed groups.<sup>75</sup> Steps by the Red Cross movement to work

<sup>75</sup> On this topic see Program on Humanitarian Policy and Conflict Research, above note 66.

with private military companies to implement existing law are only the beginning. We shall need to think about ways of treating non-state actors not only as objects of governance, but as sources of normativity and legitimacy. This will require a highly creative approach to global governance, going well beyond state-centric international legal approaches, emphasizing non-territorial and non-hierarchical aspects of global “public” citizenship. Mechanisms for promoting such public citizenship could include voluntary arrangements such as the Deed of Commitment promoted by Geneva Call or the US–UK Voluntary Principles on Security and Human Rights; national regulatory strategies and mechanisms incentivizing or mandating private actors’ compliance with certain standards, as the Swiss government and ICRC are currently exploring in relation to private military companies; and public advocacy engaging individual consumers, voters and worshippers.

### Contesting humanitarianism

Whether or not we adopt such creative approaches to legitimacy, it is entirely foreseeable that at some point political pressure to revisit the content of existing norms of international humanitarian law may become overwhelming, particularly because of the prevalence – or at least the prominence – of asymmetric warfare. In many cases this will require a revisiting of the very notion of humanitarianism, to develop a common consensus on which behaviours it mandates. The challenge here is to find ways to adjust the interstate edifice of international humanitarian law to deal with global private violence, without abandoning the humanitarian foundations that underpin the existing edifice.

This may require systematic thinking and extensive discussion of, for example, how the seven Fundamental Principles of the Red Cross movement (humanity, impartiality, neutrality, independence, voluntary service, unity and universality) and other key principles (such as those of distinction and proportionality) ought to be adjusted in dealing with deterritorialized, non-hierarchical organizers of violence. There is no doubt that humanitarian workers in the field are already forced to make such on-the-spot adjustments; they need and deserve more comprehensive and consistent guidance, not only from their headquarters but from the so-called “international community” at large, whose interests they are often purported to represent. This is not simply a question of what the “humane treatment” requirements of Common Article 3 are in the case of a terrorist with unique apparent knowledge of a future crime, but also of how humanitarian workers in the field ought deal with warlords and private military companies and what the role of detention visits is in relation to criminal kidnapping organizations, to name but a few contemporary challenges.

Although we might aim, ultimately, to resolve questions of competing standards of humanitarianism offered by different legal traditions, jurisdictions and regimes, a more cautious approach might involve focusing on what is common, rather than on what is contested. The aim here must be, once again, to find a “global” solution which reinforces the consensus underpinning behaviours

we know as “humanitarianism”. International humanitarian actors such as the ICRC might join with stakeholders such as private military companies, national and sub-national law enforcement authorities, national and international refugee regime administrators, national militaries, multilateral peacekeepers and human rights authorities to forge commitments on activities of common interest, such as detention, interrogation, international transfer (including *réfoulement*) and minimum trial standards, that apply at all times and in all places.

But we also need to accept that defending humanitarianism requires more than standardizing norms. It may also require creating legal, administrative and socioeconomic structures which create incentives for humanitarian behaviour. There may be a level at which the “acceptance” approach of some humanitarian actors is no longer sustainable, absent an extra level of incentives to regulate and constrain the threats posed by those actors who reject and attack humanitarianism. This need not translate into coercive restraint. Some private actors may be induced to act in accordance with public values and to offer public goods if such behaviour clearly offers them private benefits, including, for example improved economic benefits. This is as true of private military companies who adopt corporate social responsibility measures to improve their market “brand” as it is of local militias who are induced to disarm by the prospect of alternative livelihoods offered by the international community.

Humanitarianism ought, such a line of thinking would seem to suggest, to be considered as part of a larger social system which values non-violence, practised by all social actors, whether military or commercial, public or private. Global humanitarian action may need, therefore, to deal not only with responsible command structures, but responsible enterprise more generally. Where international humanitarian law has operated predominantly through “responsible command” models, this more social conception of global humanitarian regulation may need to develop additional “enterprise” models. Such models, which attribute responsibility and liability not through hierarchical relations but through transactional relations, may already be beginning to emerge through litigation in national and international courts.<sup>76</sup> These models may facilitate the transparent and globally consistent regulation of violence which is organized not through hierarchical subordination, but through aiding, abetting, complicity, joint criminal enterprise and social influence.<sup>77</sup>

The development of such models through decentralized litigation is itself a key process in the movement towards a global reorganization of legitimate violence, rebalancing the relationship between public values and private interests in global society. It is a system being built by decentralized, often private action through courts and contracts. But for that very reason it risks fragmentation and

<sup>76</sup> See especially Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*, FAFO Report 536, FAFO, Oslo, 2006.

<sup>77</sup> For examples of the early adaptation of doctrines of command responsibility to such situations, see *U.S. v. Krauch et al.* (“IG Farben case”, case 6), TWC VIII, pp. 1081–210 at pp. 1124, 1126; *Prosecutor v. Musema*, T.Ch, 27 January 2000, Judgment and Sentence, ICTR-96-13.

inconsistency. Moreover, it risks producing dominant interpretations of humanitarian and military norms which are skewed towards criminal justice perspectives. Over time, this criminal law orientation may lead to norms of conduct which are meaningful to prosecutors, judges and juries, but not to actors in the field such as military commanders and humanitarian workers. (Again, the *Tadić* “protected persons” example springs to mind.) A more effective approach might be for states and other key actors within the humanitarian system to work with interested parties, such as business, to codify these rules, and to clarify how existing norms governing humanitarian conduct by governments and their auxiliaries ought to apply in a variety of non-hierarchical, relational situations.

### From law to rule?

Such a project assumes that there will be room for humanitarian action in the future. The final danger of the return of the private is the possibility of the development of a rather more gloomy scenario in which such action has lost its relevance. The broader danger is that law itself will in a sense be privatized, leaving no room for public service delivery on the global level, and therefore no room for global humanitarian action.

If not appropriately regulated, private military companies and other military entrepreneurs, operating through trans-national networks of financial, governmental, social, legal and military power could render security a commodity available only to those with sufficient financial, social or political power. The danger here is that access to security may cease to be a matter of right flowing from one’s humanity, at least nominally guaranteed by states, and instead become a matter of financial, social and political power. The modern, rational legal entitlements protected by international humanitarian law risk reverting to relational, transactional entitlements, closer to the historical experience of pre-modern societies such as feudal Europe.<sup>78</sup> In such an arrangement, law disaggregates into overlapping and often competing systems of rule and authority. The danger is that, with military entrepreneurs figuring prominently in the mix, this competition may become violent. The globe would then risk reproducing conditions such as those in pre-modern Europe, with states and private entrepreneurs vying to run protection rackets for overlapping populations, and humanitarian “protection” being reduced to a strategic tool in efforts to win the allegiance of and control over populations – “hearts and minds” operations writ large.

Such developments may seem remote or unlikely to some, but to others they may describe how humanitarian action is already perceived and received in some parts of the world. Much of what we often take for granted in today’s global organization of legitimate violence probably seemed far-fetched, if not inconceivable, before it came to pass – whether it was Dunant’s plan to establish

78 Cf. A. C. Cutler, “Globalization, the rule of law, and the modern law merchant: Medieval or late capitalist associations?”, *Constellations*, vol. 8 (2001), pp. 480–502.

committees to assist wounded soldiers on the battlefield, or the concept of a legitimate secular state, or even the axiomatic distinction we make between the public and the private. The first step in managing these processes of reorganization may in fact be to “reimagine the real”. There are signs that the world is already reorganizing around us: the return of the private in the organization of violence, exemplified by the resurfacing of military entrepreneurialism in the form of private military companies, is just one example of the recalibration of the balance between public authority and private power. If we wish to maintain the legitimacy of international humanitarian law and action, and to retain the public access to humanitarian goods, services and treatment that it protects, we must act quickly to “reimagine” the real and to find this law’s place in it.

# Human rights obligations of non-state actors in conflict situations

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## **Abstract**

*The threat to human rights posed by non-state actors is of increasing concern. The author addresses the international obligations of belligerents, national liberation movements and insurgent entities, looks at the growing demands that such armed groups respect human rights norms and considers some of the options for holding private military companies accountable with regard to human rights abuses. The argument developed throughout this article is that all sorts of non-state actors are increasingly expected to comply with principles of international human rights law.*

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## **Rebels, insurgents, and belligerents**

Rebels, insurgents and belligerents are sometimes depicted by international lawyers as being positioned on a sliding scale according to degrees of control

\* This article represents an adapted and updated version of Chapter 7 of the author's *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006.

over territory and recognition by governments.<sup>1</sup> International law originally only considered rebels as having international rights and obligations from the time they graduate to insurgency. Traditionally, insurgents were considered to have international rights and obligations with regard to those states that recognized them as having such a status. According to Antonio Cassese, to be eligible for such recognition insurgents need only satisfy minimal conditions:

International law only establishes certain loose requirements for eligibility to become an international subject. In short, (1) rebels should prove that they have effective control over some part of the territory, and (2) civil commotion should reach a certain degree of intensity and duration (it may not simply consist of riots or sporadic and short-lived acts of violence). It is for states (both that against which the civil strife breaks out and other parties) to appraise – by granting or withholding, if only implicitly, recognition of insurgency – whether these requirements have been fulfilled.<sup>2</sup>

With regard to an insurrectional group recognized as such by the relevant state, it is clear that there are certain international rights and obligations that flow from this status, depending on the terms of the recognition.<sup>3</sup> Under this traditional international law, insurgents who were recognized by the state against which they were fighting not only as insurgents but also expressly as belligerents, became assimilated to a state actor with all the attendant rights and obligations which flow from the laws of international armed conflict.<sup>4</sup> Today, these recognition regimes have been replaced by compulsory rules of international humanitarian law which apply when the fighting reaches certain thresholds. Commentators such as Ingrid Detter have suggested that the idea that the application of the rules of armed conflict are related to the recognition of belligerency has been “abandoned”,<sup>5</sup> and Heather Wilson has claimed that, since the First World War, the old law is “more theoretical than real”, since recognition has hardly occurred since that time.<sup>6</sup>

Although the theoretical possibilities remain for states to bestow rights and obligations on rebels by recognizing them as either insurgents or belligerents, it makes more sense today simply to consider rebels (unrecognized insurgents) as

1 E.g. Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements*, Oxford University Press, Oxford, 1988, p. 24. See also Lassa Oppenheim and Hersch Lauterpacht (eds.), *International Law: a Treatise (Disputes, War and Neutrality)*, 7th edn, Vol. II, Longman, London, 1952, pp. 209–16; Robert Jennings and Arthur Watts, (eds.), *Oppenheim’s International Law (Peace)*, 9th edn, Vol. I, part 1, Longman, London, 1996, pp. 161–83.

2 Antonio Cassese, *International Law*, 2nd edn, Oxford University Press, Oxford, 2005, at p. 125. See also Antonio Cassese, *International Law in a Divided World*, Oxford University Press, Oxford, 1986, pp. 81–5.

3 Eibe H. Riedel, “Recognition of Insurgency”, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV, Elsevier, Amsterdam, 2000, pp. 54–6.

4 *Ibid.*, pp. 47–50.

5 Ingrid Detter, *The Law of War*, 2nd edn, Cambridge University Press, Cambridge, 2000, p. 43.

6 Wilson, above note 1, p. 27.

addressees of international obligations under contemporary international humanitarian law, especially the obligations contained in Common Article 3 to the four Geneva Conventions of 1949, in Additional Protocol II of 1977 to the Geneva Conventions and in Article 19 of the Hague Convention on Cultural Property of 1954. These obligations are considered in more detail below. Today, international law imposes obligations on certain parties to an internal armed conflict irrespective of any recognition granted by the state they are fighting against or by any third state. The problem is that governments are often loath to admit that the conditions have been met for the application of this international law, for to admit such a situation is seen as an admission that the government has lost a degree of control and as an “elevation” of the status of the rebels.

In some cases written agreements have been entered into during and after armed conflicts. These may contain mutual commitments to respect not only the laws of armed conflict but human rights as well.<sup>7</sup> Such agreements are less focused on the old questions of recognition and simply aim to build confidence, placing the protection of the individual at the centre of such measures. Such agreements are nevertheless sometimes predicated on the actual capacity of the rebels to fulfil the obligations in question. The preamble to the San José Agreement on Human Rights, between El Salvador and the Frente Farabundo Martí para la Liberación Nacional (FMLN), included the following paragraph: “Bearing in mind that the Frente Farabundo Martí para la Liberación Nacional has the capacity and the will and assumes the commitment to respect the inherent attributes of the human person.”<sup>8</sup> In this case the agreement was also signed by the Representative of the UN Secretary-General (Alvaro de Soto), and this fact, together with the arrangements for UN monitoring, suggests that this would constitute an agreement governed by international law between entities recognized as having the requisite international status to assume rights and obligations under international law.<sup>9</sup> This example shows how international law has moved beyond recognition of insurgency during armed conflict to a new type of recognition for human rights purposes. The obligations of the non-state actor in such situations stretch beyond both the duration of armed conflict and the laws of armed conflict.

7 See the San José agreement between El Salvador and the *Frente Farabundo Martí para la Liberación Nacional* (FMLN) signed by both sides on 26 July 1990. UN Doc. A/44/971-S/21541 of 16 August 1990, Annex.

8 *Ibid.*, p. 2.

9 See Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, pp. 49–51. See more generally, with regard to all agreements witnessed by the UN, Emmanuel Roucouas, “Non-State Actors: Areas of International Responsibility in Need of Further Exploration”, in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Brill, Leiden, 2005, pp. 391–404, esp. p. 397. For a discussion of other agreements which may not have such a status, see Pieter H. Kooijmans, “The Security Council and Non-State Entities as Parties to Conflicts”, in Karel Wellens (ed.), *International Law: Theory and Practice*, Martinus Nijhoff, The Hague, 1998, pp. 333–46.

## National liberation movements

An additional category of international actor to be considered in this context is the national liberation movement (NLM). In some ways it is clumsy to list NLMs as non-state actors. Their representatives may reject the label of non-state actor, since not only may they wish to stress their putative state-like aspirations and status, they may sometimes already be recognized as a state member in certain regional intergovernmental organizations. One difference between such groups and the recognized belligerents and insurgents discussed above is that such NLMs may be able to claim rights, and will be subject to international obligations, even in the absence of control of territory or express recognition by its adversary. Article 1(4) of the 1977 Protocol I to the Geneva Conventions classifies three types of war of national liberation as international armed conflict, so that all the rules applicable to those conflicts apply. It covers “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination”.<sup>10</sup> Under Article 96(3) of Protocol I, the authority representing the people struggling against the colonial, alien, or racist party to the Protocol can undertake to apply the Conventions and the Protocol by making a declaration to the depository (the Swiss Federal Council).<sup>11</sup>

Furthermore, such a liberation authority could make a declaration under the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.<sup>12</sup> Such a declaration can bring into force not only the Weapons Convention and its protocols, but also the Geneva Conventions, even in the absence of the state against which the liberation movement is fighting being a party to Protocol I.<sup>13</sup> In the absence of any declarations having been accepted, however, attention has turned to the customary status of these rules.<sup>14</sup>

10 See also General Assembly Resolution 3103 (XXVIII) of 12 December 1973.

11 A number of declarations of this kind have been deposited with the ICRC by groups such as the African National Congress (ANC), South-West Africa People’s Organisation (SWAPO), the Palestine Liberation Organization (PLO), and the Eritrean People’s Liberation Front (EPLF). See also the other examples given by Michel Veuthey, *Guérilla et droit humanitaire*, ICRC, Geneva, 1983, p. xxvi.

12 10 October 1980, see Article 7(4).

13 Article 7(4)(b).

14 Although certain declarations have been sent to the International Committee of the Red Cross the procedure demands a communication with the Swiss authorities. The table of ratifications compiled by the ICRC contains the following note: “Palestine: On 21 June 1989, the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the United Nations Office at Geneva informing the Swiss Federal Council that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto.” On 13 September 1989, the Swiss Federal Council informed the states that it was not in a position to decide whether the letter constituted an instrument of accession, “due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine”. This was not a declaration under either Article 96(3) of Protocol I or Article 7 of the Conventional Weapons Convention 1980, so the issue was not whether the PLO represented an authority which represented an NLM, but whether it could be considered a state. For full discussion of the state practice and the history of these provisions, see Antonio Cassese, “Wars of National Liberation”, in Christophe Swinarski (ed.), *Studies and Essays in International*

Suffice it to say that no government faced with a liberation movement accepts that it is colonial, racist or in alien occupation. Arguments before South African and Israeli judges that liberation movements are entitled to privileges under international law have not met with success,<sup>15</sup> although the thrust of the ideas expressed in Article 1(4) of Protocol I seemed at one point to be relevant when it came to sentencing certain South West Africa People's Organisation (SWAPO) fighters in Namibia.<sup>16</sup> Attempts by the Red Army Faction and the Republic of New Afrika to invoke the rule as customary also failed before the courts of the Netherlands and the United States respectively.<sup>17</sup> The category of national liberation movements highlights the fact that non-state actors can become bound by international law pursuant to the terms of international humanitarian law treaties. It also leads us to consider below more closely the situation where armed groups are bound by the laws of internal armed conflict and where they make declarations or enter into agreements to abide by certain international standards.

## Rebel groups, unrecognized insurgents, armed opposition groups, or parties to an internal armed conflict

Where there is no recognition of insurgency or belligerency, and the group in question is not a national liberation movement that has successfully triggered the application of the rules of international armed conflict, one is left with an internal armed conflict involving rebels or what are sometimes termed "armed opposition groups". The humanitarian law which applies during internal armed conflict gives rise to certain duties for these rebels.<sup>18</sup> The minimum protection offered by Common Article 3 to the four Geneva Conventions of 1949 contains obligations for "each Party to the conflict".

*Humanitarian Law and Red Cross Principles: Essays in Honour of Jean Pictet*, Martinus Nijhoff, The Hague, 1984, pp. 314–24; L.R. Penna, "Customary International Law and Protocol I: An Analysis of Some Provisions", in Swinarski, pp. 201–25; Georges Abi-Saab, "Wars of National Liberation in the Geneva Conventions and Protocols", 165 *Recueil des Cours de l'Académie de Droit International de la Haye* (1979), pp. 357–455. See also Zegveld, above note 9, p. 14, for further references regarding failed attempts to adhere to the Conventions by the Provisional Revolutionary Government of Algeria and the Smith Government in Rhodesia.

- 15 *S v. Mogoerane* (unreported), Transvaal Provincial Division of the South African Supreme Court, 6 August 1982, discussed by Christina Murray, "The 1977 Geneva Protocols and Conflict in Southern Africa", *International and Comparative Law Quarterly*, Vol. 33, 1984, pp. 462–270; *S v. Petane* [1988] 3 SALR 51; see also the rejection of combatant status for members of the Organisation of the Popular Front for the Liberation of Palestine caught in military uniform in *Military Prosecutor v. Kassem and others* [1971] 42 ILR 470.
- 16 See Christina Murray, "The Status of the ANC and SWAPO in International Humanitarian Law", *South African Law Journal*, Vol. 100, 1983, p. 402; *S v. Sagarius* [1983] 1 SA 833 (SWA).
- 17 *Public Prosecutor v. Folkerts* [1987] 74 ILR 695; *US v. Marilyn Buck* US District Ct for the Southern District of New York, [1988] 690 F Supp. 1291; both excerpted and discussed in Marco Sassoli and Antoine A. Bouvier, *How Does Law Protect in War?* ICRC, Geneva, 2006, pp. 1435–48.
- 18 See Zegveld, above note 9; Lyndsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon, Oxford, 1989; Yves C. Sandoz, Christophe Swinarski and Bruno Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Nijhoff, Geneva/Dordrecht, 1987; Theodor Meron, *Human Rights in Internal Strife: Their International Protection*, Grotius, Cambridge, 1987.

These obligations are to “Persons taking no active part in the hostilities” as well as to the “wounded and sick”. The actual prohibitions include murder, violence to the person, cruel treatment, the taking of hostages, humiliating and degrading treatment, and sentences or executions without judicial safeguards. Lastly, the Article includes a positive obligation to collect and care for the sick and wounded.

The designation of a situation as “an armed conflict not of an international character”, so as to trigger the application of Common Article 3 to the Geneva Conventions of 1949, is obviously an act of considerable political importance for all sides to the conflict. The rebels will often welcome the designation of their attacks as constituting armed conflict, since this confers a curious sort of international recognition on them,<sup>19</sup> and the applicability of Common Article 3 reinforces the special role of the International Committee of the Red Cross (ICRC).<sup>20</sup> On the other hand, as already noted, the government may be less willing to acknowledge the situation as one of armed conflict, preferring instead to portray it as a fight against criminals and terrorists. To be clear, the application of the obligations does not depend on any acceptance by the government that the threshold for the applicability of humanitarian law has been reached. In some cases the situation is put beyond doubt by UN resolutions stating that the humanitarian rules contained in Common Article 3 are to be respected by both sides in a particular conflict.<sup>21</sup> Most recently the US Supreme Court has pointed to the applicability of Common Article 3 with regard to the procedural guarantees offered by military commissions due to try individuals captured in Afghanistan during the conflict there between the United States and Al Qaeda. The Court held that Common Article 3 was applicable to that conflict.<sup>22</sup> Deputy Secretary of Defense Gordon England later issued a memorandum which stated, “The Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda.” The memorandum then requested defence commands and departments to start a prompt review of policies and procedures “to ensure that they comply with the Standards of Common Article 3”.<sup>23</sup> For our purposes it is worth simply recalling that if Common Article 3 is indeed applicable, then the terms of Common Article 3 refer to obligations for each “Party” to the conflict; in this case this means international obligations not only for the United States but also for Al Qaeda (and its members to the extent that their actions constitute war crimes). It would not seem that the US administration considers the conflict to be confined to the period of fighting in Afghanistan.<sup>24</sup> The statement of the State Department Legal Advisor,

19 This is despite the fact that Common Article 3 ends with the sentence: “The application of the preceding provisions shall not affect the legal status of the Parties to the conflict”.

20 Common Article 3 includes the paragraph: “An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.”

21 See e.g. the UN Commission on Human Rights Resolution on El Salvador, 1991/71, preambular para. 6 and operative para. 9. See also General Assembly Resolutions 45/172 and 46/133 on El Salvador.

22 *Hamdan v. Rumsfeld* 548 U. S. (2006), p. 66 of the slip opinion.

23 Memorandum of 7 July 2006.

24 For details see <<http://www.defenselink.mil/home/dodupdate/documents/20060711.html>> (visited on 23 October 2006).

John Bellinger III, to the UN Committee against Torture on 8 May 2006 is worth repeating here:

The United States is engaged in a real, not rhetorical, armed conflict with al Qaeda and its affiliates and supporters, as reflected by al Qaeda's heinous attack on September 11, 2001, an attack that killed more than 3000 innocent civilians.

It is important to clarify the distinction we draw between the struggle in which all countries are engaged in a 'global war on terrorism' and the legal meaning of our nation's armed conflict with al Qaeda, its affiliates and supporters. On a political level, the United States believes that all countries must exercise the utmost resolve in defeating the global threat posed by transnational terrorism. On a legal level, the United States believes that it has been and continues to be engaged in an armed conflict with al Qaeda, its affiliates and supporters. The United States does not consider itself to be in a state of international armed conflict with every terrorist group around the world.<sup>25</sup>

The protection offered by Protocol II to the Geneva Conventions goes beyond the minimum standards contained in Common Article 3 although the minimum standards contained in Common Article 3 remain in effect even when Protocol II is applicable. The Protocol supplements these standards with extra protection for civilians, children, and medical and religious personnel. It also details the procedural guarantees that must be afforded to people interned or detained. The important point in the present context is that it applies this wide range of duties to both sides fighting the internal armed conflict.

However, in order to trigger the application of Protocol II, the intensity of fighting has to be greater than that traditionally required for the application of Common Article 3. According to Article 1(2) of the Protocol, the Protocol does not apply to situations of internal disturbances, riots and sporadic acts of violence. In addition Article 1(1) of the Protocol requires that the dissident armed groups are under responsible command and exercise such control over part of the territory that they are in a position to carry out military operations and implement the guarantees in the Protocol. This is generally considered to constitute a higher threshold for applicability than Common Article 3. It also suggests that the rebels themselves become bound through their willingness to apply the Protocol.<sup>26</sup> As will be discussed, various theories have been advanced in the past to explain how the rebels as such become bound under the Protocol. Some of these are today less relevant as the key provisions come to be seen as customary international law for the purposes of individual prosecutions. For the moment it suffices to note that in 2004 the Appeals Chamber of the Sierra Leone Special Court simply held that "it is well settled that all parties to an armed conflict, whether states or non-state actors,

25 Statement available at <<http://www.state.gov/documents/organization/66174.pdf>> (visited on 23 October 2006).

26 Antonio Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts", *International and Comparative Law Quarterly*, Vol. 30, 1981, pp. 416–39, pp. 424–6.

are bound by international humanitarian law, even though only states may become parties to international treaties<sup>27</sup>.

At the time of the drafting of Protocol II to the Geneva Conventions, several states explained their conviction that insurgents engaged in a civil war were simply criminals, and that the protocol conferred no international legal personality on them.<sup>28</sup> However, this treaty is today assumed to contain obligations for rebels who fulfil the criteria in the Protocol and where the fighting has passed the Protocol's threshold. Various theories have been suggested to explain how a treaty such as Protocol II entered into by states can create international duties for the rebel group as such.<sup>29</sup> Today, even in the absence of a consensus on a theoretical justification, it has become clear that, not only are rebels bound as parties to the conflict by Common Article 3 to the Geneva Convention, but they are also bound by the provisions of Protocol II. Indeed, from early on the ICRC Commentary to the Protocol simply asserted this to be the case:

The deletion from the text of all mention of 'parties to the conflict' only affects the drafting of the instrument, and does not change its structure from a legal point of view. All the rules are based on the existence of two or more parties confronting each other. These rules grant the same rights and impose the same duties on both the established government and the insurgent party, and all such rights and duties have a purely humanitarian character.<sup>30</sup>

The Commentary highlights the theories which allow for the imposition of international duties on individuals and groups and asserts that the fact of application is not challenged by states in practice.

The question is often raised as to how the insurgent party can be bound by a treaty to which it is not a high contracting party. It may therefore be appropriate to recall here the explanation given in 1949:

[T]he commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State. Although this argument has occasionally been questioned in legal literature, the validity of the obligation imposed upon insurgents has never been contested.<sup>31</sup>

It may be useful to consider the existing legal arguments for the application of these obligations to armed opposition groups under four headings. First, private individuals and groups are bound as nationals of the state that has made the international commitment. Second, where a group is exercising government-like functions it should be held accountable as far as it is exercising

27 *Prosecutor v. Sam Hinga Norman* (Case No. SCSL-2004-14-AR72(E)), Decision on preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of 31 May 2004, para. 22.

28 Cassese, above note 26.

29 *Ibid.*

30 Sandoz, Swinarski, and Zimmermann, above n. 18, para. 4442.

31 *Ibid.* at 4444, footnotes omitted.

the de facto governmental functions of the state.<sup>32</sup> Third, the treaty itself directly grants rights and imposes obligations on individuals and groups. Fourth, obligations such as those in Common Article 3 are aimed at rebel groups, and it has been argued by Theodor Meron that the effective application of these rules should not depend on the incorporation of duties under national law. In Meron's words, "Therefore, it is desirable that Article 3 should be construed as imposing direct obligations on the forces fighting the government."<sup>33</sup>

While these theories could all justify the application to individuals and non-state actors of certain human rights obligations found in treaties,<sup>34</sup> the focus has remained on international humanitarian law.<sup>35</sup> The theoretical basis for the application of the laws of internal armed conflict remains misty. Such theories have rarely been articulated by governments or international organizations in their application of international law to rebel groups. For example, in 1998 with regard to Afghanistan the UN Security Council simply reaffirmed that "all parties to the conflict are bound to comply with their obligations under international

32 Rüdiger Wolfrum and Christiane E. Philipp, "The Status of the Taliban: Their Obligations and Rights under International Law", *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, pp. 559–601, who recall that *de facto* regimes exercising effective control over parts of territory may enjoy limited rights and duties under international law (at p. 585). Their enquiry concerns the rights and obligations regarding the use of force and they conclude that as a de facto regime (albeit unrecognized) the Taliban are considered an international subject, and their complicity with the terrorist group Al Qaeda meant they could be targeted in order to bring them into compliance with their international law obligations (at p. 601).

33 Theodor Meron, *Human Rights in Internal Strife: Their International Protection*, Grotius, Cambridge, 1987, p. 39. For a discussion of the other approaches see *ibid.*, pp. 33–40, Zegveld, above note 9, pp. 15–16, and Richard Baxter, "Jus in Bello Interno: the Present and Future Law", in John N. Moore (ed.), *Law and Civil War in the Modern World*, Johns Hopkins University Press, Baltimore, 1974, pp. 518–36.

34 See Meron, above note 33, pp. 34–5, who highlights direct obligations imposed on individuals by Articles 5(1) and 20 of the International Covenant on Civil and Political Rights and under the heading "human rights instruments" he highlights the international individual criminal responsibility under the International Convention on the Suppression and Punishment of *Apartheid* (1973) and the Convention on the Prevention and Punishment of the Crime of Genocide (1948).

35 Zegveld, above note 9, p. 52, questions whether (i) there indeed exists a protection gap which is not addressed by humanitarian law; (ii) whether human rights principles would lead to a different result from the application of humanitarian law principles; and (iii) the threshold for the application of humanitarian law is arguably not as high as is presumed so that efforts should concentrate on the application of humanitarian law. Zegveld concludes that "There is widespread international practice demonstrating that armed opposition groups can be held accountable for violations of international law" (at p. 151). But she wishes to minimize the application of human rights law to these groups. With regard to the practice she concluded, "International practice is thus ambiguous on the question of conditions for accountability of armed opposition groups for violations of human rights law. There is some authority for the proposition that human rights instruments could govern armed opposition groups exercising governmental functions. However, this conclusion is mitigated by practice holding armed opposition groups apparently lacking any effectiveness accountable for human rights violations" (at p. 151). Her recommendation points towards a cautious application of human rights law: "since the accountability of armed opposition groups is a direct consequence of their status as parties to the conflict, there should be a close link between their accountability and their status. This is also why international bodies are and should be very cautious about holding armed opposition groups accountable for violations of human rights norms. These norms presume the existence of a government, or at least, an entity exercising governmental functions. Armed opposition groups rarely function as de facto governments" (at p. 152).

humanitarian law and in particular under the Geneva Conventions” of 1949.<sup>36</sup> Interestingly, the resolution goes on to state that “persons who commit or order the commission of breaches of the Conventions are individually responsible in respect of such breaches”. This confirms at the highest level that individual responsibility attaches to violations of international humanitarian law in internal armed conflicts (even outside the contexts of Yugoslavia, Rwanda and the regime of the International Criminal Court). It is also of interest that Security Council resolutions in this context demand that “Afghan factions” put an end to violations of human rights. In the context of Afghanistan, the demand was focused on discrimination against girls and women, but the resolution also demands that the factions “adhere to the international norms and standards in this sphere”.<sup>37</sup> Moreover, the Security Council went on to suggest that local authorities that did not respect human rights should be denied reconstruction assistance.<sup>38</sup>

In the context of Guinea-Bissau the Security Council called on “all concerned” to respect relevant provisions of humanitarian law and human rights, as well as to ensure unimpeded access by humanitarian organizations.<sup>39</sup> With regard to Liberia, the resolution first mentions the use of child soldiers and then simply demands that “that all parties cease all human rights violations and atrocities against the Liberia population, and stresses the need to bring to justice those responsible”.<sup>40</sup>

36 Resolution 1214 (1998), 8 December 1998, preambular para. 12.

37 *Ibid.*, para. 12; in full the paragraph reads: “12. *Demands* that the Afghan factions put an end to discrimination against girls and women and other violations of human rights, as well as violations of international humanitarian law, and adhere to the international norms and standards in this sphere”. See also S/RES/1193 (1998) para. 14, which “*Urges* the Afghan factions to put an end to discrimination” and other violations of human rights. Following the attack on the Taliban by the United States and others the Security Council stated that it was “*Deeply concerned* by the grave humanitarian situation and the continuing serious violations by the Taliban of human rights and international humanitarian law” (preambular para. 10 of S/RES/1378 (2001)); whereas it *called* “on all Afghan forces to refrain from acts of reprisal, to adhere strictly to their obligations under human rights and international humanitarian law”. (Operative para. 2.) See also S/RES/1528 (2004) preambular para. 6, which called on the parties and the Government “to prevent further violations of human rights and international humanitarian law and to put an end to impunity”. Although the Council’s resolution on weapons of mass destruction and non-state actors offers a definition of non-state actor for the purposes of the resolution, it does not address the non-state actors as such, but calls on states to take certain measures. S/RES/1540 (2004). A non-state actor is defined “or the purpose of this resolution only” as an “individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution”.

38 S/1471 (2003), para 4. “Stresses also, in the context of paragraph 3 above, that while humanitarian assistance should be provided wherever there is a need, recovery or reconstruction assistance ought to be provided, through the Transitional Administration, and implemented effectively, where local authorities demonstrate a commitment to maintaining a secure environment, respecting human rights and countering narcotics.”

39 S/RES/1216 (1998) Para 5. “Calls upon all concerned, including the Government and the Self-Proclaimed Military Junta, to respect strictly relevant provisions of international law, including humanitarian and human rights law, and to ensure safe and unimpeded access by international humanitarian organizations to persons in need of assistance as a result of the conflict.”

40 S/RES/1509 (2003) para. 10. See also regarding Côte d’Ivoire S/RES/1479 (2003) para. 8. “Emphasizes again the need to bring to justice those responsible for the serious violations of human rights and international humanitarian law that have taken place in Côte d’Ivoire since 19 September 2002, and reiterates its demand that all Ivorian parties take all the necessary measures to prevent further violations of human rights and international humanitarian law, particularly against civilian populations whatever their origins.”

The negotiations over the former Yugoslavia involved the participation of the various parties and the formulae used by the Council in the Resolutions with regard to the former Yugoslavia included demands on various parties to *inter alia* facilitate humanitarian assistance and cease “ethnic cleansing”, leading Theo van Boven to conclude, “The responsibility of Non-State Actors and their duties to respect and to comply with international law, must be regarded as inherently linked with the claim that they qualify as acceptable parties in national and international society.”<sup>41</sup>

The human rights demands with regard to the treatment of girls and women, access to humanitarian assistance, the use of child soldiers and respect for the civilian population are situation-specific; but the Security Council presumes that non-state actors have international obligations under the international humanitarian law of armed conflict and human rights law. The alternative explanations – that the Security Council is itself recognizing the non-state actor as a belligerent<sup>42</sup> or “creating” the obligations for the factions – seem unconvincing and unworkable. The idea that the Security Council creates the obligation for the specific non-state actor being targeted has been specifically dismissed by Christian Tomuschat, who, having reviewed the practice of the Security Council with regard to the former Yugoslavia, Afghanistan, Sudan, Sierra Leone, Ivory Coast, the Democratic Republic of the Congo, Angola, Liberia and Somalia, concluded that:

When pronouncing on the duty of parties to armed conflict to respect human rights standards, the Security Council does not intend to create new obligations. It just draws the attention of the addressees to the obligations incumbent upon them under international human rights law, as interpreted by it. For that purpose, no specific order is necessary.<sup>43</sup>

For Christian Tomuschat the non-state actors are bound by international human rights law, whether or not they have consented to the relevant human rights rule:

A movement struggling to become the legitimate government of the nation concerned is treated by the international community as an actor who, already at his embryonic stage, is subject to the essential obligations and responsibilities every State must shoulder in the interest of a civilized state of affairs among nations. The rule that any obligation requires the consent of

41 Theo C. van Boven, “Non-State Actors; Introductory Comments [1997]”, in Fons Coomans, Cees Flinterman, Fred Grünfeld, Ingrid Westendorp, and Jan Willems (eds.), *Human Rights from Exclusion to Inclusion; Principles and Practice: An Anthology from the Work of Theo van Boven*, Kluwer, The Hague, 2000, pp. 363–9. See especially the compilation of parties addressed by the Security Council and list of demands made, p. 368; Paola Gaeta, “The Dayton Agreements and International Law”, *European Journal of International Law*, Vol. 7, 1996, pp. 147–63.

42 This question is examined by Wolfrum and Philipp (above note 32, pp. 583–4) with regard to the Taliban; they conclude that Security Council statements concerning the application of humanitarian law were declaratory rather than constitutive and that no recognition as belligerents by the Security Council can be implied.

43 Christian Tomuschat, “The Applicability of Human Rights Law to Insurgent Movements”, in Horst Fischer, Ulrika Froissart, Wolff Heintschel von Heinegg, and Christian Raap (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berliner Wissenschafts-Verlag, Berlin, 2004, pp. 573–91, p. 586.

the party concerned has long been abandoned. The international community has set up a general framework of rights and duties which every actor seeking to legitimize himself as a suitable player at the inter-State level must respect.<sup>44</sup>

But Tomuschat's underlying rationale for this approach is based on a recognition that "elements of governmental authority have fallen into the hands of a rebel movement".<sup>45</sup> This leaves open the possibility that, where rebels are not seen as exercising government authority, they may avoid international human rights obligations. It is well-known that neither governments nor international organizations will readily admit that rebels are operating in ways which are akin to governments. Linking rebel obligations to their government-like status is likely to result in there being few situations where human rights obligations can be unequivocally applied to insurgents.<sup>46</sup> One effectively returns to the position of those commentators who dismiss the applicability of human rights obligations for insurgents on the grounds that non-state actors rarely operate as *de facto* governments,<sup>47</sup> and in any event are incapable of protecting human rights. Lindsay Moir accepts the full application of humanitarian obligations for insurgents but is adamant that such non-state actors have no human rights obligations:

Human rights obligations are binding on governments only, and the law has not yet reached the stage whereby, during internal armed conflict, insurgents are bound to observe the human rights of government forces, let alone of opposing insurgents. Non-governmental parties are particularly unlikely to have the capacity to uphold certain rights (e.g. the right to due process, being unlikely to have their own legal system, courts, etc.).<sup>48</sup>

Rather than focusing on the obligations that insurgents cannot fulfil (fair trial with legal aid and interpretation, progressive implementation of access to university education), it is preferable to stress that the obligations apply to the extent appropriate to the context. Even conventional human rights law demands that a state take steps "to the maximum of its available resources" to fulfil progressively its human rights obligations in the context of economic and social rights.<sup>49</sup>

Zegveld in her review of international practice sets out a theoretical basis for the creation of obligations on non-state actors:

44 Ibid., p. 587.

45 Ibid., p. 588.

46 An interesting early example of the UN applying the rights of the child in an agreement with rebels in Southern Sudan emerges from the account by Iain Levine who reveals the rationale that convinced the humanitarian agencies to apply human rights in such a context: "While it was not for OLS (Operation Lifeline Sudan) to determine the political future of south Sudan, members felt that control of territory brought with it serious responsibilities for the well-being of the rights of people living there". *Promoting Humanitarian Principles: The Southern Sudan experience*, Overseas Development Institute (ODI), Humanitarian Practice Network Paper 21, 1997, p. 14.

47 Zegveld, above note 9, p. 152, discussed above.

48 Moir, above note 18, p. 194.

49 Article 2(1) International Covenant on Economic, Social and Cultural Rights.

International bodies have generally considered the ratification of the relevant norms by the territorial state to be sufficient legal basis for the obligations of armed opposition groups. These bodies thereby establish the conception of international law as a law controlled by states, under which states can simply decide to confer rights and impose obligations on armed opposition groups.<sup>50</sup>

While this approach is considered legitimate for humanitarian law, Zegveld does not consider it appropriate for human rights law due to an assumption that “The main feature of human rights is that these are rights that people hold against the state only.”<sup>51</sup>

It is suggested that this assumption is no longer valid. The issue of the human rights obligations of non-state actors has arisen as a very practical problem in the context of truth commissions and for UN human rights monitors. The issue arose starkly in the context of the Guatemalan Historical Clarification Commission.<sup>52</sup> It was determined that at times when there was no armed conflict the insurgents were bound by certain international law principles common to human rights and humanitarian law. The report of the Guatemalan Historical Clarification Commission referred to human rights violations by the insurgents. The legal analysis is perhaps more developed, since it refers to “general principles common to international human rights law”, thus suggesting that the insurgents could not be burdened with all the human rights obligations of the state:

127. The armed insurgent groups that participated in the internal armed confrontation had an obligation to respect the minimum standards of international humanitarian law that apply to armed conflicts, as well as the general principles common to international human rights law. Their high command had the obligation to instruct subordinates to respect these norms and principles.

128. Acts of violence attributable to the guerrillas represent 3% of the violations registered by the CEH[Commission]. This contrasts with 93% committed by agents of the state, especially the Army. This quantitative difference provides new evidence of the magnitude of the state’s repressive response. However, in the opinion of the CEH, this disparity does not lessen

50 Zegveld, above note 9, p. 17.

51 Ibid., p. 53.

52 See the discussion by Christian Tomuschat: “For a long time it seemed to be an unassailable axiom that it is incumbent upon governments only to respect and ensure human rights, so that it was inconceivable that groups without any official position could also violate human rights. Here again, the argument of reciprocity is of great weight. Not to subject insurgent movements to any obligation owed to the international community before an armed conflict may be found to exist would leave them exclusively under the authority of domestic law, favouring them, but also discriminating against them at the same time. It was one of the great challenges of the Guatemalan Historical Clarification Commission to determine the legal yardstick by which conduct of the different guerrilla groups could be measured even in times when one could hardly speak of an armed conflict”. Christian Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford University Press, Oxford, 2003, p. 261. He goes on to refer to the paragraphs cited below.

the gravity of the unjustifiable offences committed by the guerrillas against human rights.<sup>53</sup>

The full Spanish version of the report details the principles. A rough translation would mean that these included the prohibition on torture, inhuman and degrading treatment, a prohibition on hostage-taking, guarantees of fair trial and physical liberty for the individual.<sup>54</sup>

More recently in the Truth and Reconciliation Commission of Sierra Leone had a mandate which read as follows:

6. (1) The object for which the Commission is established is to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.<sup>55</sup>

The Commission's Report contains detailed examinations of activity by multiple actors, including not only the insurgents, rebels and international peacekeepers, but also the private security firm, Executive Outcomes. This time the violations by the non-state actors are significant compared with those committed by state actors. The Commission "found the RUF [Revolutionary United Front] to have been responsible for the largest number of human rights violations in the conflict".<sup>56</sup> The Commission used the expression "human rights violations" with regard to all actors including multinational forces and private security companies.

With regard to internationally legally binding human rights obligations we have seen that these are currently presumed by the United Nations to apply when they are being flagrantly denied by a faction, a party to a conflict, or an armed opposition group.<sup>57</sup> For Dieter Fleck it is simply "logical" that if the

53 *Guatemala Memory of Silence*, Executive Summary Conclusions and Recommendations, UN Doc. A/53/928 Annex, 27 April 1999. For the relevant part of the Spanish full report see paras. 1699–1700 in volume II, pages 312–3. Christian Tomuschat chaired the Commission and has highlighted the way in which the Commission determined that outside times of armed conflict the insurgents were bound by these common principles. See Tomuschat, above note 52, p. 261.

54 See the full Report of the Commission, available only in Spanish, paras 1698–1700. Available from <<http://shr.aas.org/guatemala/ceh/mds/spanish/>> (last visited on 23 October 2006).

55 Supplement to the Sierra Leone Gazette Vol. Cxxxi, No. 9 dated 10th February, 2000.

56 Para 15 of the "Overview" accessible at: <[www.nuigalway.ie/human\\_rights/publications.html](http://www.nuigalway.ie/human_rights/publications.html)> (visited 23 October 2006). See also Vol. 2, Chapter 2, paras 106 and 107, where the Commission found that the RUF was "the primary violator of human rights in the conflict" and responsible for 60.5 per cent of the violations (24,353 out of 40,242 violations). See further paras 115–172. The RUF was not the only non-state actor dealt with in the report. ECOMOG (the Ecomog Cease-Fire Monitoring Group and Executive Outcomes (the Military Security Company) are both considered. With regard to ECOMOG, the Report points to "human rights violations" including summary executions of civilians. At para. 396. With regard to Executive Outcomes, the Report states that the Commission recorded no "allegation of any human rights violation against the mercenaries". At para. 402.

57 Zegveld, above note 9, p. 48, highlights the Security Council Afghanistan Resolution 1193 (1998) and also mentions the resolution on Angola (S/RES1213 (1998)) which is addressed not only to the government of Angola but also to UNITA.

insurgents can have obligations under humanitarian law they should also be able to bear human rights obligations.<sup>58</sup> From here it is a small step to suggest that such international human rights obligations apply at all times to all armed opposition groups (even before the appeals of the Security Council). The resolution adopted by the distinguished expert body the Institute of International Law, at its Berlin session in 1999, stated that “All parties to armed conflicts in which non-State entities are parties, irrespective of their legal status ... have the obligation to respect international humanitarian law as well as fundamental human rights.”<sup>59</sup> With regard to disturbances short of armed conflict the resolution includes an Article X to similar effect concerning fundamental human rights: “To the extent that certain aspects of internal disturbances and tensions may not be covered by international humanitarian law, individuals remain under the protection of international law guaranteeing fundamental human rights. All parties are bound to respect fundamental rights under the scrutiny of the international community.”<sup>60</sup>

To those who would still prefer to rely simply on humanitarian law I would respond as follows: first, humanitarian law does not usually apply in the absence of protracted armed conflict; second, even when there is a reasonable claim that there is a protracted armed conflict, governments have often denied the existence of a conflict, making dialogue with the parties about the application of humanitarian law rather problematic; and, third, the human rights framework allows for a wider range of accountability mechanisms, including monitoring by the Special Rapporteurs of the UN Commission of Human Rights and the field offices of the High Commissioner for Human Rights.

Most recently, the UN’s Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, grappled with the question in the context of his report on Sri Lanka. Alston concluded in the following terms:

25. Human rights law affirms that both the Government and the LTTE [Liberation Tigers of Tamil Eelam] must respect the rights of every person in Sri Lanka. Human rights norms operate on three levels – as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community. The Government has assumed the binding legal obligation to respect and ensure the rights recognized in the International Covenant on Civil and Political Rights

58 According to Dieter Fleck “If non-state actors have human rights, it appears logical that they also must have responsibilities, no different from the obligations insurgents have under international humanitarian law. There is a clear trend to subject non-state actors to human rights law”. Dieter Fleck, “Humanitarian Protection Against Non-State Actors”, in *Verhandeln für den Frieden – Negotiating for Peace: Liber Amicorum Tono Eitel*, Springer, Berlin, 2003, pp. 69–94, p. 79.

59 “The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties”, resolution adopted at the Berlin Session, 25 August 1999, Article II.

60 Ibid., Article X. According to the Commentary fundamental rights are assimilated to those rights that are applicable in states of emergency. Institute of International Law, *L’application du droit international humanitaire et des droits fondamentaux de l’homme dans les conflits armés auxquels prennent part des entités non étatiques: résolution de Berlin du 25 août 1999 – The application of international humanitarian law and fundamental human rights in armed conflicts in which non-state entities are parties: Berlin resolution of 25 August 1999 (commentaire de Robert Kolb) Collection “résolutions” n° 1*, Pedone, Paris, 2003, p. 43.

(ICCPR). As a non-state actor, the LTTE does not have legal obligations under ICCPR, but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.<sup>61</sup>

26. I have previously noted that it is especially appropriate and feasible to call for an armed group to respect human rights norms when it ‘exercises significant control over territory and population and has an identifiable political structure’. This visit clarified both the complexity and the necessity of applying human rights norms to armed groups. The LTTE plays a dual role. On the one hand, it is an organization with effective control over a significant stretch of territory, engaged in civil planning and administration, maintaining its own form of police force and judiciary. On the other hand, it is an armed group that has been subject to proscription, travel bans, and financial sanctions in various Member States. The tension between these two roles is at the root of the international community’s hesitation to address the LTTE and other armed groups in the terms of human rights law. The international community does have human rights expectations to which it will hold the LTTE, but it has long been reluctant to press these demands directly if doing so would be to treat it like a State’.

27. It is increasingly understood, however, that the human rights expectations of the international community operate to protect people, while not thereby affecting the legitimacy of the actors to whom they are addressed. The Security Council has long called upon various groups that Member States do not recognize as having the capacity to formally assume international obligations to respect human rights.<sup>62</sup> The LTTE and other armed groups must accept that insofar as they aspire to represent a people before the world, the international community will evaluate their conduct according to the Universal Declaration’s “common standard of achievement”.<sup>63</sup>

Alston goes on to include specific human rights recommendations addressed to the non-state actor: “The LTTE should refrain from violating human rights, including those of non-LTTE-affiliated Tamil civilians. This includes in particular respect for the rights to freedom of expression, peaceful assembly, freedom of association with others, family life, and democratic participation, including the right to vote. The LTTE should specifically affirm that it will abide by the North-East Secretariat on Human Rights charter.”<sup>64</sup>

61 Footnote in the original reads: “14. Consistent with this analysis, the LTTE created North East Secretariat on Human Rights released the final version of the NESOHR Charter of human rights in Oct 2005. Its stated objectives include promoting respect for human rights “according to the Universal Declaration of Human Rights and the International Covenants on human rights””, available at <<http://nesohr.org/charter/Charter-English.PDF>> (visited 23 Octobre 2006).

62 Footnote in the original reads: “SC Res. 1265 (1999), preamble; SC Res. 1193 (1998), paras. 12, 14; SC Res. 814 (1993), para. 13”.

63 UN Doc. E/CN.4/2006/53/Add.5, 27 March 2006 (footnote omitted).

64 Ibid., para. 85. See also the letter addressed directly to the LTTE concerning prevention of killings, investigation, and the application of the death penalty, “Allegation letter sent 21 November 2005, UN Doc. E/CN.4/53/Add.1, 27 March 2006, p. 320. Note the “Urgent appeal” sent to the Palestinian Authority regarding death sentences, on 28 February 2005, *ibid.*, p. 321.

This approach is applied in the joint report on Lebanon and Israel by a group of four special rapporteurs:

Although Hezbollah, a non-State actor, cannot become a party to these human rights treaties, it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights. The Security Council has long called upon various groups which Member States do not recognize as having the capacity to do so to formally assume international obligations to respect human rights. It is especially appropriate and feasible to call for an armed group to respect human rights norms when it “exercises significant control over territory and population and has an identifiable political structure”.<sup>65</sup>

The Office of the UN High Commissioner for Human Rights (OHCHR) has a human rights field operation in Nepal. The Office reports on the human rights situation. Reports include a special section on incidents involving the Communist Party of Nepal (Maoist) (CPN-M).<sup>66</sup> Often these cannot be expressed in terms of violations of international humanitarian law since they took place during the cease-fire outside the context of an armed conflict. At one level there is apparently a commitment to human rights by the CPN-M, but this does not really seem dispositive to the UN’s reporting. Another section in the report covered killings by an “illegal armed groups” known as Pratikar Samiti (retaliation groups) later renamed “Peace and Development Committees” as well as killings by a group known as the Special Tiger Force.<sup>67</sup> The UN report does not allege that these groups were supported by the state. Their killings are simply detailed as part of the human rights situation. One recent press release by the OHCHR Nepal Office illustrates the approach:

OHCHR has continued to emphasize in its meetings with CPN-M leaders that abductions of civilians for any reason are in violation of CPN-M’s commitment to international human rights standards. These abductions and related investigations and punishment fail to provide even minimum

65 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, UN Doc. A/HRC/2/7, 2 October 2006, para. 19. Footnotes omitted. Part of footnote 19 attached to the end of this paragraph reads: “Furthermore, the obligations of Lebanon under international human rights law continue to apply in territories under the control of de facto authorities. Their acts are classified, under the law on State responsibility, as acts of the State to the extent that such authorities are in fact exercising elements of governmental authority in the absence or default of the official authorities, and in circumstances which call for the exercise of such authority (see Article 9, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001), in *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, chap. IV.E.1.)” This suggestion implies a simultaneous complementary set of obligations on both the State and the non-state actor.

66 See UN Doc. E/CN.4/2006/107 16 February 2006, paras 45–58.

67 *Ibid.*, paras 59–61.

guarantees of due process and fair trial. As a consequence, victims of abductions are vulnerable to other violations of their human rights, particularly their right to life and physical integrity, as in the noted cases. OHCHR concerns in this regard also apply to CPN-M cadres accused of crimes.<sup>68</sup>

To conclude this section, the assumption of many humanitarian law experts that that human rights law applies only to governments, and not to unrecognized insurgents, is no longer a universally shared assumption.

### Successful insurrectional and other movements

The articles of the International Law Commission (ILC) on “Responsibility of States for Internationally Wrongful Acts”<sup>69</sup> stipulate that the conduct of an insurrectional movement, which succeeds in becoming the new government, is conduct which gives rise to state responsibility under international law.<sup>70</sup> In addition to insurrectional movements, “other” movements that succeed in establishing a new state will also be held responsible, as a state, for their unlawful acts committed while they were a non-state actor.<sup>71</sup> There is no need in such cases for any recognition until the insurgency succeeds. The new government is obviously recognized in the context of the eventual claim made against it. At that point the insurrectional (or other) movement’s behaviour is treated as if it were a government at the time of its internationally wrongful acts.<sup>72</sup> The obligations at the time would include not only the rules of international humanitarian law, briefly referred to above, but also general rules of international law including, it is now suggested, international human rights law.<sup>73</sup>

68 “OHCHR Urges The Investigation And Prevention Of Serious Human Rights Abuses By CPNM”, Press Release 27 June 2006. For a later fuller report see OHCHR *Human rights abuses by the CPN-M Summary of concerns*, September 2006. The Working Group on Enforced or Involuntary Disappearances has a limited mandate (UN Doc. E/CN.4/2006/56, 27 December 2005, para. 8): “In the context of internal armed conflict, opposition forces have reportedly perpetrated disappearances. While the mandate of the Working Group is limited to violations carried out by state agents or non-State actors acting with the connivance of the State, the Working Group condemns the practice of disappearance irrespective of who the perpetrators may be”. The report refers to the arbitrary use of disappearances by the Security Forces in Nepal and continued: “Maoist insurgents also commit widespread illegal deprivations of liberty” (at para. 386). In this context it is impossible to suggest that the Maoists are acting with the connivance of the state

69 See UN Doc. A/Res/56/83, adopted 12 December 2001. The Commentary is found in A/56/10, Report of the ILC, adopted at its 53rd session, 2001. The Commentary is also reproduced together with a helpful introduction and appendices in James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002.

70 Article 10(1) “The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.”

71 Article 10 (2) “The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.”

72 It has been suggested that this responsibility arises “as from the beginning of the revolution”, Chittharanjan F. Amerasinghe, *State Responsibility for Injuries to Aliens*, Clarendon, Oxford, 1967, p. 54.

73 David Matas, “Armed Opposition Groups”, *Manitoba Law Journal*, Vol. 24, 1997, pp. 621–34.

The history of this rule of attribution in the context of state responsibility reflects state practice concerning claims made regarding “damage caused to foreigners by an insurrectionist party which has been successful”.<sup>74</sup> The background to the rule of attribution involves the substantive law concerning the protection of aliens rather than the laws of armed conflict (which historically were rather underdeveloped with regard to internal armed conflict). Today the substantive law regarding the protection of aliens has been overtaken by the international law of human rights,<sup>75</sup> and it makes sense simply to apply the law of human rights to the successful insurgents.

The definition of “dissident armed forces” is said to capture the “essential idea of an “insurrectional movement””.<sup>76</sup> The ILC Commentary suggests that a guide to the sort of groups which are covered by this rule can be found in the threshold criteria contained in Protocol II to the Geneva Conventions. Protocol II covers armed conflicts which take place between the forces of a party to the treaty and “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. The ILC identifies certain situations that are not covered, with the result that groups engaged in such activity would not count as insurrectional movements.<sup>77</sup> Article 1(2) states, “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” The Commentary excludes from the article’s reference to “other movements” “the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State”.<sup>78</sup>

Unsuccessful insurrectional movements fall outside the application of the rules of state responsibility, but the International Law Commission is careful to state that an unsuccessful insurrectional movement may be held responsible for its own breaches of international law.<sup>79</sup>

## **Practical steps taken to ensure respect for human rights by non-state actors in times of armed conflict**

It would be tempting to leave the issue here: international humanitarian law applies to all sides, in accordance with the thresholds outlined in that branch of

74 See para. 13 to Article 10, the ILC Commentary, above note 69, page 117, citing a document prepared for the 1930 Preparatory Committee for the Codification Conference.

75 See John Dugard, Special Rapporteur, ILC, First report on diplomatic protection, UN Doc. A/CN.4/506, 7 March 2000, “Contemporary international human rights law accords to nationals and aliens the same protection, which far exceeds the international minimum standard of treatment for aliens, set by Western Powers in an earlier era”. At para. 32.

76 ILC Commentary, above note 69, para. 9 to Article 10, page 115.

77 Ibid.

78 Para 10 of the Commentary to Article 10 at 115, above note 69.

79 See Para 16 of the Commentary to Article 10 at 118: “A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present Articles, which are concerned only with the responsibility of States.”

law, and human rights obligations can be discerned from the practice of the Security Council and applied more generally. Where an insurgent or other movement succeeds in becoming a new government or creating a new state, that new government will be internationally responsible for the violations of international law committed by the movement. But serious practical problems remain; the theory does not work in practice.

First, as mentioned above, by relying on the threshold criteria such as those found in Protocol II,<sup>80</sup> one is in reality asking a government to accept that rebels have control of territory and have achieved some sort of authority. Governments have been reluctant to do this or even recognize the arguably lower threshold in Common Article 3, namely that there is an “armed conflict not of an international character occurring within the territory of one of the High Contracting Parties”.<sup>81</sup> Although the treaties are at pains to point out that the application of the rules confers no recognition or status on the rebels, governments nevertheless often deny the applicability of these norms. Does such a denial really matter? As Christopher Greenwood has emphasized, “the acceptance by a government that an armed conflict exists is not a legal prerequisite”, the obligations in Common Article 3 and Protocol II “are stated to be applicable provided that certain objective criteria are met”.<sup>82</sup> So if the law applies should we worry about the attitude of the government? The attitude of the government is of course relevant, since it obviously becomes harder to convince the rebels that they should comply with rules that the government is refusing to acknowledge as the appropriate framework for their own troops. Despite the fact that the rules are designed to protect the victims of war, rather than create a level playing field, the reciprocity between government and rebels remains important – and that very suggestion of parity is part of the problem.

80 The Protocol applies to “all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. (2) This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”. Article 1(1) and (2). The Protocol has been applied in Russia (Chechnya), Colombia, El Salvador and Rwanda.

81 With regard to Article 3, the International Criminal Tribunal for the Former Yugoslavia’s definition of an armed conflict is increasingly applied. In *Prosecutor v. Tadić* (jurisdiction) IT-94-I-AR72, 2 October 1995, the Appeals Chamber posited a definition of the meaning of armed conflict and the scope of the obligations: “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there”. At para. 70.

82 Christopher Greenwood, “International Humanitarian Law (Laws of War)”, in Frits Kalshoven (ed.), *The Centennial of the First International Peace Conference*, Kluwer Law International, The Hague, 2000, pp. 161–259, p. 231.

Second, turning to the rebels, theories concerning why they should comply with these norms are of more than academic interest. Arguments that rest on national commitments or international custom may be rejected by rebels who have neither participated in the process nor been allowed to adhere to the treaty.<sup>83</sup> Reliance on the binding nature of national law (even where this merely implements international law) may be met with a frosty response in situations where the rebels seek to challenge the legitimacy of the regime to adopt any law at all. While some rebel groups seeking to become the government of a state may be looking for international legitimacy, and could perhaps be convinced of the need to accept the application of norms accepted by the international community of states, other groups may have no such aspirations, being content with control of certain natural resources and the opportunity to run organized criminal activity.<sup>84</sup>

Perhaps it is time for a radical rethink. Human rights organizations such as Amnesty International are reporting on armed groups and demanding respect for human rights obligations outside the framework of humanitarian law obligations (recruitment of under-18s, abuses of humanitarian workers, denial of freedom of expression through restrictions on journalists etc.).<sup>85</sup> Human Rights Watch has reported on the forced divorces and physical abuses inflicted by an armed opposition group on their own fighters.<sup>86</sup> In short, human rights monitors are expanding the traditional the traditional normative framework beyond humanitarian law. An interesting development in this field is the adoption of commitments, declarations, codes of conduct and memoranda of understanding by the armed groups themselves. Such texts increasingly refer to human rights

83 See generally Marco Sassòli, "Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law", Conference Paper, University of Quebec in Montreal, 2000, available through <<http://www.ihlresearch.org/ihl/>> (visited 23 October 2006); Zegveld, above note 9), p. 17, footnote 27.

84 See the discussion by Claude Bruderlein, "The role of non-state actors in building human security: the case of armed groups in intra-state wars", Centre for Humanitarian Dialogue, Geneva, 2000, p. 11. For a set of essays covering some of the initiatives designed to limit the harm in conflict situations caused by the economic activities of non-state actors such as corporations and financial institutions see Karen Ballentine and Heiko Nitzschke (eds.), *Profiting from Peace: Managing the Resource Dimensions of Civil War*, Boulder, Colo., Lynne Rienner, 2005.

85 See "Israel And The Occupied Territories And The Palestinian Authority: Without distinction – attacks on civilians by Palestinian armed groups", AI Index MDE 02/003/2002; regarding armed groups in Algeria: "Algeria: Steps towards change or empty promises?", MDE 28/005/2003 (to stop targeting civilians immediately and respect the most fundamental human right, the right to life; to stop immediately the practice of abducting women and girls and subjecting them to rape and other forms of torture. Regarding armed political groups in the Democratic Republic of Congo: "DRC: On the precipice: the deepening human rights and humanitarian crisis in Ituri", AFR 62/006/2003 (armed political groups should immediately cease unlawful killings and other human rights abuses against civilians and combatants who have ceased to take part in hostilities; all forces should immediately cease harassment of and human rights abuses against humanitarian NGO staff and human rights activists and ensure unhindered and safe access for humanitarian agencies to all areas under their control; all armed groups should end the recruitment into their forces of child soldiers under the age of 18 and cooperate with MONUC and other appropriate agencies for the disarmament, demobilization and reintegration of these children). See "DRC: Addressing the present and building a future", AFR 62/050/2003; and "Haiti: Abuse of human rights: political violence as the 200th anniversary of independence approaches", AMR 36/007/2003. See also "Iraq: In cold blood: abuses by armed groups", AI Index MDE 14/009/2005.

86 Human Rights Watch, "No Exit: Human Rights Abuses Inside the MKO Camps" (May 2005).

standards and have been tailored to the particularities of the situation. The preliminary empirical work done in this area “suggests that where armed groups do commit themselves to written codes of conduct, this encourages them to respect human rights”.<sup>87</sup> Another study of eleven such codes, with regard to Burundi, Liberia, Somalia, Sierra Leone, Afghanistan, Sudan, Democratic Republic of the Congo, Angola, East and West Timor, Democratic People’s Republic of Korea and the Russian Federation revealed that “for non-State actors, the agreements refer to international human rights customary law”.<sup>88</sup> This study also notes that all the agreements state that the beneficiaries of humanitarian aid are to enjoy the following rights: “the right to live in security and dignity, the right to basic needs, the right to receive humanitarian assistance without discrimination and according to basic needs, the right to be involved in humanitarian activities of concern to them, the right to legal and effective human rights protection, and the right to protection against forced population transfer”.<sup>89</sup> Non-governmental organizations such as Geneva Call are engaging with non-state actors to monitor commitments made by non-state actors to Geneva Call in the area of anti-personnel mines, and the UN Secretary-General’s Special Representative for Children and Armed Conflict works by obtaining and monitoring commitments not to recruit or use children in armed conflict.<sup>90</sup>

Interestingly, in the context of the Secretary-General’s reports on children and armed conflict we have seen how important it is to find practical solutions rather than present a picture based on specific violations of international humanitarian law. In one report the Secretary-General referred to attempts by his Special Representative to obtain commitments from armed groups in Northern Ireland “to refrain from recruiting or using children in the conflict”.<sup>91</sup> Later the report stated that following a trip to the republic of Chechnya of the Russian Federation the Special Representative reported that “insurgency groups continued to enlist children and use them to plant landmines and explosives”.<sup>92</sup> A few months later we find corrigenda to the report which explain, for example, that with regard to Chechnya the expression “insurgency groups” is to be replaced with “illegal armed groups” and the inclusion of the following phrase after the reference to Chechnya: “though the situation there is not an armed conflict within the meaning of the Geneva Conventions and the Additional Protocols thereto”.<sup>93</sup> A similar adjustment had

87 International Council on Human Rights Policy, “Ends and Means: human rights approaches to armed groups”, ICHRP, Versoix, 2000, p. 52.

88 Jean-Daniel Vigny and Cecilia Thompson, “Fundamental Standards of Humanity: What Future?”, *Netherlands Quarterly of Human Rights*, Vol. 20, 2002, pp. 185–99, p. 193.

89 *Ibid.*, p. 194.

90 Both initiatives are discussed in *Human Rights Obligations of Non-State Actors*, 2006, pp. 289–99. See further <<http://www.genevacall.org/home.htm>> (visited 23 October 2006) and <<http://www.un.org/special-rep/children-armed-conflict/>> (visited 23 October 2006).

91 UN Doc. A/58/546-S/2003/1053, 10 November 2003, para. 58.

92 *Ibid.*, para. 61.

93 UN Doc. A/58/546-Corr.2-S/2003/1053-Corr.2, 19 April 2004.

been made to the entry regarding Northern Ireland.<sup>94</sup> The heading in the Secretary-General's reports now refers not only to parties to armed conflicts but also to parties that recruit or use children "in other situations of concern".<sup>95</sup> The United Nations and non-governmental organizations will continue to find practical ways to expose those non-state actors that abuse the rights of children in conflict situations. Where the framework of international humanitarian law is precluded due to the lack of an armed conflict, or the perceived lack of an armed conflict, the UN and NGOs will have to rely on the idea that the non-state actors involved have human rights obligations.

### Private security firms

A first immediate response to the issue of private security firms in the context of armed conflict is to label them mercenaries and hence suggest that they are tainted with illegality and illegitimacy. The modern international definition of a mercenary is problematic and operates in international humanitarian law simply to deprive captured individuals of any right to claim prisoner-of-war status in an international armed conflict.<sup>96</sup> Outside international humanitarian law, attempts to criminalize mercenary activity flounder on a series of definitions which are easy to evade. While the label of "mercenary" will continue to be applied to express the speaker's disapproval rather than to describe an individual satisfying the specific criteria under international law, it is suggested that human rights concern in this area is less likely to be about whether an individual fulfils the criteria for being a mercenary and more likely to be focused on issues of corporate accountability, contract law and individual criminal responsibility under the laws of armed conflict. Although treaty crimes concerning mercenaries have been in force for some time with regard to Africa,<sup>97</sup> prosecutions for the crime of mercenarism as defined in the Convention for the Elimination of Mercenarism in Africa treaty or other treaties are rare, even if some quite well-known trials of "mercenaries" have taken place based on violations of national law.<sup>98</sup>

94 UN Doc. A/58/546-Corr.1-S/2003/1053-Corr.1, 20 February 2004.

95 Ibid. See also the new Report of the Secretary-General A/59/695-S/2005/72, 9 February 2005, Annex II.

96 See Article 47 of Protocol I to the Geneva Conventions of 1949. For an explanation of the background political debates at the UN and the OAU on the issue of mercenaries and the eventual adoption of Article 47 see Antonio Cassese, "Mercenaries: Lawful Combatants or War Criminals?", *ZaōRV*, Vol. 40, 1980, pp. 1–30.

97 Convention of the OAU for the Elimination of Mercenarism in Africa of 3 July 1977, which entered into force on 22 April 1985, and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries Mercenary Convention of 4 December 1989, entered into force 20 October 2001.

98 The trials in 2004 with regard to those accused of plotting a coup in Equatorial Guinea did not mention mercenarism. See Amnesty International, "Equatorial Guinea: Trial of alleged coup plotters seriously flawed", AI Index: AFR 24/017/2004, 30 November 2004, and similarly the charges in Zimbabwe with regard to the same plot were focused on firearms and immigration infractions: "Mercenaries' appeal in Zimbabwe", *BBC News*, 9 December 2004, details accessed at <<http://news.bbc.co.uk/1/hi/world/africa/4082481.stm>> (visited 23 October 2006). See further Eric David, *Mercenaires et volontaires internationaux en droit des gens*, Editions de L'Université de Bruxelles, Brussels, 1978, pp. 229–63. For a table depicting the various firms and their objectives, with regard to various African countries, see Appendix I "Mercenaries: Africa's Experience 1950s–1990", in Abdel-Fatau Musah and J 'Kayode Fayemi (eds.), *Mercenaries: An African Security Dilemma*, Pluto, London, 2000, pp. 265–74.

A second approach is to think about how private military companies may trigger state responsibility under international law. State responsibility applies where the company is either empowered by law to exercise elements of governmental authority or where the company is acting on the instruction of, or under the direction or control of a state.<sup>99</sup> But looking at state responsibility fails to capture the full picture. A more comprehensive approach demands that we ask to what extent there is direct accountability under international norms and procedures for the companies themselves?

The issue of the international accountability of the companies themselves was addressed at the level of the UN Human Rights Commission (now Council). The Council's Working Group on the use of Mercenaries has a dual mandate. On the one hand the Working Group is to monitor the effects of "private companies offering military assistance" on the "enjoyment of human rights", and on the other hand the Working Group is to "prepare draft international principles that encourage respect for human rights on the part of those companies in their activities".<sup>100</sup> In its 2006 report the Working Group agreed that private military and security companies providing assistance in a transnational context should apply the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights approved by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003.<sup>101</sup> The Working Group also agreed to establish a "monitoring and complaint mechanism to address complaints regarding mercenaries" activities'.<sup>102</sup>

The accountability discussion also involves consideration of the possibility of complaints under the US Alien Tort Claims Act. Genocide, slave trading, slavery, forced labour and war crimes have been said by the US courts to be actionable even in the absence of a state nexus.<sup>103</sup> And the *Kadic v. Kradžić* decision stated that where rape, torture and summary execution are committed in isolation, these crimes "are actionable under the Alien Tort Act, without regard to state action, to the extent they were committed in pursuit of genocide or war crimes".<sup>104</sup> The Supreme Court in the *Sosa v. Alvarez-Machain* case<sup>105</sup> pointed to a

99 See Articles 5 and 8 of the ILC's draft articles on state responsibility, A/Res/56/83, adopted 12 December 2001, discussed in Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 241–4.

100 Commission on Human Rights Resolution 2005/2.

101 UN Doc. E/CN.4/2006/11/Add.1, 3 March 2006, para 28. "In this respect, the members agreed that the normative provisions of the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (E/CN.4/Sub.2/2003/12/Rev.2) of 2003 approved by the Sub-Commission on the Promotion and Protection of Human Rights should apply to private companies in those cases where such companies were operating and providing military and security services in more than one country. The Norms should also apply when private companies operate as a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively."

102 *Ibid.*, p. 2.

103 *Wiwa v. Royal Dutch Shell Petroleum (Shell)*, US District Court for the Southern District of New York, 28 February 2002, p. 39. See also *Doe I v. Unocal Corporation*, 18 September 2002, paras. 3 ff.

104 *Kadic v. Karadžić*, 70 F. 3d 232 (2d Cir., 1995), pp. 243–244.

105 *Sosa v. Alvarez-Machain et al.*, 542 US 692 (2004).

1984 decision of the Court of Appeals for the District of Columbia Circuit that there was “insufficient consensus in 1984 that torture by private actors violates international law”.<sup>106</sup> However, the assumption that the crime of torture is confined to state officials has now been rebutted; as the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has more recently confirmed, there is no need for a public official to be involved in order for a private individual to be responsible under international law for the international crime of torture.<sup>107</sup>

As to whether obligations can extend beyond states and individuals to corporations, this has been presumed in the cases pending in the US federal courts,<sup>108</sup> and was examined in some detail in at least one case. The determination in that case was that corporations do have obligations under international human rights law. In the preliminary stages of the case against Talisman Energy Inc., concerning human rights abuses in Sudan, Judge Schwartz concluded:

[S]ubstantial international and United States precedent indicates that corporations may also be held liable under international law, at least for gross human rights violations. Extensive Second Circuit precedent further indicates that actions under the ATCA [Alien Tort Claims Act] against corporate defendants for such substantial violations of international law, including *jus cogens* violations, are the norm rather than the exception.<sup>109</sup>

In *Jama v. Esmor*, the Supreme Court’s new test developed in *Sosa v. Alvarez-Machain* was applied by the District Court dealing with claims made by asylum seekers against individual guards and the company for which they worked (Esmor). Senior District Judge Dickenson R. Debevoise quoted the Supreme Court’s new test and found that the individual allegations of sexual harassment and other mistreatment did not meet the rigorous threshold set by the Supreme Court:

A federal court applying the ATCA “should not recognize private claims under federal common law for violations of any international law norm with

106 Referring to *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (CADDC 1984) at footnote 20.

107 “The Trial Chamber in the present case was therefore right in taking the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention”. *Prosecutor v. Kunarac, Kovac and Vukovic*, Case IT-96-23 & IT-96-23/1-A, Judgment of the International Criminal Tribunal for the former Yugoslavia (Appeals Chamber), 12 June 2002, para. 148.

108 In addition to the case mentioned in the succeeding footnote, see also the following cases pending under this legislation at the time of writing: *Wiwa v. Royal Dutch Petroleum Co et al.* Case No. 96 CIV 8386 (KMW) (SDNY 2002); *Villeda et al. v. Fresh Del Monte Produce Inc, et al.* Case No 01-CIV-3300 (SD Fla. 2001); *Bowoto et al. v. Chevron et al.* Case No. C99-2506 (ND Cal 2000); *Arias et al. v. DynCorp et al.* Case No 01-01908 (DDC 2001); *John Doe I et al. v. Exxon Mobil Corp et al.*, Case No. 01CV01357 (DDC 2001); *Sinaltrainal et al. v. Coca-Cola et al.* Case No. 01-03208 (SD Fla 2001); *Estate of Rodrigues et al. v. Drummond Company Inc et al.* Case No. CV-02-0665-W (ND Ala 2002). For a detailed discussion of all of the decisions concerning corporations up to July 2004 see Sarah Joseph, *Corporations and Transnational Human Rights Litigation*, Hart Publishing, Oxford, 2004.

109 *The Presbyterian Church of Sudan et al. v. Talisman Energy Inc, Republic of the Sudan* Civil Action 01 CV 9882 (AGS), US District Court for the Southern District of New York, p. 47 of the Order of 19 March 2003. We discuss this case and the arguments in detail in Clapham, above note 99, Chapter 6.7.1.

less definite content and acceptance among civilized nations than the historical paradigms when paragraph 1350 was enacted” [*Sosa* at 2765].<sup>110</sup> None of the claims against the individual Esmor Guards can meet the rigorous *Sosa* requirements. Compare the conduct in which each individual Esmor Guard is alleged to have engaged with the torture and murder which was the subject of *Filartiga v. Pena-Irala* [630 F.2d 876 (CA 6 1980)].<sup>111</sup>

But the Opinion determines that the Alien Tort case against the corporation Esmor itself could not be dismissed in a summary judgment, and that the *Sosa* strict requirements were satisfied with regard to customary international human rights law, in particular the right not to be subjected to inhuman and degrading treatment. The judge carefully took into account the Supreme Court’s reference to consider whether there might be alternative remedies to an Alien Tort Claim. In the present case, normal routes of complaint were closed off, either because the private corporation was not bound by the Constitutional and public law protections or because the aliens were ineligible to invoke certain remedies.<sup>112</sup>

This case represents a clear finding that proceedings may continue under the ATCA against a non-state actor for violations of human rights law. One could easily see the logic being applied to private security companies accused of human rights abuses in other situations.<sup>113</sup>

Are there less legalistic approaches that could be envisaged? P.W. Singer has suggested that a “body of international experts, with input from all stakeholders (governments, the academy, nongovernmental organizations, and the firms themselves) could establish the parameters of the issues, build an internationally recognized database of the firms in the industry, and lay out potential forms of regulation, evaluation tools, and codes of conduct that public-decision makers could then weigh and decide upon”.<sup>114</sup> Singer foresees that the process would involve audits that would “include subjecting PMF personnel data bases to appraisal for past violations of human rights”.<sup>115</sup> In addition, such a body could not only monitor compliance with international norms but also have “certain powers to suspend payments.<sup>116</sup> The idea is that an approved and monitored firm could work for the UN and be in a position to win tenders from multinationals “concerned about their image”.<sup>117</sup>

110 The Court’s reference is to the reported version *Sosa v. Alvarez-Machain* 124 S. Ct. 2739 (2004).

111 *Jama v. Esmor*, Civ. No. 97-3093(DRD), 10 November 2004, p. 33 of the published transcript.

112 In a case concerning a Federal prison run by a private company, the Supreme Court decided that no constitutional tort for cruel and unusual punishments (Eighth Amendment to the US Constitution) could lie against a private corporation, (even though it can lie against individual federal guards where there is no other remedy) *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61 (2001).

113 Complaints remain before the US Courts concerning human rights abuses by contractors in Iraq; see *Salah et al. v. Titan Corp*, 353 F. Supp. 2d 1087 (2004); *Ibrahim et al. v. Titan Corp* 391 F. Supp. 2d 10 (2005).

114 Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, Ithaca, 2003, p. 241.

115 *Ibid.*

116 *Ibid.*

117 *Ibid.*

It may seem strange to consider that the “murky” world of “mercenarism” could be made accountable through market pressures. But two factors make this approach worthy of serious consideration. First, because these firms may be forced to rely on their contractual arrangements with governments to ensure payment, including respect for human rights and humanitarian law as “essential elements” of any contract would permit governments to withhold payment under certain conditions. The international arbitration under UNCITRAL rules and subsequent litigation concerning Sandline International and the government of Papua New Guinea ended in a settlement for US\$13.3 million. Although this contract did mention “conformance with the Geneva Convention”,<sup>118</sup> a properly drafted contract term demanding full respect for international humanitarian law and internationally recognized human rights as well as guarantees regarding careful recruitment and discipline for human rights abuses would provide a real incentive to comply with international human rights law due to the prospect of future disputes and settlements.<sup>119</sup> Second, private security firms themselves may be coming to see the advantages of human rights monitoring in order to enter the mainstream and the lucrative possibilities it offers.

Tim Spicer’s autobiography, *An Unorthodox Soldier: Peace and War and the Sandline Affair*, contains multiple references to human rights in its opening chapter. Some of these are worth reproducing here for what they reveal about the way in which respect for human rights is presented as part of the solution from the perspective of a non-state actor:

Given that a PMC [private military company] is a business, it is acknowledged that a fundamental law of successful business is that the supplier is only as good as his last contract. Ethical businesses first build a reputation and then work hard to protect it. If a particular PMC performed badly or unethically, exploited the trust placed in it by a client, changed sides, violated human rights or sought to mount a coup, then the company and its principals would find that their forward order book was decidedly thin. Discarding ethical and moral principles can therefore only be a one time opportunity. The chance will not recur and the company’s prospects would disappear.<sup>120</sup>

One hears here echoes of the corporate social responsibility embrace of human rights. The difference may be that, in the context of armed conflict, the

118 Contract of 31 January 1997, the contract was made available on the Sandline International website: <[www.sandline.com/site/](http://www.sandline.com/site/)> (visited 23 October 2006). It is also reproduced in Singer, above note 114, p. 245.

119 Françoise Hampson has suggested that the agreement between a company and a government should include *inter alia* “the circumstances in which they can open fire in defence of property and /or in defence of life” as well as obligations to cooperate in any investigation into the unlawful use of force. With regard to contracts between security companies and corporations she has suggested that the security company should be required to provide its personnel with training in the relevant domestic law and that it should be stipulated in the contract that security personnel will be subject to the domestic criminal law of the country in which they are operating. “The problem with mercenary activity”, working paper for the UN meeting of the Group of Experts, Geneva 13–17 May 2002, at 3

120 *An Unorthodox Soldier: Peace and War and the Sandline Affair*, Mainstream Publishing, Edinburgh, 1999, pp. 25–6.

abuse of human rights quickly translates into international criminal responsibility for the individuals concerned. There is no need to formulate elaborate arguments about conspiracy and complicity in the present context; the individuals themselves may be accused of the direct commission of international crimes. Many of those concerned are nationals of states parties to the Rome Statute of the International Criminal Court (ICC). Furthermore, several countries with internal armed conflicts have ratified the Rome Statute, including, the Democratic Republic of Congo, Afghanistan and Colombia. The prospect of criminal prosecution before an international tribunal has been registered by Tim Spicer as part of the incentive for private military companies to comply with the Geneva Conventions.

Spicer goes on to suggest field-based monitoring of the behaviour of private military companies (PMCs). He suggests that observer teams be deployed alongside the company; operating “in the same way as a referee at a football match” (but without the power to send players off, a task which should be left to local commanders). In this way “the PMC will be fully cognisant of the fact that their actions are being monitored and will not want to be banned from “playing in another game” in the future, or to find themselves in front of an international tribunal”.<sup>121</sup> The threat of criminal sanctions may well be an effective form of regulation from a human rights perspective. Yet while many will be subject to the potential jurisdiction of the ICC or the prospect of national trials for crimes contained in the Rome Statute, others will fail to come within the scope of any effective criminal law.<sup>122</sup>

The Abu Ghraib scandal has been addressed in various US official reports. Major-General Taguba’s Investigation recommended that Steven Stephanowicz, a contract US civilian interrogator, from Consolidated Analysis Centers Inc. (CACI), 205th Military Intelligence Brigade, “be given an Official Reprimand to be placed in his employment file, termination of employment, and generation of a derogatory report to revoke his security clearance for the following acts”, which included the fact that he “Allowed and/or instructed MPs, who were not trained in interrogation techniques, to facilitate interrogations by “setting conditions” which were neither authorized and in accordance with applicable regulations/policy. He clearly knew his instructions equated to physical abuse.”<sup>123</sup> The Schlesinger Report mentions a finding of inadequate training among 35 per cent of private contractors used for interrogation, and suggests that future contracts should specify the experience and qualifications needed.<sup>124</sup> From a human rights perspective, the response to the participation in abuse by private contractors has been rather feeble. There is no sense that any of the companies involved will suffer any disadvantage or have any new incentive to tighten their procedures to

121 *Ibid.*, p. 26.

122 See Peter W. Singer, “War, profits, and the Vacuum of Law: Privatized Military Firms and International Law”, *Columbia Journal of Transnational Law*, Vol. 42, 2004, pp. 521–49, pp. 537–8.

123 *Article 15–6 investigation of the 800th Military Police Brigade*, p. 48. Available at <[www.globalpolicy.org/security/issues/iraq/attack/law/2004/2004tagubareport.pdf](http://www.globalpolicy.org/security/issues/iraq/attack/law/2004/2004tagubareport.pdf)> (visited 23 October 2006).

124 *Final Report of the Independent Panel to Review DoD Operations*, p. 69. Available at <[www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf](http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf)> (visited 23 October 2006).

avoid future abuse and exclude those already implicated from any future contact with detainees.

A series of expert reports has argued for new regulation for this sector at the national, regional and international levels.<sup>125</sup> Part of the concern stems from perceived ambiguities in international law with regard to the status of the personnel:<sup>126</sup> when can they be considered combatants entitled to prisoner-of-war status on capture? when can they be prosecuted under military law? when does their activity amount to mercenarism? These and other questions concerning state responsibility were tackled in great detail by a group of experts convened by the University Centre for International Humanitarian law (soon Geneva Academy of International Humanitarian law and Human Rights). Space does not permit even a summary of the rich debate, and the reader is referred to the report of the meeting.<sup>127</sup> The general level of concern stems in part from the fact that so few prosecutions have been brought in home countries (such as the United States) for human rights abuses committed in Iraq,<sup>128</sup> given that it is impossible for the Iraqi national authorities to prosecute those working for the Coalition. Concern also comes from a more general suspicion that those engaged in armed conflict and interrogation should be democratically accountable in the public sphere.

In considering the impact of human rights law on various regimes for licensing private security companies, one may begin with the regulation of the private security companies by the Coalition Provisional Authority in Iraq. To comply with Iraqi Ministry of Interior vetting standards, employees of private security companies must “Be willing to respect the law and all human rights and freedoms of all Iraqi citizens”.<sup>129</sup> Note that companies have to submit a minimum refundable bond of \$25,000 and that “any breaches of Iraq or other applicable law by employees or companies may result in forfeiture of the bond”.<sup>130</sup> Prompt action with respect to “individual violations” is to be taken into account by the ministry

125 See e.g. Caroline Holmqvist, “Private Security Companies: The Case for Regulation”, Stockholm International Peace Research Institute Policy Paper No. 9, Stockholm, 2005; Fred Schreier and Marina Caparini, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies”, Geneva Centre for the Democratic Control of Armed Forces Occasional Paper No. 6, Geneva, 2005; Peter W. Singer, “The Private Military Industry and Iraq: What Have We Learned and Where to Next?”, Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2004; James Cockayne, “Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study”, International Peace Academy, New York, 2006; and Simon Chesterman and Chia Lehnardt *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (forthcoming).

126 E.g. Schreier and Caparini, above note 125; Singer, above note 125, pp. 11–14.

127 “Expert Meeting on Private Military Contractors: Status And State Responsibility For Their Actions”, 29–30 August 2005, available at <[http://www.ucihl.org/communication/Private\\_Military\\_Companies\\_report.pdf](http://www.ucihl.org/communication/Private_Military_Companies_report.pdf)> (last visited 23 October 2006). Readers may also be interested in the “Swiss Initiative in Cooperation with the International Committee of the Red Cross to Promote Respect for International Humanitarian Law and Human Rights Law with regard to Private Military and Security Companies Operating in Conflict Situations” and intergovernmental initiative organized by the Swiss Federal Department of Foreign Affairs; papers are available at <[www.dv.admin.ch/psc](http://www.dv.admin.ch/psc)> (last visited 23 October 2006).

128 Singer, above note 125, p. 13.

129 CPA/MEM/26 June 2004/17, Section 2(6)(b).

130 *Ibid.*, Section 3(3). I am grateful to James Stewart from the legal office of the ICRC for bringing this to my attention.

in determining whether the bond should be forfeited in whole or in part. This arrangement should be seen against the context of the situation in Iraq, where contractors are “immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto”.<sup>131</sup> Although there is obviously a risk that a \$25,000 bond could be written off as an operating cost, this sum represents a minimum and one could imagine larger sums, proportionate to the actual contract, which could be used to compensate the victims of any human rights abuses committed by the company.

A further example is provided by the South African Regulation of Foreign Military Assistance Act, which states that government approval may not be granted if it would “result in the infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered”.<sup>132</sup> This clause is less about accountability after the fact than about seeking to force into the approval process a consideration of the human rights implications. A poor record on human rights issues would surely render unlikely the approval of any agreement to offer private military services. Operating without approval is a criminal offence which applies not only to natural persons but also to juristic persons, in other words, to the companies themselves.<sup>133</sup>

The United Kingdom’s Green Paper entitled “Private Military Companies: Options for Regulation”<sup>134</sup> sets out various regulatory options, ranging from an outright ban, through registration and licensing to a voluntary code of conduct. Human rights obligations figure explicitly in the discussion of a Voluntary Code of Conduct. The Green Paper foresees that such a code would cover respect for human rights, as well as respect for international law including international humanitarian law and the laws of war.<sup>135</sup> It is suggested that a trade association, such as the British Security Industry Association, would police compliance with the code. It is also suggested that the code would include a provision allowing for external monitoring. For many observers, any regulation in this field must take into consideration international human rights obligations and ensure that the companies themselves abide by these obligations. According to Beyani and Lilley, “The UK Government should ensure that national legislation reflects relevant international human rights and humanitarian law, so UK mercenaries and private military companies do not violate these laws.”<sup>136</sup> On the other hand Walker and Whyte have suggested that “the relevant doctrines of human rights law and humanitarian law were not designed with private or corporate protagonists in

131 CPA/ORD/27 June 2004/17, Section 4(3).

132 Section 7(1)(b).

133 Section 8(1).

134 HC 577, 12 February 2002. For an overview of the situation in other countries, see Annex B to the Green Paper. Apart from South Africa and the United States regulation is almost entirely limited to outlawing mercenarism. For the United States see the US Arms Export Control Act 1968; licences have to be obtained from the State Department under the International Transfer of Arms Regulations and exports of defence services over \$50m have to be notified to Congress.

135 *Ibid.*, para. 76.

136 Chaloka Beyani and Damian Lilly, *Regulating private military companies: options for the UK Government*, International Alert, London, 2001, para. 61.

mind”.<sup>137</sup> They go on to conclude that “The opening of legitimate markets to PMCs looks less like a transfer of power from the public and the private sector than the re-regulation of security provision, a shift in the form of regulation from international human rights or humanitarian law to contract and civil law.”<sup>138</sup>

It is, however, the voluntary code model which is currently most influential, the process which, in the field of security for companies in the extractive sector, led to the adoption of the Voluntary Principles on Security and Human Rights. This framework involves representatives from human rights organizations, trade unions, the oil companies and the governments of the United States, the United Kingdom, the Netherlands and Norway.<sup>139</sup> In normative terms, the Principles are helpful in outlining the international standards with which private security companies are expected to comply, and the human rights obligations for which the extractive industry companies should ensure respect when engaging such private security companies. For instance, the Guidelines state that:

Private security should act in a lawful manner. They should exercise restraint and caution in a manner consistent with applicable international guidelines regarding the local use of force, including the UN Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials, as well as with emerging best practices developed by Companies, civil society, and governments ...

Private security should (a) not employ individuals credibly implicated in human rights abuses to provide security services; (b) use force only when strictly necessary and to an extent proportional to the threat; and (c) not violate the rights of individuals while exercising the right to exercise freedom of association and peaceful assembly, to engage in collective bargaining, or other related rights of Company employees as recognized by the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.

The approach of specifically referring to the UN Basic Principles and Code of Conduct as well as the Universal Declaration of Human Rights has been replicated in the Sarejevo Code of Conduct for Private Security Companies.<sup>140</sup> Such an approach seems to represent an appropriate translation of human rights standards to the private sector.<sup>141</sup> With regard to the role of the extractive industry company itself the Guidelines state:

137 C. Walker and D. Whyte, “Contracting out war? Private military companies, law and regulation in the United Kingdom”, vol. 54 *International & Comparative Law Quarterly* (2005) 651–89, at 687 .  
138 *Ibid.*, at 689.

139 See <<http://www.voluntaryprinciples.org/>> (visited 23 October 2006).

140 South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (SEESAC, 2006) Principles 2.6 and 2.7. See also *SALW and Private Security Companies in South Eastern Europe: A Cause or Effect of Insecurity* (SEESAC: 2005) and “The Sarajevo Client Guidelines for the Procurement of Private Security Companies” (SEESAC: 2006).

141 On the concept of human rights “translation” see Craig Scott, “Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms”, Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, Hart Publishing, Oxford, 2001, pp. 45–63.

In cases where physical force is used, private security should properly investigate and report the incident to the Company. Private security should refer the matter to local authorities and/or take disciplinary action where appropriate. Where force is used, medical aid should be provided to injured persons, including to offenders ...

Where appropriate, Companies should include the principles outlined above as contractual provisions in agreements with private security providers and ensure that private security personnel are adequately trained to respect the rights of employees and the local community. To the extent practicable, agreements between Companies and private security should require investigation of unlawful or abusive behavior and appropriate disciplinary action. Agreements should also permit termination of the relationship by Companies where there is credible evidence of unlawful or abusive behavior by private security personnel.

The Principles may be included in contracts in a manner which would render them legally enforceable (under the law governing the contract) and there is some evidence that extraction companies are seeking to give the Principles a place, not only in their training schemes and 'discussions with stakeholders',<sup>142</sup> but also in their contractual relations.<sup>143</sup>

In closing this section we can point to a recent development. The British Association of Private Security Companies announces at the beginning of its website that it "aims to raise the standards of operation of its members and this emergent industry and ensure compliance with the rules and principles of international humanitarian law and human rights standards".<sup>144</sup> The Charter sets out a number of binding principles for members, including the following principle, which requires that members "Decline to provide lethal equipment to governments or private bodies in circumstances where there is a possibility that human rights will be infringed". It will be interesting to see the extent to which this form of self-regulation has an impact on the private military companies sector, and whether those who employ such companies start to inquire as to whether companies are members of such associations. There will be considerable interest in whether these associations successfully police and punish those members that transgress the rules. For our purposes the key point is that it is the normative framework of human rights that has caught the imagination of those concerned and surprised those who see such promises as "un-mercenary".<sup>145</sup>

## Final remarks

This paper has argued that non-state actors such as armed opposition groups and private security companies have human rights obligations. Other non-state actors

142 Christine Batruch, "Oil and conflict: Lundin Petroleum's experience in Sudan", in Alyson J. K. Bailes and Isabel Frommelt (eds.), *Business and Security: Public-Private Sector Relationships in a New Security Environment*, Oxford University Press, Oxford, 2004, pp. 148–60, pp. 154–5.

143 See, e.g., BP's *Sustainability Report*, 2003, p. 32.

144 <<http://www.bapsc.org.uk/default.asp>> (visited 29 August 2006).

145 *The Economist*, "Private military companies: Who dares profits", 20 May 2006, p. 38.

(that we have not been able to examine here) are present in times of armed conflict and have their own human rights obligations.<sup>146</sup> We should briefly mention international organizations and their associated peacekeeping operations as well as companies outside the security sector. It is becoming increasingly obvious to those interested in ameliorating the suffering which accompanies conflicts that the lawyers need to adjust their field of vision to encompass the human rights obligations of non-state actors. As pointed out above this has already happened in the context of specific reports on Guatemala, Sierra Leone, Sri Lanka, Lebanon and Nepal.

We have to be aware that the political obstacles to a general shift in thinking are considerable: governments will accuse the humanitarians of bestowing legitimacy on their enemies and threaten to withdraw co-operation. But this challenge has been overcome with humanitarian law. No one should be accused of backing terrorists by accusing them of violating Common Article 3 to the Geneva Conventions. It is time to do the same with regard to human rights law. Once we rid ourselves of the assumption that human rights only cover the relationship between individuals and governments there is no danger that accusing an armed group of human rights violations lends it automatic legitimacy or quasi-governmental status. If we fail to address our human rights concerns to these non-state actors we fail the victims of the abuses. It is time to feel comfortable talking about the human rights obligations of non-state actors.

146 See Clapham, above note 99, chs. 4 (UN), 5 (EU and WTO), 6 (corporations) and 7 (humanitarian organizations).

# Business goes to war: private military/ security companies and international humanitarian law

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## **Abstract**

*Recent years have witnessed an increase in the number of private military and security companies (PMCs/PSCs) operating in situations of armed conflict, as well as a change in the nature of their activities, which are now increasingly close to the heart of military operations and which often put them in close proximity to persons protected by international humanitarian law. It is often asserted that there is a vacuum in the law when it comes to their operations. In situations of armed conflict, however, there is a body of law that regulates both the activities of the staff of PMCs/PSCs and the responsibilities of the states that hire them. Moreover, other states also have a role to play in promoting respect for international humanitarian law by such companies. This article examines the key legal issues raised by PMCs/PSCs operating in situations of armed conflict, including the status of the staff of these companies and their responsibilities under international humanitarian law; the responsibilities of the states that hire them; and those of the states in whose territory PMCs/PSCs are incorporated or operate.*



\* The article reflects the views of the author alone and not necessarily those of the ICRC. The author would like to thank H el ene Maillet and Nathalie Weizmann, ICRC Legal Division, for their unflinching and good-humored assistance, and Mario for his insight.

## Introduction

Over the last decade and a half, functions traditionally performed by the security or military apparatuses of states have increasingly been contracted out to private military/security companies (PMCs/PSCs). Whereas the bulk – in dollar terms at least – of these contracts initially related to logistical or administrative support tasks, the past years have witnessed a significant growth in the involvement of PMCs/PSCs in security and military functions in situations of armed conflict. This involvement includes the protection of personnel and military assets, the staffing of checkpoints, the training and advising of armed and security forces, the maintenance of weapons systems, the interrogation of suspects or prisoners, the collection of intelligence and even participation in combat operations. States are not the only client of PMCs/PSCs; these companies also provide a variety of services to other actors including, private corporations, international and regional inter-governmental organizations as well as non-governmental organizations, often in situations of armed conflict.

It is the extremely visible presence of PMCs/PSCs in Iraq since 2003 that has drawn public attention to them.<sup>1</sup> While the circumstances in Iraq have undoubtedly provided a fertile ground for the industry, they definitely did not mark the beginning of the move towards a “privatization of warfare”. This shift started in the early 1990s, if not before, and resulted from a variety of factors, including the downsizing of national armed forces in the aftermath of the Cold War and their disengagement from “proxy commitments” overseas, as well as the preponderance of free market models of states that promoted the outsourcing of traditional government functions, including those in the military field.<sup>2</sup> The phenomenon has rightly given rise to considerable media interest, academic debate and, much more rarely, regulatory activity and legal proceedings.

- 1 It is notoriously difficult to obtain accurate and reliable figures of the number of PMCs/PSCs, or their employees, operating in Iraq. The United States Government Accountability Office’s 2005 report to Congress on the use of private security provides in Iraq, quotes a Department of Defense assessment of at least 60 companies with “perhaps as many as 25,000 employees”. The Government Accountability Office’s 2006 report refers to the Director of the Private Security Company Association of Iraq’s estimate that “approximately 181 private security companies were working in Iraq with just over 48,000 employees.” *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers*, United States Government Accountability Office, Report to Congressional Committees (hereinafter 2005 United States Government Accountability Office Report), July 2005, GAO-05-737, p. 8; and *Rebuilding Iraq: Actions Still Needed to Improve Use of Private Security Providers*, United States Government Accountability Office, Testimony before the Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform, 13 June 2006, GAO-06-865T, p. 2, respectively. A United States Department of Defense census of contractors in Iraq, covering United States, Iraqi and third country nationals (but not subcontractors) working for the United States government in Iraq, came to the significantly higher figure of 100,000. Renae Marie, “Census counts 100,000 contractors in Iraq”, *Washington Post*, 5 December 2006.
- 2 See e.g., Deborah Avant, *The Market for Force: The Consequences of Privatizing Security*, 2005, pp. 30 et seq; Caroline Holmqvist, *Private Security Companies: The Case for Regulation*, SIPRI Policy Paper No. 9, January 2005, pp. 1 et seq; Fred Schreier and Marina Caparini, *Privatizing Security: Law, Practice and Governance of Private Military and Security Companies*, Geneva Centre for the Democratic Control of Armed Forces Occasional Paper No. 6, March 2005; and Joanna Spear, *Market Forces: The Political Economy of Market Forces*, FAFO Report 531, 2006, pp. 11 et seq.

PMCs/PSCs raise a multitude of legal, political and practical questions. What are the rights and obligations of PMCs/PSCs under international law and what are those of the states that hire them or in whose territory they operate? How is the industry to be best regulated – at the international level, the national level or by self-regulation?<sup>3</sup> What are the consequences of this apparent erosion of states' monopoly of force? Does the work of PMCs/PSCs undermine or enhance state control of force?<sup>4</sup> Does it impede or assist state-building efforts and security sector reform in weak states and those emerging from armed conflict? What limits, if any, should be set on the outsourcing of governmental activities in this sphere? What are the true cost benefits of such outsourcing?<sup>5</sup> How can PMCs/PSCs be accommodated within armed forces' control and command structures? What are the effects of what appears to be a further blurring of the distinction between military and civilian actors?<sup>6</sup> Can humanitarian organizations ever have recourse to private security?<sup>7</sup> And, last but not least, what is the impact, negative or positive, of PMCs/PSCs on local populations? Various players have had to grapple with these questions, either in the abstract or in a very immediate and practical way, including the International Committee of the Red Cross (ICRC).

In view of the increased presence of these relatively new actors, carrying out a range of tasks that are getting increasingly close to the heart of military operations in situations of armed conflict, including military occupation, and which often put them in direct contact with persons protected by international humanitarian law, the ICRC has begun a dialogue with the industry and with the states responsible for their operations. The aim of the dialogue is twofold: to promote compliance with international humanitarian law by ensuring that PMCs/PSCs and the relevant states are aware of their obligations and to ensure that PMCs/PSCs are familiar with and understand the ICRC's mandate and its activities for persons affected by armed conflict.

The present article focuses on the first dimension: the legal framework applicable to PMCs/PSCs operating in situations of armed conflict and, in particular, the position under international humanitarian law.

PMCs/PSCs have featured widely in the media in recent months and it is often asserted, both in popular and in expert publications, that there is a vacuum

3 On the question of regulation of the industry see, *inter alia*, Holmqvist, above note 2; Kathleen Jennings, *Armed Services: Regulating the Private Military Industry*, FAFO Report 532, 2006; and Schreier and Caparini, above note 2.

4 On this dimension of the phenomenon see Avant, above note 2; and Anna Leander, *Eroding State Authority? Private Military Companies and the Legitimate Use of Force*, 2006.

5 The above-mentioned 2005 United States Government Accountability Office Report found, *inter alia*, that despite the significant role played by private security providers in enabling reconstruction efforts in Iraq to take place, neither the Department of State, nor the Department of Defense, nor the US Agency for International Development had complete data on the costs of using the private sector. 2005 United States Government Accountability Office Report, above note 1, pp. 29 et seq.

6 On the impact of PMCs/PSCs on civil/military relations, see e.g., Sami Makki, *Militarisation de l'humanitaire, privatisation du militaire*, Cahier d'Etudes Stratégiques No. 36–37, CIRPES, June 2004.

7 On the use of private security services by humanitarian organizations, see e.g., James Cockayne, *Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study*, International Peace Academy, March 2006.

in the law when it comes to their operations.<sup>8</sup> Such sweeping assertions are inaccurate. In situations of armed conflict there is a body of law that regulates both the activities of PMC/PSC staff<sup>9</sup> and the responsibilities of the states that hire them, namely international humanitarian law. Moreover, the states in whose territories such companies operate, as well as their states of nationality, also have a significant role to play in ensuring respect by PMCs/PSCs for that law.

In the event of serious violations of international humanitarian law, the responsibilities of PMC/PSC staff and of the states that hire them are well established as a matter of law. Admittedly, difficulties have arisen in practice in bringing legal proceedings for violations.

It is true, however, that there is very limited law relating to national or international control of the services PMCs/PSCs may provide and the administrative processes, if any, with which they must comply in order to be allowed to operate. At present there is no international regulation of the issue. Only a handful of states have adopted *specific* legislation laying down procedures with which PMCs/PSCs based in their territory must comply in order to be allowed to operate abroad – the most well-known example being South Africa's 1998 Regulation of Foreign Military Assistance Act. Very few states address this provision of services by means of their arms export control legislation, another possible way of exercising some oversight.<sup>10</sup> Equally few states specifically regulate the provision of military/security services by companies operating in their territory.<sup>11</sup>

This article examines the key legal issues raised by PMCs/PSCs operating in situations of armed conflict, including the status of the staff of these companies and their responsibilities under international humanitarian law; the responsibilities of the states that hire them; and those of the states in whose territory PMCs/PSCs are incorporated or operate.

It should be noted at the outset that international humanitarian law is not concerned with the lawfulness or legitimacy of PMCs/PSCs *per se*, nor of the hiring

8 See e.g., Peter Singer, "War, profits and the vacuum of law: Privatized military firms and international law", *Columbia Journal of Transnational Law*, No. 42, 2004, p. 521; Clive Walker and Dave Whyte, "Contracting out war? Private military companies, law and regulation in the United Kingdom", *International and Comparative Law Quarterly*, No. 54, 2005, p. 651 at p. 687; and, most recently, "CICR: les mercenaires permettent aux états de contourner la loi", *Tribune de Genève*, 20 October 2006.

9 The present article uses the terms "staff" and "employees" of PMCs/PSCs interchangeably to refer, in a generic manner, to all persons working for such companies, be they permanently employed, hired on an *ad hoc* basis, subcontractors, nationals of the states where the company is operating or "expatriates". The terms also include managers and directors of the companies.

10 The United States' International Traffic in Arms Regulations (ITAR), which implement the 1968 Arms Export Control Act, are one of the few examples of national export legislation that address the provision of some military/security services abroad. They require US companies offering defense services, including training to foreign states, to register and obtain a license from the US State Department. See Schreier and Caparini, above note 2, pp. 105 et seq.

11 At present only Iraq and Sierra Leone have legislation specifically regulating the provision of military/security services in their territory. Iraq's law was adopted by the Coalition Provisional Authority in 2004 and is currently being amended (CPA Memorandum 17: Registration Requirements for Private Security Companies, 26 June 2004). Sierra Leone's regulations are found in Section 19 of the 2002 National Security and Central Intelligence Act.

of them by states to perform particular activities. Rather, it regulates the behavior of such companies if they are operating in situations of armed conflict. This is consistent with the approach adopted by international humanitarian law more generally. It does not address the lawfulness of resorting to armed force but instead regulates *how* hostilities are conducted. It does not address the legitimacy of organized armed groups but regulates *how* they must fight.

This article only presents the position under international humanitarian law. Various other bodies of public international law are also relevant to the phenomenon, including the rules relating to resort to the use of force, and those on the responsibility of states for wrongful acts under international law,<sup>12</sup> as well, of course, as human rights law.<sup>13</sup> The national laws of states of nationality of the PMCs/PSCs, their staff and their clients, as well as those of the states where the companies operate, also play a crucial role in regulating the activities of PMCs/PSCs and establishing mechanisms for enforcing the law.

Before starting the legal analysis, a preliminary comment about terminology is necessary. At present, there is no commonly agreed definition of what constitutes a “private military company” or a “private security company”. Commentators have adopted different approaches to this key question of definition. Some, like Singer, the author of the first comprehensive analysis of the industry, draw a distinction between companies on the basis of the services they provide.<sup>14</sup> Others adopt intentionally generic terms.<sup>15</sup>

Besides the fact that, as Holmqvist points out, a classification of companies on the basis of their relative physical proximity to the front line gives a misleading picture of their potential strategic and tactical influence, since the provision of training or technical advice can have an extremely significant impact on hostilities,<sup>16</sup> the practical reality appears to be that many

12 On this topic see the Report of the *Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions*, organized by the University Centre for International Humanitarian Law, Geneva, 29–30 August 2005. Available at: [http://www.ucihl.org/communication/private\\_military\\_contractors\\_report.pdf](http://www.ucihl.org/communication/private_military_contractors_report.pdf).

13 On the human rights dimension see e.g., Cordula Droegge, “Private military and security companies and human rights: A rough sketch of the legal framework”, background document prepared for the Governmental Expert Workshop of 16–17 January 2006, organized by the Swiss Federal Ministry of Foreign Affairs, available at <http://www.eda.admin.ch/psc>; Francoise Hampson, “The implications of human rights law”, background document prepared for the Governmental Expert Workshop of 13–14 November 2006 organized by the Swiss Federal Ministry of Foreign Affairs, available at <http://www.eda.admin.ch/psc>; and Alexis Kontos, “Private security guards: Privatized force and state responsibility under international human rights law”, *Non-State Actors and International Law*, Vol. 4, No. 3, 2004, p. 199.

14 Singer’s classification of companies is based on the military “tip of the spear” metaphor in “battle space”, where the tip represents the front line. He classifies companies in three groups according to the services provided and the level of force they are willing to use: military provider firms, military consultant firms and military support firms. The first type of companies provide services at the front line; the second type provide principally advisory and training services; while the third are used for the provision of “non-lethal aid and assistance”, including logistic functions such as feeding and housing troops. Peter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, 2003, pp. 91 et seq.

15 Cockayne, for example, speaks of “commercial security providers”, while Avant and Holmqvist use the term “private security company”.

16 Holmqvist, above note 2, p. 5.

companies offer a broad spectrum of services.<sup>17</sup> Some of these services are clearly very distant from the battlefield and, to use the key concept for the purpose of international humanitarian law, clearly do not amount to direct participation in hostilities, whereas others are much closer to the heart of combat operations. In view of this, the present article does not propose a definition of “private military company” or “private security company”, nor does it attempt to classify individual companies. Instead, the intentionally vague and generic term “private military/security company” is used to cover companies providing any form of military or security service in situations of armed conflict.

This approach reflects the fact that for the purposes of international humanitarian law, it is not the label given to a particular party that determines its responsibilities, but rather the nature of the activities actually performed.

The first part of this article addresses the status of the staff of PMCs/PSCs under international humanitarian law; the second part looks at their responsibilities and the role of companies in promoting respect for that law; the third part deals with the responsibilities of states that hire PMCs/PSCs; and the fourth with those of other states, principally the states of nationality of companies and the states in whose territory they operate. The fifth part is devoted to the question of mercenaries. Although this is a separate topic, its inclusion was considered necessary, as discussions of PMCs/PSCs often start with the question of whether their employees are mercenaries.

## **The status of the staff of private military companies/private security companies under international humanitarian law**

It is sometimes stated that PMCs/PSCs have no status under international law, with the implicit consequence that neither companies nor their staff have any legal obligations. From an international humanitarian law point of view this assertion is misleading. While the companies themselves have neither status nor obligations under international humanitarian law – as this body of law does not regulate the status of legal persons – their employees do, even though they are not specifically mentioned in any treaty. Admittedly, with regard to status, there is no simple answer applicable to all PMC/PSC employees, as it depends on the nature of any relationship they may have with a state and on the type of activities they carry out. Status is thus something that must be determined on a case-by-case basis. However, international humanitarian law contains criteria for determining this status as well as clear consequent rights and obligations.

17 For an outline of the range of services performed by the industry, see Avant, above note 2, pp. 7–22, and Schreier and Caparini, above note 2, pp. 14–42.

## Mercenaries?

Discussions of PMCs/PSCs often focus on or at least begin with the politically fraught question of whether the staff are mercenaries. Although not central to international humanitarian law, this question inevitably attracts much attention – and causes some confusion. In recognition of this debate, and for the sake of completeness, the fifth part of the present article outlines the position of mercenaries under international humanitarian law and the two specialized mercenary conventions.

## Combatants or civilians?

A far more central question for the purposes of international humanitarian law, with immediate practical consequences for the persons involved, is the status of the staff of PMCs/PSCs: are they combatants or are they civilians? If they are combatants, they may be targeted at all times but have the right to take direct part in hostilities; if captured, they are entitled to prisoner-of-war status and may not be prosecuted for having participated in hostilities.<sup>18</sup> Conversely, if they are civilians they may not be attacked. However, if they take direct part in hostilities, they will lose this immunity from attack during such participation. Moreover, as civilians do not have a right to take direct part in hostilities, if they do so, they will be “*unprivileged belligerents*” or “*unlawful combatants*” who, when captured, are not entitled to prisoner-of-war status and may be tried for merely having participated in hostilities, even if in doing so they did not commit any violations of international humanitarian law.<sup>19</sup>

The term “combatant” has a very specific meaning under international humanitarian law, which is not synonymous with the generic term “fighter”. There are four categories of persons who can be considered combatants.<sup>20</sup> The following two are most pertinent for present purposes:

- members of the armed forces of a state party to an armed conflict or members of militias or volunteer corps forming part of such forces;<sup>21</sup>
- members of other militias and of other volunteer corps, including those of organized resistance movements, belonging to a state party to an armed conflict, provided that such militias or corps fulfill the following conditions: they are commanded by a person responsible for his/her subordinates; they have a fixed distinctive sign recognizable at a distance; they carry arms

18 Article 43(2) of Additional Protocol I recognizes the right of combatants to participate directly in hostilities.

19 On the issue of unprivileged belligerents, see e.g., Knut Dörmann, “The legal situation of “unlawful/unprivileged combatants””, *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, p. 45.

20 Additional Protocol I, Article 50(1).

21 Third Geneva Convention, Article 4A(1).

openly; and they conduct their operations in accordance with the laws and customs of war.<sup>22</sup>

These categories will be briefly reviewed in turn with a view to determining whether the staff of PMCs/PSCs could fall within them.

### *Members of the armed forces of a state?*<sup>23</sup>

It is principally members of states' armed forces who are combatants. Therefore, at risk of stating the obvious, it should be noted as a preliminary point that only the staff of PMCs/PSCs *hired by states* could ever be combatants.<sup>24</sup> Considering that some 80% of the contracts of PMCs/PSCs are concluded with clients other than states,<sup>25</sup> this in itself already precludes a large proportion of PMC/PSC employees from being combatants.

While international humanitarian law is very clear on the fact that members of the armed forces of a state are combatants, it does not provide clear and specific guidance as to who can be considered a member of the armed forces,<sup>26</sup> nor as to the pre-requisites to be met by militias or volunteer corps for them to "form part" of the armed forces.<sup>27</sup>

22 Ibid., Article 4A(2). The two other categories of combatants listed in Article 4A(3) and (6) of the Third Geneva Convention are members of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power and participants in a *levée en masse* respectively.

23 On this issue, see e.g., Ricou Heaton, "Civilians at war: Re-examining the status of civilians accompanying the armed forces", *Air Force Law Review*, No. 57 (2005), p. 155 at pp. 168 et seq; Rebecca Rafferty Vernon, "The future of competitive sourcing: Battlefield contractors – facing the tough tests", *Public Contract Law Journal*, No. 33 (2004), p. 369 at pp. 404 et seq; and Michael Schmitt, "Humanitarian law and direct participation in hostilities by private contractors or civilian employees", *Chicago Journal of International Law*, No. 5 (2005), p. 511 at pp. 523 et seq.

24 The possibility exists that a company may be hired by one state to perform operations on behalf of a second state. There have been instances when donor governments have hired a company to assist a second state in security sector reform, for example. However, such an arrangement is unlikely to be made for activities close to the heart of military operations. See e.g., Adedeji Ebo, *The Challenges and Opportunities of Security Sector Reform in Post-Conflict Liberia*, Geneva Centre for the Democratic Control of Armed Forces Occasional Paper No. 9, December 2005; and Francesco Mancini, *In Good Company? The Role of Business in Security Sector Reform*, 2005.

25 Statement by a representative of a UK company to the author. The percentage of government contracts concluded by US companies is higher. See e.g., Dominick Donald, *After the Bubble: British Private Security Companies after Iraq*, The Royal United Services Institute, Whitehall Paper 66, 2006.

26 Some commentators are of the view that, despite the apparently clear wording of Article 4(A)1 of the Third Geneva Convention, it is not just members of "other militias" and "volunteers corps" who have to meet the four conditions listed in Article 4(A)2, but also members of a state's armed forces. See e.g., George Aldrich, "The Taliban, al Qaeda, and the determination of illegal combatants", *American Journal of International Law*, Vol. 96, 2002, p. 895, and Yoram Dinstein, "Unlawful combatancy", *Israel Yearbook of Human Rights*, Vol. 32, 2002, p. 247 at p. 255. This debate is beyond the scope of the present article.

27 According to the *Commentary* on the Third Geneva Convention, this provision relates to groups that "although part of the armed forces were quite distinct from the army as such." The *Commentary* adds that although "strictly speaking not essential" as members of such groups would already fall within the expression "members of the armed forces", the reference to militias and volunteer groups was retained nonetheless. Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. III, *Geneva Convention relative to the Treatment of Prisoners of War* (hereinafter *Commentary: Third Geneva Convention*), ICRC, 1960, p. 52.

National law sometimes contains stipulations on these issues. Absent any national law, there is thus no clear-cut way of determining the circumstances in which an employee of a PMC/PSC can be considered a member of the armed forces, or of militias or volunteer corps forming part thereof. The mere fact that a PMC/PSC has been hired to provide assistance to a state's armed forces is not conclusive; a more formal affiliation than a mere contract is required.<sup>28</sup> Similarly, the nature of the activities performed by such a company's staff, although determinative of whether they are taking direct part in hostilities for targeting purposes, is also not a key element for determining whether they are members of the armed forces. Instead, possible indicators of such membership might include:

- whether they have complied with national procedures for enlistment or conscription, where they exist;
- whether they are employees of the department of defense – bearing in mind, however, that such departments also employ significant numbers of civilians;
- whether they are subject to military discipline and justice;
- whether they form part of and are subject to the military chain of command and control;
- whether they form part of the military hierarchy;
- whether they have been issued with the identity cards envisaged by the Third Geneva Convention or other forms of identification similar to those of “ordinary” members of the armed forces; and
- whether they wear uniforms.

Satisfaction of any of these indicators, apart from the first, is not conclusive evidence *per se* of membership of the armed forces. The position is thus unclear. Whether a person is a member of a state's armed forces or not should be a straightforward determination that can easily be made upon capture, so that the person concerned can immediately be granted prisoner-of-war status if entitled to it. This being said, in case of doubt as to the status of a captured person who has taken direct part in hostilities, the Third Geneva Convention requires that a person be treated like a prisoner of war pending a decision on his/her status by a competent tribunal.<sup>29</sup>

To come back to the staff of PMCs/PSCs, as the policy underlying much of the outsourcing of the activities formerly carried out by the armed forces aims to reduce numbers of the armed forces and related costs, there are likely to be very few instances in which the staff of PMCs/PSCs are incorporated into the armed forces to the extent necessary for them to be considered members thereof for the purposes of status determination under international humanitarian law.<sup>30</sup>

28 Schmitt, above note 23, p. 525.

29 Third Geneva Convention, Article 5.

30 A conclusion shared by Schmitt, above note 23, p. 526.

### *Members of other militias and of other volunteer corps belonging to a state party to an armed conflict?*

While Article 4A(1) of the Third Geneva Convention focuses on persons formally incorporated into a state's armed forces, Article 4A(2) deals with members of groups that are structurally independent of such forces but nonetheless fighting alongside them. This provision was drafted to resolve uncertainties about the status of partisans during the Second World War.<sup>31</sup>

In order to be considered combatants on the basis of this provision, the staff of PMCs/PSCs must fulfill two requirements. First, the group as a whole must "belong to" a party to an international armed conflict. Secondly, it must meet the four conditions laid down in Article 4A(2) of the Third Geneva Convention.

In the past, the requirement that the group "belong to a party to the conflict" was interpreted as requiring the explicit authorization of the state concerned, but already at the time of the negotiations of the 1949 Geneva Conventions this was no longer considered necessary. According to the *Commentary* on that provision, a "*de facto* relationship" sufficed, including one based on a tacit agreement. What mattered was that the operations of the group in question indicated on behalf of which party to the conflict it was fighting.<sup>32</sup>

The nature of the link that has to exist between a state party to an armed conflict and a militia or volunteer group for the latter's members to be considered lawful combatants was recently addressed by the International Tribunal for the former Yugoslavia. In its view, there had to be control over the militia/volunteer group by the state, as well as a "relationship of dependence and allegiance of these irregulars *vis-à-vis* that party to the conflict."<sup>33</sup>

With regard to PMCs/PSCs, there is no reason why a contract to perform certain services on behalf of a state party to a conflict could not amount to such control or "relationship of dependence", if not necessarily allegiance. However, as in the case of Article 4A(1), only companies hired by or acting on behalf of a *state* party to an *international* armed conflict could ever meet this requirement. Those hired by or acting on behalf of any other actor operating in a situation of armed conflict would not.<sup>34</sup>

In addition, the question arises whether only companies actually hired to fight could meet this requirement, or whether those providing logistical support could, in the words of the *Commentary*, also be considered as "fighting on behalf" of that state. Since the persons in question are considered "combatants", this provision would presumably only cover persons hired to carry out activities close

31 *Commentary: Third Geneva Convention*, above note 27, pp. 52 et seq. The provision is based on Article 1 of the 1907 Hague Regulations, but its scope of application is expanded to cover militia that are independent of the armed forces.

32 *Ibid.*, p. 57.

33 ICTY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, (IT-94-1), Judgment of 15 July 1999, paras. 93–94.

34 Schmitt suggests that PMCs/PSCs hired by a private entity to support one side to the conflict might also qualify but also adds that this is a "fairly far-fetched scenario". Schmitt, above note 23, p. 528.

to the heart of military operations. As there appears to be consensus among states – both those that have adopted regulations on the topic<sup>35</sup> and those that have not – that contractors should not be employed for such activities, only a small minority of PMCs/PSCs are likely to satisfy this requirement.

Companies that have the requisite affiliation with a state would then have to meet the four conditions outlined above: that of being commanded by a person responsible for his/her subordinates; that of having a fixed distinctive sign recognizable at a distance; that of carrying arms openly; and that of conducting their operations in accordance with the laws and customs of war.

Whether or not the conditions have been met must be determined on a case-by-case basis. Nonetheless, without entering into detailed discussion of each condition, some points deserve highlighting. First, the requirement of command by a person responsible for his/her subordinates does not call for command by a military officer.<sup>36</sup> What matters is that there is a person who bears responsibility for action taken on his/her orders. The aim of this provision is to ensure discipline within the group and respect for international humanitarian law. As Schmitt points out, while this provision is likely to exclude individuals acting alone or in unstructured groups, there is no reason for concluding that the more established companies would lack the requisite supervisory structure.<sup>37</sup>

On the other hand, if the practice in Afghanistan and Iraq is taken as indicative of future behavior, the condition that the staff of PMCs/PSCs are least likely to satisfy is that of wearing a distinctive sign. One recurring complaint from Afghanistan and Iraq, the two contexts with the largest PMC/PSC presence to date, is that the staff of these companies are extremely difficult to identify. They wear a variety of attire, ranging from military uniform-like camouflage gear which, accompanied by the weapons some contractors often carry openly, causes civilians confuse to them with members of the armed forces, to civilian attire that makes them difficult to distinguish from other non-military actors.<sup>38</sup>

Finally, the requirement for operations to be conducted in accordance with international humanitarian law must be met by the group as whole, rather than by the members thereof individually. While contractors have been accused of serious violations of the law,<sup>39</sup> there have been no allegations to date of companies engaging in systematic violations.

35 See e.g., “Contractor Personnel Authorized to Accompany the U.S. Armed Forces”, United States Department of Defense Instruction Number 3020.41, 3 October 2005, para. 6.1.5 and “Guidance for Determining Workforce Mix”, US Department of Defense Instruction Number 1100.22, 7 September 2006.

36 *Commentary: Third Geneva Convention*, above note 27, p. 529.

37 Schmitt, above note 23, p. 529.

38 It is also extremely difficult to distinguish clearly between employees of different companies; this makes it virtually impossible for civilians affected by their activities to file complaints. See e.g., “PMSCs in post-conflict situations: A view from the local population in Angola and Afghanistan”, presented by the non-governmental organization Swisspeace at the Governmental Expert Workshop of 13–14 November 2006 organized by the Swiss Federal Ministry of Foreign Affairs.

39 See *Ilham Nassir Ibrahim et al. v. Titan Corporation et al*, 391 F. Supp. 10 D.D.C. (2005); and *Saleh et al. v. Titan Corporation et al.*, 436 F. Supp. 2d 55 D.D.C. (2006).

In view of the above, although not impossible, it is likely to be only a small minority of PMC/PSC staff who could be considered combatants on the basis of Article 4A(2) of the Third Geneva Convention, namely those hired by a state party to an international armed conflict to take direct part in hostilities who satisfy the four above-mentioned conditions.<sup>40</sup>

For the sake of completeness, it should be noted that the rules of Article 4A(1)–(3) of the Third Geneva Convention for determining membership of the armed forces – and consequently entitlement to combatant status – have been supplemented by Additional Protocol I of 1977.<sup>41</sup> The relevant provisions do not make a significant difference in practice to the position of the staff of PMCs/PSCs just outlined.

### *Civilians accompanying the armed forces*

The Third Geneva Convention establishes a narrow exception to the principle that it is only combatants who are entitled to prisoner-of-war status if captured. In addition to the aforementioned members of the armed forces and of militias and other volunteer corps belonging to a party to a conflict identified in Articles 4A(1) and (2) of the Third Geneva Convention, Article 4A(4) identifies a further class of persons entitled to prisoner-of-war status if captured:

“Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.”<sup>42</sup>

The legal position of persons falling within this category is clear: they are not members of the armed forces, nor are they combatants,<sup>43</sup> but they are entitled to prisoner-of-war status if captured.

40 Schmitt also shares this view, above note 23, p. 531, as did one of the experts at the mentioned Expert Meeting of August 2005. Report of the *Expert Meeting on Private Military Contractors*, above note 12, p. 10.

41 Principally Articles 43 and 44 of Additional Protocol I.

42 This provision is not an innovation introduced in 1949, but repeats, with a slight modernization of the terms used and the addition of certain categories of persons (civilian members of military aircraft crews, members of labor units and of services responsible for the welfare of the armed forces), the position set out in Article 81 of the 1929 Geneva Convention relative to the Treatment of Prisoners of War, which was itself based on Article 13 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land. See also Article 50 of the 1863 Instructions for the Government of Armies of the United States in the Field (Lieber Code); Article 34 of the 1874 Brussels Project of an International Declaration concerning the Laws and Customs of War; and Article 13 of the Regulations respecting the Laws and Customs of War on Land, annexed to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land.

Article 4A(4) of the Third Geneva Convention is the exception that is most relevant for the present purposes. The second one is in Article 4A(5) and relates to crews of the merchant navy and civilian aircraft.

43 Article 50(1) of Additional Protocol I makes it clear that they are civilians.

What is not so clear is precisely who comes within this exception. The above list of possible services provided is indicative, not exhaustive. Neither the *travaux préparatoires* for this provision nor the *Commentary* shed light on the limits of the activities that may be carried out by this category of persons.<sup>44</sup> However, the non-combatant status of civilians accompanying the armed forces and the nature of the activities listed by way of example – with the exception of civilian members of military aircraft crews<sup>45</sup> – would seem to indicate that the drafters intended this category not to include persons carrying out activities that amount to taking a direct part in hostilities.

Two further issues arise. The first is more procedural: is possession of the identity card mentioned in Article 4A(4) a prerequisite for inclusion in this category? And what is the nature of the authorization that must have been received?

The question of the effect of the identity card was discussed during the negotiations, and it was ultimately agreed that possession of one was a supplementary safeguard for the persons concerned, but not an indispensable prerequisite for being granted prisoner-of-war status.<sup>46</sup> Application of the provision was dependent on authorization to accompany the armed forces and the card was merely proof of that. There was no discussion, however, of what amounted to authorization, nor is it addressed in writings on the topic. In relation to the staff of PMCs/PSCs, it is unlikely that the mere existence of a contract would *per se* amount to such authorization.

There was some discussion of this issue in relation to PMCs/PSCs at the August 2005 expert meeting. In particular, one of the experts was of the opinion that states could not simply confer the status in question upon contractors they hired by merely issuing them with an identity card; there had to be some nexus between the contractor and the armed forces.<sup>47</sup> He also considered that, while it was not clear whether the words “accompanying the armed forces” require the armed forces to be physically present where the contractors are operating, the latter had at least to be providing some sort of services to the armed forces, and not merely performing a contract for the state.<sup>48</sup>

44 The *Commentary* merely notes that “[t]he list is given by way of indication, however, and the text could (...) cover other categories of persons or services who might be called upon, in similar conditions, to follow the armed forces during any future conflict”; *Commentary: Third Geneva Convention*, above note 27, p. 64. Similarly, the question of what categories of persons could fall within this provision was only discussed in very general terms during the negotiations. A British suggestion had called for elimination of the listing of persons covered. See the proposed amendment to Article 3 dated 26 April 1949, reproduced as Annex No. 90 relating to the Prisoners of War Convention, in *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 3, Federal Political Department, Berne, 1949, pp. 60–61. On these discussions see Howard Levie, *Prisoners of War in International Armed Conflict*, Naval War College International Law Studies, Vol. 59, 1978, p. 62.

45 On the position of these persons, see discussion at note 51 below.

46 *Commentary: Third Geneva Convention*, above note 27, pp. 64 et seq. During the earlier stages of the negotiations, possession of the card had been a requirement. See e.g., *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*, ICRC, Geneva, 1947, p. 113. This reflected the position under Article the 1907 Hague Regulations, which made entitlement to prisoner-of-war status dependent on possession of such certification.

47 Report of the *Expert Meeting on Private Military Contractors*, above note 12, p. 14.

48 *Ibid.*, p. 15.

Secondly, and somewhat more controversially, what is the position of civilians accompanying the armed forces if they carry out activities that amount to taking direct part in hostilities? Do they retain their entitlement to prisoner-of-war status or do they become “unprivileged belligerents” or “unlawful combatants” who may be tried for their participation in hostilities?

This issue was not addressed in the negotiations. The prevailing view appears to be that as the persons concerned are not members of the armed forces and not combatants,<sup>49</sup> there is no reason to treat them differently from any other civilian taking a direct part in hostilities.<sup>50</sup> Indeed, some are of the view that the nature of the activities listed in Article 4A(4) – which, with the notable exception of the civilian crew of military aircraft,<sup>51</sup> are clearly support operations not connected with the core fighting functions of the armed forces – are evidence of an implicit condition that in order to enjoy prisoner-of-war status under this provision the persons concerned must not directly participate in hostilities.<sup>52</sup> This view is also expressed in some military manuals.<sup>53</sup>

This position, however, is not unanimous. In particular, a recent US Department of Defense instruction has taken the opposite view, namely that if civilians accompanying the armed forces do take direct part in hostilities, they nonetheless retain their entitlement to prisoner-of-war status.<sup>54</sup> This approach reflects the position of a US commentator who argues that Article 51(3) of Additional Protocol I deprives civilians who take direct part in hostilities only of their protections under Section I of Part IV of the Protocol – i.e., against the effects of hostilities. It does not, however, affect protections to which they may be entitled pursuant to other sections of the Protocol, including, most notably, Section II of

49 Additional Protocol I, Article 50(1).

50 See e.g., Knut Ipsen, “Combatants and Non-combatants”, in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, 1995, para. 317. See also Report of the *Expert Meeting on Private Military Contractors*, above note 12, p. 14; Heaton, above note 23, p. 174; and Rafferty Vernon, above note 23, p. 406.

51 The inclusion of this category of persons in Article 4A(4), who are in fact likely to be taking direct part in hostilities, has led one commentator to suggest that “the Third Geneva Convention has implicitly granted civilian members of military aircraft the status of lawful combatants in so far as they remain on board the aircraft.” Allan Rosas, *The Legal Status of Prisoners of War - A Study in International Humanitarian Law Applicable in Armed Conflicts*, 1976, p. 310.

52 See Report of the *Expert Meeting on Private Military Contractors*, above note 12, p. 14, and Ipsen, above note 50.

53 See for example, the UK Military Manual, which states that: “Armed forces increasingly rely on the technical and administrative support of civilians. Civilians who are authorized to accompany the armed forces in the field in such capacities remain non-combatants, though entitled to prisoner of war status, so long as they take no direct part in hostilities. They may not be directly attacked. However, they share the dangers of war of the members of the armed forces they support. They should not wear military uniform and must carry a special identity card confirming their status. The law is silent on the question of whether such civilians may be issued with weapons. To ensure retention of non-combatant status, they should be issued with small arms for self-defence purposes only. It should be borne in mind that, if they carry arms, they are likely to be mistaken for combatants. It follows that, so far as possible, such civilians should not be deployed to places where they are liable to come under enemy fire or to be captured.” (Emphasis added.) (*The Manual of the Law of Armed Conflict*, UK Ministry of Defence, 2004, para. 4.3.7.)

54 See e.g., US Department of Defense Instruction No. 1100.22, above note 35, at footnote 19.

Part IV, which preserves any entitlement a person may have to prisoner-of-war status under the Third Geneva Convention.<sup>55</sup>

On the basis of this analysis, it seems safe to conclude that the staff of PMCs/PSCs who provide services to the armed forces short of direct participation in hostilities could fall within this category on condition they have received the relevant authorization from the state in question.<sup>56</sup> The matter must be determined on a case-by-case basis, depending on the nature of the activities carried out. While many of the support functions performed by contractors for the armed forces undoubtedly do fall within Article 4A(4) there are also many others, especially those closer to the heart of military operations, which probably do not.

### *Civilians*

The staff of PMCs/PSCs hired by states who do not fall within the aforementioned four categories – who, in view of the many requirements that have to be met, are likely to constitute a significant proportion – will be “ordinary” civilians.<sup>57</sup> This is also the status of all employees of PMCs/PSCs present in situations of armed conflict and hired by entities other than states, such as companies operating in the state in question, inter-governmental organizations, non-governmental organizations and, as this is not impossible, organized armed groups participating in a non-international conflict.

This conclusion may appear at odds with the images of PMC/PSC employees propagated by the media as heavily armed contractors in camouflage gear. Whereas this appearance does not affect the *status* of the persons concerned, the performance of certain activities may affect their protection under international humanitarian law.

While the staff of PMCs/PSCs must not, as civilians, be the object of attack, if they engage in activities that amount to taking a direct part in hostilities they lose this immunity from attack for the duration of their participation. This is an important difference between them and combatants, who can be targeted at any time.

The question of which activities amount to “taking a direct part in hostilities” is obviously crucial to determining the protection to which the staff of PMCs/PSCs are entitled. Although this question is central to the entirety of international humanitarian law, as it determines when civilians lose their protection from attack, treaties provide neither a definition nor precise guidance

55 Additional Protocol I, Article 44(6). See Report of the *Expert Meeting on Private Military Contractors*, above note 12, p. 14.

56 The position of the UK Ministry of Defence is that it hires PMCs/PSCs only for logistical and support functions and considers all such persons to be civilians accompanying the armed forces under Article 4A(4) of the Third Geneva Convention. (Conversation with author.)

57 “Ordinary” civilians as opposed to the above-mentioned special category of “civilians accompanying the armed forces”.

as to the nature of the activities covered. According to the *Commentary*, “acts which, by their nature and purpose are intended to cause actual harm to enemy personnel and equipment” amount to direct participation.<sup>58</sup> Supplying food and shelter to combatants or generally “sympathizing” with them does not. A considerable grey zone exists between these two ends of the spectrum.<sup>59</sup>

The problem of determining what amounts to direct participation exists in relation to all civilians and not just the staff of PMCs/PSCs, and obviously the same parameters apply. A detailed analysis of the diverse activities of PMCs/PSCs in recent years in order to determine whether they amount to direct participation in hostilities is beyond the scope of the present article.<sup>60</sup> Two points, nonetheless, deserve to be highlighted.

First, in response to the argument often made that PMCs/PSCs are only providing *defensive* services and therefore, it is claimed, are not taking a direct part in hostilities, it should be noted that international humanitarian law does not draw a distinction between offensive or defensive operations.<sup>61</sup> For example, PMCs/PSCs have often been retained in Iraq since 2003 to protect military installations, such as barracks and military hardware. These are military objectives and defending them amounts to taking a direct part in hostilities. Secondly, even though the staff of PMCs/PSCs may not in fact be taking a direct part in hostilities, they often work in close proximity to members of the armed forces and other military objectives. This puts them at risk of being permissible “collateral damage” in the event of attacks.<sup>62</sup>

The realities of Iraq, where PMCs/PSCs are currently most visibly active, are such that there has been little discussion of the legal framework regulating deprivation of liberty of the staff of such companies who are not combatants. But

58 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (hereinafter *Commentary: Additional Protocols*), 1987, para. 1942. In relation to non-international armed conflicts, the *Commentary* describes the concept of taking direct part in hostilities as implying “a sufficient causal relationship between the act of participation and its immediate consequences.” *Ibid.*, para. 4787.

59 In an effort to address the challenging issues raised by the concept of “direct participation in hostilities” the ICRC, in cooperation with the TMC Asser Institute, initiated a process aimed at clarifying this notion. In the framework of this process, four informal Expert Meetings entitled “Direct Participation in Hostilities under International Humanitarian Law” have been held in The Hague (2 June 2003 and 25–26 October 2004) and Geneva (23–25 October 2005 and 27–28 November 2006), which brought together around 40 legal experts representing military, governmental and academic circles, as well as international and non-governmental organizations. The reports of the first three meetings held to date are available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205>.

60 For the views of one commentator as to when the staff of PMCs/PSCs can be considered to be taking direct part in hostilities, see Schmitt, above note 23.

61 See e.g., Article 49(1) of Additional Protocol I, which states that “‘[a]ttacks’ means acts of violence against the adversary, whether in offense or in defense.”

62 This is recognized for, example, in the aforementioned US Department of Defense instruction on contractors, which states, *inter alia*, that “contractor personnel may be at risk of injury or death incidental to enemy actions while supporting other military operations.” US Department of Defense Instruction No. 3020.41, above note 35, para. 6.1.1.

this is something that is addressed by law in a far more straightforward manner than direct participation in hostilities.

These employees are *not* entitled to prisoner-of-war status or the protections of the Third Geneva Convention. This does not mean they have no protection under international humanitarian law. If held in relation to an international armed conflict, they benefit from the protection of the Fourth Geneva Convention, which lays down minimum standards of treatment and conditions of deprivation of liberty, as well as minimum judicial guarantees to be respected in criminal proceedings. Should the person concerned fall within the exceptions to the Fourth Geneva Convention,<sup>63</sup> he/she will still be entitled to the fundamental guarantees found in Article 75 of Additional Protocol I and the customary rules of international humanitarian law applicable in international conflicts.<sup>64</sup>

If held in relation to a non-international conflict they benefit from the protections of common Article 3 of the Geneva Conventions, Additional Protocol II and the customary rules of international humanitarian law applicable in non-international conflicts.<sup>65</sup>

As has already been stated, if captured after having taken direct part in hostilities in either an international or non-international conflict, the staff of PMCs/PSCs may be prosecuted under the national law of the state that is holding them for their mere participation in hostilities.

## **The responsibilities under international humanitarian law of the staff of PMCs/PSCs and the role of companies in promoting respect for that law**

### The responsibilities of employees

Regardless of their status, be they combatants, civilians accompanying the armed forces or “ordinary” civilians, like all persons in a country experiencing armed conflict the staff of PMCs/PSCs are bound by international humanitarian law and

63 According to Article 4(1) of the Fourth Geneva Convention, all persons who, in situations of international armed conflict or occupation, at a given moment and in any manner whatsoever find themselves in the hands of a party to the conflict or occupying power of which they are not nationals, are protected by the Convention. Persons captured by their own state of nationality are thus *not* protected by the Convention. Article 4(2) of the Fourth Geneva Convention also excludes from its protection nationals of a neutral state and nationals of co-belligerent states who are in the territory of a party to the conflict so long as their state of nationality has normal diplomatic relations with the state in whose hands they find themselves.

64 Article 75 of Additional Protocol I lays down some fundamental guarantees for persons in situations of international armed conflict, including occupation, who do not benefit from more favorable protection under the four Geneva Conventions or Additional Protocol I. These rights include prohibitions on murder, torture and other forms of ill-treatment as well as minimum due process guarantees.

65 In addition, in both international and non-international armed conflicts, persons deprived of their liberty benefit from further important protections under human rights law.

may face individual criminal responsibility for any serious violations they may commit or have ordered to be committed.<sup>66</sup>

The staff of PMCs/PSCs may be prosecuted by the courts of a number of states, including the state where the alleged wrongdoing occurred, the state of nationality of the victims, the state of nationality of the alleged perpetrator and that of the PMC/PSC employing him/her. States party to the Geneva Conventions – and as there is now universal ratification of the Conventions this means *all* states – must search for and prosecute or extradite persons suspected of having committed grave breaches of the Conventions and, for the states that have ratified it, Additional Protocol I, including, when necessary, by the exercise of universal jurisdiction.<sup>67</sup>

Moreover, provided their jurisdictional requirements are met, international criminal tribunals may also prosecute the staff of PMCs/PSCs and their managers. There is nothing to preclude them from being prosecuted, for example, by the International Criminal Court. To date, however, as a reflection of the traditional position that legal persons do not have responsibilities under international law, no international tribunal has been granted jurisdiction over companies.<sup>68</sup>

Despite the existence of clear legal obligations and a well-established network of national courts with potential jurisdiction over serious violations of international humanitarian law, proceedings against the staff of PMCs/PSCs have

66 First Geneva Convention, Article 49, Second Geneva Convention, Article 50, Third Geneva Convention Article 129, Fourth Geneva Convention, Article 146, and Additional Protocol I, Article 85. The jurisprudence of international tribunals supports the position adopted by certain military manuals, as well as the text of the aforesaid treaty provisions, that it is not only commanders and superiors within a military structure who may be held responsible for serious violations of international law they have ordered to be committed. Anyone in a superior/subordinate position that enables him/her to issue orders can similarly be criminally responsible. For practice in this area, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, 2005, Rule 152, and supporting practice in Vol. II: *Practice*, Part 2, pp. 3713–3714.

67 First Geneva Convention, Article 49, Second Geneva Convention, Article 50, Third Geneva Convention Article 129, Fourth Geneva Convention, Article 146, and Additional Protocol I, Article 85. The Geneva Conventions require states to “suppress” violations of international humanitarian law that are not grave breaches, but leave it to states to decide how this is to be done. The extent of the jurisdiction granted to national courts for such violations varies. The courts of all states have jurisdiction over alleged crimes that have taken place in their territory, but there is no uniform approach with regard to other grounds for jurisdiction. Some states have extremely expansive jurisdictional bases, requiring no link with the offence, but most require a link with the offence for proceedings to be commenced – usually the presence in their territory of the perpetrator or the victim. States have also criminalized different violations of international humanitarian law. Some have confined themselves to grave breaches of the Geneva Conventions and of Additional Protocol I, (i.e., to serious violations committed in international armed conflicts) while others have also criminalized serious violations committed in non-international armed conflicts. For a review of the approach adopted by various states, see Henckaerts and Doswald-Beck, *ibid.*, Vol. I: *Rules*, Ch. 44, and Vol. II: *Practice*, Part 2, pp. 3883–3884.

68 The possibility was discussed during negotiations on the Statute of the International Criminal Court but ultimately not adopted. See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, 2006, pp. 244 et seq.

been rare.<sup>69</sup> This is due to a variety of factors – some legal, and others more practical and political.

First, the companies and their staff may have been given immunity from the courts of the states where they operate. This is the case, for example, in Iraq, where the legal framework developed by the Coalition Provisional Authority (CPA) gives contractors – including private security companies – immunity from Iraqi laws and also from legal processes.<sup>70</sup> Although the relevant order does not apply to all private companies operating in Iraq, it does benefit a significant number, particularly those providing services to the multi-national forces and to states with diplomatic or consular relations with Iraq.

Secondly, the courts in the countries where the PMCs/PSCs are operating, the most obvious forum for instituting proceedings, may have stopped functioning because of the conflict.

Thirdly, third states, including the state of nationality of the relevant PMC/PSC or its employees and, when it is the client, the state that hired the company, may be unable to exercise extraterritorial jurisdiction over the PMC/PSC staff because they lack the necessary national legislation. States also may be reluctant for practical and political reasons to commence prosecutions for serious violations of international humanitarian law that occurred abroad.

Finally, even where third states are able and willing to commence such prosecutions, the proceedings are complicated by the fact that most of the evidence and witnesses are in the country where the violations took place.

As in determining the limits of direct participation in hostilities, the challenges of holding perpetrators of serious violations of international humanitarian law accountable are general and not specific to the staff of PMCs/PSCs. In fact, more possible legal avenues exist for bringing proceedings against such persons than against members of the armed forces, including criminal

69 To date there has been one prosecution of three PMC/PSC employees for hostage-taking and torture committed while they were running an unauthorized place of detention in Afghanistan. However, this case is not representative of the issues raised by the industry, as Jack Idema, the leader of the group, was more akin to a bounty hunter than an ordinary PMC/PSC employee. It is not clear whether any form of corporate structure existed, and it appears that he was acting on his own and not on behalf of any client. See e.g., Fariba Nawa, *Afghanistan, Inc.*, Corpwatch Investigative Report, 2006, p. 15, available at <http://corpwatch.org/article.php?id=14081>. The two cases currently before the US courts are civil proceedings against the companies and not their staff. See above note 39.

70 Coalition Provisional Authority Order 17 grants immunity from Iraqi laws and legal processes to contractors for acts performed pursuant to contracts or subcontracts concluded with the CPA or with states that have provided personnel or a broad range of other forms of assistance to the CPA or to the multinational forces in Iraq or to the international humanitarian or reconstruction effort or to diplomatic or consular missions for the supply of goods and services in Iraq to or on behalf of the multinational forces; or for humanitarian aims, reconstruction or development projects approved or organized by the CPA or such a state; or for the benefit of the diplomatic consular missions of such states. Contracts for security services provided to such states and their personnel and or the MNF and its personnel, international consultants and contractors are also expressly covered by the order. Coalition Provisional Authority Order Number 17 (Revised): Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, 27 June 2004. Pursuant to Article 26(c) of the Law of Administration for the State of Iraq for the Transitional Period of 8 March 2004, this order remains in force until rescinded or amended by legislation duly enacted and having the force of law.

proceedings against individuals and, if hired by a state, proceedings against that state and possibly also criminal or civil proceedings against the company.

While no additional legal hurdles exist in bringing proceedings against the employees of PMCs/PSCs, a number of practical problems do remain, not least in identifying the company for which a person is working.

Moreover, while a number of states may have jurisdiction over serious violations of international humanitarian law, the same is not true of “ordinary crimes” not related to the armed conflict. In such cases usually only the local courts have jurisdiction, but as already said, they may not be functioning or the contractors may have been given immunity. This is unsatisfactory both for the victims of these “lesser” crimes and also for states associated with PMCs/PSCs, which are often viewed by the local population in the same light as the contractors and perceived as “getting away” with crimes. In an attempt to remedy this problem, the United Kingdom, for example, is considering applying its system of “standing courts”, which permits it to try civilians who commit offences abroad in theatre, to certain contractors.<sup>71</sup>

An alternative approach is that adopted by the United States, which enacted the 2000 Military Extraterritorial Jurisdiction Act (MEJA)<sup>72</sup> to expand US federal criminal jurisdiction to civilians accompanying the US armed forces overseas. Jurisdiction is granted for offences that would have been punishable by imprisonment for more than one year if committed within the jurisdiction of the United States, provided that no foreign state is prosecuting the same offence. MEJA is expressly applicable to Department of Defense contractors and subcontractors, among others. This expansion of jurisdiction was necessary for the aforementioned “ordinary crimes” and not for serious violations of international humanitarian law over which the US courts already had extraterritorial jurisdiction on the basis of the War Crimes Act.<sup>73</sup>

71 Report of the *Expert Meeting on Private Military Contractors*, above note 12, pp. 9 and 58–59. The jurisdiction of these courts would be limited to contractors directly hired by the British government.

72 USC, Chapter 18, § 3261–3267 (2000). On MEJA, see e.g., Andrew Fallon and Theresa Keene, “Closing the legal loophole? Practical implications of the Military Extraterritorial Jurisdiction Act of 2000: Civilians accompanying the armed forces”, *Air Force Law Review*, No. 51, 2001, p. 271; and Joseph Perlak, “The Military Extraterritorial Jurisdiction Act of 2000: Implications for contractor personnel”, *Military Law Review*, No. 169, p. 92.

73 USC, Chapter 18, § 2441. The jurisdiction of civilian United States courts over “ordinary crimes” committed by contractors must be distinguished from the question of whether contractors may be prosecuted for failing to obey orders given by members of the armed forces – a potential “command and control” weakness repeatedly raised by armed forces working with contractors. While such behavior by members of the armed forces is punishable under the Uniform Code of Military Justice, contractors are only subject to this law, and to the jurisdiction of military courts, in case of Congressionally declared war (*United States v. Averette*, 19 C.M.A. 363 (1970)). In all other circumstances, while the company and, in turn, the employee may be sued for breach of contract, the latter cannot be prosecuted for failing to obey orders. Commanders have expressed concern at this state of affairs, as they fear that in view of the increased reliance on the private sector, it could amount to loss of a core task, such as aircraft maintenance at a time of need. On this issue, see e.g., Stephen Blizzard, “Increased reliance on contractors on the battlefield: How do we keep from crossing the line?”, *Air Force Journal of Logistics*, No. XXVIII, 2004, p. 2. The scope of application of the UCMJ was significantly expanded in late 2006 by a clause inserted almost unnoticed in the Department of Defense’s 2007 budget legislation. This

Yet, MEJA has not resolved all of the problems. In particular, it only applies to civilian contractors working directly for the Department of Defense and not to those working for other US departments or agencies, let alone those hired by other clients. Host state nationals are also excluded. It is therefore relevant to only a minority of PMC/PSC employees.

### The position of company managers and senior officers

In addition to the criminal responsibility of employees who actually perpetrate a serious violation of international humanitarian law or order its commission, managers and possibly more senior company officers may also face legal liabilities.<sup>74</sup> The responsibility of superiors for grave breaches of international humanitarian law is expressly recognized in Article 86(2) of Additional Protocol I.<sup>75</sup> It can arise if a superior knew or had information that should have enabled him/her to conclude that a subordinate was committing or was going to commit a breach of international humanitarian law but failed to take all feasible measures within his/her power to prevent or repress the breach.<sup>76</sup>

This possible avenue for the attribution of responsibility to the managers and directors of PMCs/PSCs still needs to be explored in practice, as it has never been applied to superiors unconnected to a state or organized armed group. This being said, it appears to be generally accepted that the “superior” referred to may be a civilian, and that the required commander/subordinate relationship may be a *de facto* one, as opposed to one based on law. The key issue is control over the actions of the subordinate.<sup>77</sup> This may also be considered to exist within a PMC/PSC. One significant limitation is the “range” of superiors covered. According to the *Commentary*, the provision is generally limited to direct superiors who have a personal responsibility for the subordinates within their control.<sup>78</sup> Within a PMC/PSC, although an employee’s direct manager would certainly be covered, this responsibility is unlikely to extend to the company’s senior officers. In any event, even if the concept of superior responsibility were found not to apply *de jure* within a PMC/PSC, the types of activities that superiors must take to prevent or

provision extends the application of the UCMJ beyond “declared wars” to also include “contingency operations”. (Section 552 National Defense to Authorization Act for Fiscal year 2007), on this amendment see, e.g., P. Singer, *Law Catches up to Private Militaries*, *Defense Tech*, 4 January, 2007.

74 Article 86(2) of Additional Protocol I mentions the possibility of “penal or disciplinary” responsibility.

75 It was not a new concept, a number of prosecutions in the aftermath of the Second World War were based on the same notion of “superior responsibility” under national law. *Commentary: Additional Protocols*, above note 58, paras. 3540 et seq. See also Kriangsak Kittichaisaree, *International Criminal Law*, 2001, pp. 251 et seq.

76 The concept of superior responsibility was also recognized in Article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia, in Article 6(3) of the Statute of the International Criminal Tribunal for Rwanda, and in Article 28 of the Statute of the International Criminal Court, and was the basis of a number of prosecutions before both *ad hoc* tribunals.

77 See e.g., the practice referred to by Henckaerts and Doswald-Beck, above note 66, Vol. I: *Rules*, Rule 153, and Vol. II: *Practice*, Part 2, pp. 3733 et seq.

78 *Commentary: Additional Protocols*, above note 58, para. 3544. One of the reasons given for this limitation is that the immediate superior is most likely to have the requisite knowledge of the (potential) wrongdoing for the responsibility to arise. *Ibid.*

repress breaches and thus avoid responsibility can provide useful guidance for companies to promote respect for international humanitarian law. These activities include preventive action, such as the establishment of systems to ensure that violations are not committed, and ensuring the constant and effective application of those systems, as well as *post facto* measures. The latter includes investigations of any allegations of wrongdoing and transmission of the findings to the competent authorities.<sup>79</sup>

## The role of companies

As stated at the outset, companies are not themselves bound by international humanitarian law.<sup>80</sup> One possible exception to this general position would be if a PMC/PSC could, in a non-international armed conflict, *itself* be considered a “party to a conflict” within the meaning of Article 3 common to the Geneva Conventions or an “organized armed group” within the meaning of Article 1(1) of Additional Protocol II.<sup>81</sup> In such cases, the company would have exactly the same obligations as any other non-state party to a non-international armed conflict.<sup>82</sup> Though not impossible, this is highly unlikely, in particular because it requires the PMC/PSC to be *itself* a party to the conflict and not fighting on behalf of one.

This being said, there is no doubt that companies have responsibilities under national law. Legal persons must respect the local law of the state where they operate,<sup>83</sup> including (with particular relevance for PMCs/PSCs) criminal law as well as tax, immigration and labor law, in addition to the law of their state of nationality. Applicable national law may also impose obligations under international humanitarian law, which become binding on companies by virtue of its incorporation into national law.<sup>84</sup> Even when this is not the case, acts that amount to violations of international humanitarian law are often also crimes under national law, and prosecutions may be brought on this basis both against company staff and, in the states that recognize the criminal responsibility of legal persons, against the companies themselves.

Furthermore, certain violations of international humanitarian law can also amount to civil wrongdoings under national law. In many common law countries, for example, they could be considered torts (unlawful deprivation of life

79 Ibid., para. 3548, and Henckaerts and Doswald-Beck, above note 66, Vol. I: *Rules*, Rule 153.

80 For a comprehensive analysis of the nature and extent of the responsibilities of non-state actors under international law more generally, by a leading proponent of a more expansive approach, see Clapham, above note 68.

81 A discussion of these requirements is beyond the scope of this article, but for a detailed review, see e.g., Liesbeth Zegveld, *Armed Opposition Groups in International Law: The Quest for Accountability*, 2002.

82 The author would like to thank James Cockayne, associate at the International Peace Academy, for drawing this possibility to her attention.

83 Unless they have been exempted therefrom, as was the case in Iraq, for example, on the basis of the above-mentioned CPA Order 17.

84 See e.g., Emanuela-Chiara Gillard, “Business and human rights obligations: The position with regard to international humanitarian law”, *Proceedings of 100<sup>th</sup> Annual Meeting*, American Society of International Law, 2006, pp. 114 et seq.

under international humanitarian law could be a wrongful death; torture and cruel, inhuman or degrading treatment or punishment could be assault and battery; and unlawful deprivation of liberty could be false imprisonment).<sup>85</sup> Companies may clearly be sued for these acts. There are several advantages to civil actions. First, it is the victims who commence proceedings, instead of a prosecutor. Secondly, the evidentiary standard to be met is lower than in criminal proceedings (“on the balance of probabilities” rather than “beyond reasonable doubt”). Thirdly, in the event of a successful action the “victim-plaintiffs” will receive compensation from the deep pockets of companies. On the other hand, one disadvantage is that extraterritorial jurisdiction in respect of civil claims is far rarer and more limited in scope than in respect of criminal offences, so unless civil proceedings are brought in the country where the alleged wrongdoing occurred, it may be difficult to find a court with jurisdiction.<sup>86</sup>

The two cases brought against PMCs/PSCs to date for, *inter alia*, alleged violations of international humanitarian law are in fact civil suits brought under the US’ Alien Tort Claims Act. This act confers jurisdiction on US District Courts in respect of “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>87</sup> It is an uncharacteristically broad basis for civil jurisdiction, applicable to a potentially very wide class of violations of international law, including those committed outside the US.

A variety of bases thus exist for bringing PMCs/PSCs to justice under national law. In any event, the staff of PMCs/PSCs are clearly bound by international humanitarian law, and violations committed by their staff, and even mere allegations of them, can have adverse consequences for companies. Most obvious is the risk of legal proceedings. More broadly, serious wrongdoing – or even just allegations thereof – can lead to increased insurance premiums and to adverse publicity, which is particularly damaging for publicly quoted companies, plus the fact that a company with a tarnished reputation may find it difficult to secure future contracts with “careful” clients such as states, inter-governmental organizations and large business enterprises.<sup>88</sup>

It is therefore in the interest of PMCs/PSCs to take steps to promote respect for international humanitarian law by their staff. Indeed, they may be required to do so to avoid allegations of superior responsibility should any serious violations be committed.

Although the steps that can be taken by companies to that effect are not specified in any treaty, those adopted by states to ensure respect by the members of

85 On this question, see e.g., Jennifer Zerk, “Common law tort liability for corporate participation in international crimes”, a paper prepared for the International Commission of Jurists’ Expert Legal Panel on Corporate Complicity, 15 September 2006; and Craig Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation*, 2001.

86 See the discussions of the August 2005 Expert Meeting on this topic: Report of the *Expert Meeting on Private Military Contractors*, above note 12, pp. 58 et seq.

87 USC, No. 28, para. 1350. For details of the cases see above note 39.

88 On this last point see Spear, above note 2, p. 44.

their armed forces can provide guidance by analogy. There seems to be agreement that as a minimum, the following elements are necessary.

First, vetting of staff to ensure that no one who has committed violations of international humanitarian law or human rights or has been associated with armed forces or groups notorious for wrongdoing is hired.

Secondly, awareness of international humanitarian law. Companies should provide their staff with general as well as situation- and task-specific training in international humanitarian law. It is not sufficient for companies to rely on the training their staff may have received in their previous careers with the armed forces, as their status, tasks and consequent obligations as private contractors are significantly different.

Thirdly, staff should be issued with standard operating procedures and rules of engagement that are in accordance with and respect their obligations under international humanitarian law as well as the applicable local law.

Fourthly, mechanisms should be established within companies to investigate any alleged violations and ensure accountability, *inter alia*, by communicating the results of such investigations to the relevant state authorities for prosecution.

This being said, in view of the as yet uncertain extent of civilian “superior responsibility” within a company, as well as the absence of internal disciplinary mechanisms as sophisticated and comprehensive as those of the armed forces, which include military justice, doubts have been expressed as to whether the incentives and tools available to PMCs/PSCs to promote respect for the law by their staff will ever be as effective as those of the armed forces.

## Industry codes of conduct

Finally, mention must be made of voluntary codes of conduct, which companies and some commentators sometimes refer to as though they were the sole source of obligations for PMCs/PSCs.

A “voluntary” approach may be appropriate in respect of human rights obligations. This is because, except for some serious violations criminalized internationally, such as torture, human rights law is binding on states and their agents but not on private entities and individuals, such as PMCs/PSCs and their staff.<sup>89</sup>

The position under international humanitarian law is significantly different. As already stressed several times, the staff of PMCs/PSCs *are* bound thereby. Accordingly it is not possible for companies to select on a voluntary basis how they and their staff should behave with regard to matters regulated by international humanitarian law. The role of codes of conduct adopted by individual companies or trade associations, such as the British Association of

<sup>89</sup> See Gillard, above note 84, p. 115. For a different view see Clapham, above note 68.

Private Security Companies or the International Peace Associations Organization, must be understood in this light. With regard to issues addressed by international law, they may be best practices for ensuring that companies and their staff perform their existing obligations under international humanitarian law, but they are not an opportunity for companies to indicate in a non-binding and generally extremely vague manner how they will conduct themselves.

## **The responsibilities of states that hire PMCs/PSCs**

Discussions of the legal framework applicable to PMCs/PSCs occasionally overlook the fact that when companies are hired by states, the latter have significant obligations alongside those of the companies' employees discussed above. In such circumstances states have an important role to play in promoting respect for international humanitarian law.

While some aspects or consequences of this parallel responsibility are expressly addressed in international humanitarian law treaties, the relevant provisions tend to be a specific expression of the general rules relating to the responsibility of states under general public international law for the acts of their agents.<sup>90</sup>

### **States cannot absolve themselves of their obligations under international humanitarian law by hiring PMCs/PSCs**

Generally, international humanitarian law does not preclude states from hiring PMCs/PSCs to carry out certain activities. However, it is clear that when they do so, they remain responsible for meeting their obligations under the law. A failure by the company to fulfill the states' obligations will not absolve the latter of their responsibility for meeting the standards in the relevant treaties.

The Third and Fourth Geneva Conventions contain limited exceptions to this general position, inasmuch as they require prisoner-of-war camps and places of internment for protected persons to be under the direct authority of a "responsible commissioned officer" or a "responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power" respectively.<sup>91</sup> However, provided this overall control and responsibility is retained, nothing precludes a state from hiring a PMC/PSC to operate such places of detention.

So if, for example, a company is hired to run a prisoner-of-war camp, the detaining state must still ensure that the standards of internment and treatment

90 Many of these principles also apply by analogy with regard to human rights obligations. See e.g., Droege, above note 13 and Hampson, above note 13.

91 Third Geneva Convention, Article 39, and Fourth Geneva Convention, Article 99.

laid down in the Third Geneva Convention are met, and cannot avoid responsibility by claiming it has hired a PMC/PSC to operate the camp.<sup>92</sup>

States may wish, however, for a variety of reasons to limit the types of activities that may be performed by companies. Such limitations may be implemented either in an *ad hoc* manner, or pursuant to regulations that formally spell out the limits of permissible outsourcing. For example, the US Department of Defense, which relies on significant private sector support, has recently adopted an instruction that, *inter alia*, specifies which activities may be outsourced and which others may only be performed by members of the armed forces or civilian Department of Defense employees.<sup>93</sup> The underlying premise, based on general US administrative law, is that functions and tasks that are “inherently governmental” may not be contracted out and are designated for exclusive Department of Defense civilian or military performance.<sup>94</sup>

Without going into the details of the instruction, the approach to certain activities of particular relevance from an international humanitarian law point of view deserves highlighting. “Operational control of military forces” is inherently governmental,<sup>95</sup> as are “combat operations”, with the consequence that only members of the armed forces may take direct part in hostilities.<sup>96</sup> However, the provision of “technical advice on the operation of weapons systems or other support of a non-discretionary nature performed in support for combat operations” is excluded therefrom and may thus be performed by the private sector.<sup>97</sup>

The provision of security to protect resources (people, information, equipment and supplies) in hostile areas is “inherently governmental” if it “involves unpredictable international or uncontrolled high threat situations where success depends on how operations are handled.”<sup>98</sup> For example, these include situations that require a show of military force or activities that directly support

92 See, for example, Article 12(1) of the Third Geneva Convention, which provides that: “Prisoners of war are in the hands of the enemy power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.”

93 US Department of Defense Instruction No. 1100.22, above note 35.

94 *Ibid.*, para. 4.1. This is also expressly specified in US Department of Defense Instruction No. 3020.41, above note 35. In general terms, according to Instruction No. 1100.22, “inherently governmental” functions include: “activities that require either the exercise of discretion when applying Federal Government authority or value judgments when making decisions for the Federal Government.”

95 US Department of Defense Instruction No. 1100.22, Enclosure 2, *Manpower Mix Criteria*, para. E2.1.1.

96 *Ibid.*, paras. E2.1.3 and E2.1.3.3. The reason given for this is that: “Only military forces provide the appropriate authorities and controls (command authority, [Uniform Code of Military Justice] authority, and discretionary authority), discipline, weapons, equipment, training and organization needed to execute combat missions on behalf of the United States. If combat operations were performed by private sector contractors, it would constitute an inappropriate relinquishment of the U.S. government’s sovereign authority.”

97 *Ibid.*, para. E2.1.3.3.2. Also “inherently governmental” is “Uniform Code of Military Justice Authority” – i.e., arresting or confining members of the armed forces and civilians accompanying them during a declared war in relation to alleged violations of the Uniform Code of Military Justice (para. E2.1.2.1); and military discipline and discretionary decision authority (para. E2.1.2.2).

98 *Ibid.*, para. E2.1.4.1.

combat (e.g., battlefield circulation control and area security) or are against a “military or paramilitary organization whose capabilities are so sophisticated that only military forces could provide an adequate defense.”<sup>99</sup> On the other hand, the private sector may provide security services that do not involve “substantial discretion, such as physical security at buildings in secure compounds in hostile environments.”<sup>100</sup>

Finally, the treatment, transfer, detention and interrogation of prisoners of war, civilian internees and other persons deprived of their liberty are inherently governmental functions.<sup>101</sup> Where adequate security is available, however, “properly trained and cleared contractors” may be used as linguists, interpreters and report writers in such operations provided “their work is properly reviewed by sufficient numbers of properly trained government officials.”<sup>102</sup>

Within this important category of operations, specific mention is made first of “direction and control of intelligence operations in hostile areas,” which is inherently governmental. Properly trained contractors may be used, however, to draft interrogation plans and conduct government-approved interrogations if properly supervised and closely monitored.<sup>103</sup> Secondly, there is a reference to “direction and control of detention facilities” for prisoners of war, civilian internees and other persons deprived of their liberty in areas of operation, which must be performed by military personnel.<sup>104</sup>

### States must ensure respect for international humanitarian law by the PMCs/PSCs they hire

In common Article 1 to the Geneva Conventions, states undertook to respect and ensure respect for international humanitarian law.<sup>105</sup> One dimension of the commitment to ensure respect requires states to take the necessary steps to ensure their armed forces comply with the law. They can do so by taking preparatory measures, including by disseminating knowledge of international humanitarian law among their armed forces, but also by supervising the implementation of their obligations, for example by monitoring the execution of orders and directions given to the military authorities.<sup>106</sup> Insofar as the staff of PMCs/PSCs can be considered members of the armed forces, on the basis of the analysis above, they too must benefit from such measures.

This obligation is not limited to a state’s armed forces but extends to other persons acting on its behalf or under its direction and control. These can

99 Ibid., paras. E2.1.4.1.2 and E2.1.4.1.3.

100 Ibid., paras. E2.1.4.1.5 and E2.1.4.1.5.1.

101 Ibid., para. E.2.1.6.

102 Id.

103 Ibid., para. E.2.1.6.2.

104 Ibid., para. E.2.1.6.4.

105 Article 1(1) of Additional Protocol I reiterates this undertaking.

106 *Commentary: Third Geneva Convention*, above note 27, p. 18; and *Commentary: Additional Protocols*, above note 58, para. 41.

obviously also include employees of PMCs/PSCs hired by a state who are not members of its armed forces.

What steps can a state take to meet this obligation to ensure respect for international humanitarian law? Treaties specifically lay down some measures that must be taken in relation to persons who are not members of the armed forces. Other measures can be suggested on the basis of steps that must be taken with regard to the armed forces.

First of all, a pre-condition for respect of the law is knowledge thereof. Employees of PMCs/PSCs hired by states must therefore be properly trained in international humanitarian law.<sup>107</sup> Indeed, this is expressly required by the Geneva Conventions for persons who assume certain responsibilities, most notably in respect of prisoners of war<sup>108</sup> and protected persons under the Fourth Geneva Convention.<sup>109</sup>

While training in humanitarian law is thus clearly mandatory for those who assume responsibilities in respect of persons protected by that law, the Conventions are silent as to who must actually train them. Consequently, when PMCs/PSCs are hired by states, either the client can provide such training or a training requirement can be inserted in the contract and the company must ensure that this condition is met. For example, a 2006 US Department of Defense Directive adopted the latter approach, obliging work statements for contractors hired by the department to “require contractors to institute and implement effective programs to prevent violations of the law of war by their employees and subcontractors, including law of war training and dissemination.”<sup>110</sup>

Secondly, instructions must be given to PMC/PSC employees that are in accordance with and comply with their obligations under international humanitarian law.<sup>111</sup> The state hiring the company can either supply such “rules

107 Article 87(2) of Additional Protocol I requires commanders to ensure that members of the armed forces under their command are aware of their obligations under the Geneva Conventions and the Protocol. Those PMC/PSC employees who can be considered members of the armed forces would obviously fall within the scope of this provision.

108 Article 127 of the Third Geneva Convention stipulates that: “Any military or *other authorities*, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions. (Emphasis added.) Mention must also be made of Article 39 of the Convention, which requires the officer in charge of a prisoner of war camp to ensure that the provisions of the Convention are known to camp staff. Such staff may, obviously, include PMC/PSC employees.

109 Article 144 of the Fourth Geneva Convention provides that: “Any civilian, military, police or *other authorities*, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions.” (Emphasis added.) Also of relevance is Article 99 of the Convention, which stipulates that: “The staff in control of internees shall be instructed in the provisions of the present Convention and of the administrative measures adopted to ensure its application.” A more general training requirement is found in Article 83(2) of Additional Protocol I, which requires: “Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the [four Geneva] Conventions and [Additional] Protocol [I] shall be fully acquainted with the text thereof.”

110 “DoD Law of War Program”, US Department of Defense Directive Number 2311.01E, 9 May 2006; para. 5.7.4.

111 Article 80(2) of Additional Protocol I requires states to give orders and instructions to ensure the observance of the four Geneva Conventions and the Protocol, and to supervise their execution.

of engagement” or “standard operating procedures” itself or can require the company to issue them.

Thirdly, in order to ensure the execution of its directions, the hiring state should carry out some form of monitoring of the performance by the PMC/PSC of the activities entrusted to it. One of the purposes of this supervision is to promptly investigate any allegations of wrongdoing, as required by the obligation to ensure respect for international humanitarian law.<sup>112</sup>

Also by way of example in this area, the aforementioned US Department of Defense Directive requires all military and US civilian employees but also contractor personnel and subcontractors assigned to or accompanying a Department of Defense component to report any possible, suspected or alleged violation of international humanitarian law for investigation. Moreover, it requires this reporting obligation to be included in contracts with companies.<sup>113</sup>

States are responsible for violations of international humanitarian law committed by the employees of PMCs/PSCs they hire that may be attributed to them

A variety of different actors may incur legal liability for the same violation of international humanitarian law. Besides the individual criminal responsibility of PMC/PSC employees for war crimes – and the possible liability of the company under national law – the state that hired the company may also be responsible for the violation if it is attributable to it.<sup>114</sup>

The rules of general public international law relating to state responsibility have recently been restated by the International Law Commission in its 2001 Articles on Responsibility of States for Internationally Wrongful Acts.<sup>115</sup> Of particular relevance for present purposes are draft Articles 4, 5, 7 and 8 setting out some of the bases for attribution of a wrongful act to a state.

A detailed analysis of the rules of attribution of conduct to states is beyond the scope of this article, which will be confined to some general observations. The

112 Ibid. In addition, Article 87(1) requires commanders to prevent and where necessary suppress and report to the competent authorities breaches of the Geneva Conventions and the Protocol. This obligation exists both in relation to members of the armed forces under their command and to “other persons under [their] control”. This expression has been very broadly interpreted as including, for example, the civilian population in an occupied territory. (*Commentary: Additional Protocols*, above note 58, para. 3555.) There appears to be no reason why this obligation should not also exist in relation to PMC/PSC employees hired by the armed forces or otherwise under their control, even though they are not within their formal chain of command and control.

113 US Department of Defense Directive No. 2311.01E, above note 35, para. 6.3.

114 While individual criminal responsibility only exists at the international level in relation to war crimes and certain very serious human rights violations, states can be responsible for *any* violation of international law.

115 Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session, and Commentaries thereto, “Report of the International Law Commission on the work of its Fifty-third session (2001)”, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10*, (UN Doc A/56/10) Chapter IV.E.1. The draft articles under discussion are generally accepted as reflecting customary law on this subject.

question of whether a state can be held responsible for violations of international humanitarian law committed by the staff of a PMC/PSC it has hired has no single easy answer. The outcome depends principally on the status of the persons concerned and the basis for their performance of the operations in question.<sup>116</sup>

If they can be considered members of the state's armed forces on the grounds discussed above, the acts of PMC/PSC employees would be those of "an organ" of the state and, consequently, imputable to the hiring state on the basis of draft Article 4(1), which provides that:

"The conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the state, and whatever its character as an organ of the central government or of a territorial unit of the state."<sup>117</sup>

State responsibility for violations of international humanitarian law committed by PMC/PSC employees who are not members of the armed forces (i.e., civilians accompanying the armed forces and "ordinary" civilians) is more difficult to establish. One possible basis could be draft Article 5, which deals with the conduct of persons or entities exercising elements of governmental authority and states that:

"The conduct of a person or entity which is not an organ of the state under Article 4 but which is empowered by the law of that state to exercise elements of the governmental authority shall be considered an act of the state under international law, provided the person or entity is acting in that capacity in the particular instance."

At first sight, this provision appears to apply to a considerable proportion of PMC/PSC activities to which international humanitarian law is relevant, as operations related to war fighting and related detention are intuitively "elements of the governmental authority".<sup>118</sup> The requirement that the entity be "empowered by the law of that state," however, significantly limits the scope of the provision. The Commentary makes it clear that draft Article 5 only covers the conduct of entities "empowered by internal law to exercise governmental functions," thus

116 The basis for and extent of state responsibility for PMCs/PSCs was the subject of extensive debate at the 2005 Expert Meeting in Geneva. See Report of the *Expert Meeting on Private Military Contractors*, above note 12.

117 The Commentary to this draft Article states that no distinction is made between the acts of "superior" and "subordinate" officials for the purpose of attribution, so the fact that PMC/PSC employees are unlikely to hold senior positions in the armed forces does not preclude state responsibility. (Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, above note 115, p. 87.)

118 The Commentary to draft Article 5 gives as examples the use of private security firms to act as prison guards, who would in that capacity exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or prison regulations, and that of airlines that have been delegated powers in relation to immigration control or quarantine. (Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, above note 115, p. 92.) The activities that could be considered an exercise of "governmental authority" were the subject of considerable discussion at the Expert Meeting. Report of the *Expert Meeting on Private Military Contractors*, above note 12, pp. 16–18.

distinguishing it from the case of entities that act under the direction or control of the state more generally.

The existence of a contract between the state and the company is obviously not sufficient *per se* to bring the latter within the scope of the provision. It is not clear, however, how specific the internal law needs to be. Do the delegated functions, as well as the manner in which they are to be performed, have to be specifically identified? Does the company have to be specifically named or is it sufficient to lay down criteria that companies must meet to be allowed to carry out the activity in question? Are instruments setting out the types of activities that may be delegated, as well as general guidance for the performance and oversight thereof like the aforementioned US Department of Defense directives on contractors and workforce mix sufficient? The position is not clear.

A final possible basis for attribution is draft Article 8, which deals with conduct directed or controlled by a state and stipulates that:

“The conduct of a person or a group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction and control of, that state in carrying out the conduct.”

At first sight this provision also appears to address the situation of many PMCs/PSCs as, provided it is sufficiently detailed, the contract could be considered a form of “instructions” or enough to place the company under the hiring state’s “direction and control”. As was the case with draft Article 5, however, a closer reading shows that the provision is fairly narrow in scope. It is clear from the article’s wording (“in carrying out the conduct”) and from the Commentary, that this provision does not cover wrongful acts committed while the company was carrying out the instructions of the state or acting under its direction and control. Instead, “the instructions, direction or control must have related to the conduct which is said to have amounted to an internationally wrongful act.”<sup>119</sup> State responsibility arises under draft Article 8 only if the state directed the company to commit violations of international humanitarian law, but not if it hired the company to perform a lawful activity and, while carrying out the contract, the PMC/PSC employees violated the law.

Draft Article 7 states the general position that state responsibility exists for all violations of international law committed by the organs of the state or persons empowered to exercise elements of governmental authority in their official capacity, including when acting *ultra vires*.<sup>120</sup> There is no such general responsibility, however, in relation to “*ultra vires*” acts committed by persons acting under a state’s instructions, direction or control.

In view of this, it is by no means automatic that a state will be responsible for violations of international humanitarian law committed by the staff of a

119 Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, above note 115, p. 108.

120 Article 91 of Additional Protocol I specifically re-states this position in relation to violations of international humanitarian law by persons forming part of the armed forces.

company it has hired. Yet situations in which the acts of contractors cannot be attributed to a state may still lead to direct responsibility of the state for its own violations of the law. This responsibility may arise because the state failed either to meet its obligations under international humanitarian law or to take the necessary steps to ensure respect of the law.

Finally, as is the case with individual criminal responsibility for war crimes, while this responsibility of states is well established as a matter of law, it is often difficult to enforce in practice. Proceedings before international tribunals are not frequent, *inter alia*, because of the difficulties of finding a court with jurisdiction, while proceedings before national courts are often thwarted by assertions of sovereign immunity or the non-self-executing nature of international humanitarian law in certain states.

### Superior responsibility

In addition to the potential liability of the state, violations of international humanitarian law committed by the staff of PMCs/PSCs hired by states could possibly also give rise to the liability of commanders of the armed forces and state representatives on the basis of superior responsibility.

This concept has been discussed above in relation to the possible liability of company managers and senior officials for the acts of their employees. Provided the necessary control over the subordinate's actions exists – and it should be recalled that the responsibility is generally limited to direct superiors with a personal responsibility for the subordinates within their control – liability could arise in theory, both for a military commander if the company has been hired to assist the armed forces, and for a civilian state official in other situations. However, unless they can be considered members of the armed forces, in which case command responsibility will arise in the ordinary manner, in most circumstances PMC/PSC employees receive instructions from company managers and not from members of the armed forces or officers of the state that has hired them. Moreover, usually it is the companies that are responsible for disciplining the employees.<sup>121</sup> Consequently, it is unlikely that state representatives will have the necessary control over the actions of PMC/PSC employees for superior responsibility to arise.

States must investigate and, if warranted, prosecute war crimes alleged to have been committed by the staff of PMCs/PSCs they have hired

As discussed above, the Geneva Conventions require states to take measures necessary for the suppression of all acts contrary to the Conventions and to search for and bring before their courts or extradite persons alleged to have committed

121 The US Department of Defense Instruction on Contractors expressly renders companies responsible for ensuring that employees perform under the terms of the contract and comply with theatre orders and applicable directives, laws and regulations. They are also responsible for maintaining employee discipline. US Department of Defense Instruction No. 3020.41, above note 35, para. 6.3.3.

grave breaches. This obligation exists for *all* persons and applies *a fortiori* in respect of persons hired by a state. Accordingly, states must ensure they have the necessary mechanisms and legislation in place to investigate and, if warranted, prosecute the staff of PMCs/PSCs they have hired for any serious violations of international humanitarian law these persons may have committed.

## The responsibilities and roles of other states

The previous section dealt with the obligations of states that hire PMCs/PSCs. They have clear and direct responsibilities. However, other states also have a role to play in promoting respect for international humanitarian law by the staff of PMCs/PSCs operating in situations of armed conflict.

### Duty to repress grave breaches

As outlined in above, *all* states must search for and prosecute or extradite persons suspected of war crimes. All states therefore have a responsibility to bring to justice PMC/PSC employees alleged to have committed serious violations of international humanitarian law.

Obviously, some states are more likely *fora* for prosecutions than others, as they have a link with the violation. These include, most notably, the state where the alleged wrongdoing took place; the state of nationality of the victims or, if different, the state where they are; the state of nationality of the alleged perpetrators; and also, possibly, the state of nationality of the company employing the persons in question. Provided their courts have a sufficiently wide basis for jurisdiction, nothing prevents other states from bringing prosecutions.

### Undertaking to “ensure respect” for international humanitarian law

Under Article 1 common to the Geneva Conventions, states parties have undertaken to respect and ensure respect for international humanitarian law. The “ensure respect” dimension of this provision has been interpreted broadly. It obviously requires states to take steps to ensure that their troops and anyone else acting on their behalf complies with the law. It has also been understood, however, as a commitment by all states to attempt to influence the behavior of parties to an armed conflict in order to promote respect for the law.<sup>122</sup>

Certain states are in a particularly favorable position to promote respect for international humanitarian law by PMCs/PSCs operating in situations of

122 See e.g., *Commentary: Third Geneva Convention*, above note 27, p. 17, and *Commentary: Additional Protocols*, above note 58, paras. 41 et seq. Doubts have been expressed as to whether the drafters of the conventions had this interpretation in mind. See e.g., Frits Kalshoven, “The undertaking to respect and ensure respect in all circumstances: From tiny seed to ripening fruit”, *Yearbook of International Humanitarian Law*, Vol. 2, 1999, p. 3.

armed conflict. In addition to the state that hires the company, which has clear obligations already discussed, they include the states in whose territory the companies operate and their state of nationality, as well as – albeit to a lesser extent – the state of nationality of the employees.

The treaties do not stipulate how the undertaking to ensure respect can be discharged. The most common approach has been for states not involved in an armed conflict to intervene through diplomatic channels to remind the belligerents of their obligations.<sup>123</sup> Many other options exist.

One possible avenue open to states in whose territory PMCs/PSCs operate and their state of nationality would be the adoption of a regulatory framework. Besides promoting respect for international humanitarian law by including, for example, staff training requirements, this approach would also allow states to address some of the other issues raised by the activities of the industry, such as the lack of transparency and the need to set clear limits to the activities that may be performed by the private sector, to name but a few. Indeed, a national regulatory framework is the solution to these issues suggested by many commentators.<sup>124</sup>

Only possible key elements of possible regulatory approaches will be outlined here, as a detailed discussion of them is beyond the scope of this article.

### *The role of states in whose territory PMCs/PSCs operate*

States in whose territory PMCs/PSCs operate may not only have hired the companies themselves but may also be “hosting” PMCs/PSCs hired by others. In Iraq today, for example, there are companies hired by the US – i.e., a party to the conflict – by third states not involved in the hostilities, by private companies and by inter-governmental and non-governmental organizations.

Such host states have a distinct interest in exercising control over these often armed actors operating in their territory. As pointed out already, at present only two states have legislation that specifically regulates the operations of PMCs/PSCs, namely Sierra Leone and Iraq.<sup>125</sup> Afghanistan is currently developing a regulatory framework.

In simple terms, such a system could, first of all, require companies wishing to provide security or military services to obtain an operating license. To

123 See e.g., Henckaerts and Doswald-Beck, above note 66, Vol. I: *Rules*, Rule 144.

124 See e.g., Schreier and Caparini, above note 2, and Holmqvist, above note 2. A regulatory framework was also recommended by the UN Special Rapporteur on the question of torture. He called upon states: “To introduce legislation to control and monitor the activities of private providers of military, security and police services to ensure they do not facilitate or perpetrate torture. Companies and individuals providing these services should be required to register and to provide detailed annual reports of their activities. Every proposed international transfer of personnel or training should require prior government approval, which should only be granted in accordance with publicly available criteria based on international human rights standards and international humanitarian law.” Report of the Special Rapporteur on the question of torture, Theo van Bowen, 15 December 2004, UN Doc E/CN.4/2005/62, para 37(h).

125 CPA Memorandum 17: Registration Requirements for Private Security Companies, 26 June 2004, and Section 19 of Sierra Leone’s 2002 National Security and Central Intelligence Act.

so do, a company would have to meet some basic criteria including, in order to ensure compliance with international humanitarian law, requirements that it vet its employees, train them in international humanitarian law, adopt standard operating procedures or rules of engagement that comply with their obligations under this law, establish internal mechanisms for investigating allegations of wrongdoings and transmit the findings to the competent authorities for further investigation.<sup>126</sup>

Obviously, the regulatory framework would cover numerous other aspects of the operations of PMCs/PSCs, including the types of activities the private sector may perform<sup>127</sup> and the types of weapons that may be employed.<sup>128</sup> It could be based on a “one-off” operating license or require contract-by-contract authorization or notification, plus registration of all employees. Finally, it could also establish a mechanism for supervising the activities of PMCs/PSCs, as well as sanctions for operating without a license or in violation thereof (e.g., withdrawal of operating license, loss of bond, imposition of fines and criminal sanctions). For purposes of transparency, annual reporting to parliament on the implementation of the regulatory framework could also be envisaged.

### *The role of the state of nationality of PMCs/PSCs*

A regulatory framework would also enable the state of nationality of PMCs/PSCs to exercise some control and oversight over the activities of their companies abroad. At present, South Africa is the only state to have adopted legislation specifically addressing the operations of its companies – and nationals – abroad.<sup>129</sup> A small minority of states deal with the provision of certain military/security services abroad in their arms export control legislation.<sup>130</sup> The UK, the state of nationality of a significant number of PMCs/PSCs, has been considering the adoption of such a regulatory framework for some time.<sup>131</sup>

Basic elements of a regulatory framework could include a requirement for an operating license, which would only be granted to companies meeting

126 Neither CPA Memorandum 17 nor Sierra Leone’s Act address this issue.

127 Section 9.1 of CPA Memorandum 17 provides that: “The primary role of PSC is deterrence. No PSC or PSC employee may conduct any law enforcement functions.”

128 See e.g., Section 6 of CPA Memorandum 17.

129 The 1998 Regulation of Foreign Military Assistance Act (FMAA). A number of amendments have been made to the FMAA and are expected to come into force in 2007. On the FMAA, see Raenette Talijaard, “Implementing South Africa’s Regulation of Foreign Military Assistance Act” in Alan Bryden and Marina Caparini (eds.), *Private Actors and Security Governance*, 2006, pp. 176 et seq.

130 See e.g., the United States’ International Traffic in Arms Regulations. On this, see Schreier and Caparini, above note 2, pp. 104 et seq.

131 See e.g., *Private Military Companies: Options for Regulation*, Foreign and Commonwealth Office, HC 577, 2002. On this Green Paper and subsequent developments in the UK, see e.g., Christopher Kinsey, “Regulation and control of private military companies: The legislative dimension”, *Contemporary Security Policy*, Vol. 26(1), 2005, p. 1; Elke Krahnmann, “Private military services in the UK and Germany: Between partnership and regulation”, *European Security*, Vol. 14(2), 2005, p. 277; and Walker and Whyte, above note 8.

standards similar to those outlined above for states where the PMCs/PSCs operate, including those aimed at promoting respect for international humanitarian law.

In addition, companies could be required to obtain “operation-by-operation” approval. The criteria for determining whether authorization should be granted could be based on criteria similar to those set for arms transfers, including consideration of whether the operation could undermine respect for international humanitarian law.<sup>132</sup> The regulations could also prohibit the performance of particular activities (e.g. direct participation in hostilities) and lay down sanctions for operating without the necessary authorizations or in violation thereof. Annual reporting to parliament on the implementation of the regulatory framework could likewise be envisaged in the state of nationality of the PMCs/PSCs.

Elaborating the key elements of such a regulatory system is not complicated. The challenge lies in monitoring compliance with it in practice, as by definition the provision of services occurs abroad and, unlike arms exports, does not entail the movement of goods which can be monitored by customs officials. Communication and cooperation with the authorities of the state where the operations take place are therefore indispensable for the system to function properly.

National regulation could be complemented with a similar system at the regional level, which would have the advantage, *inter alia*, of placing regional partners on a level playing field. The possibility of regional regulation by the European Union has been the subject of some discussion by academics, if not by European Union officials – at least not in public.<sup>133</sup>

## Mercenaries?

A detailed analysis of the position of mercenaries under international law today is beyond the scope of this article. It will therefore be confined to presenting their position under international humanitarian law and the two specific conventions on mercenaries: the 1977 Organization of African Unity Convention for the Elimination of Mercenarism in Africa<sup>134</sup> and the 1989 United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries.<sup>135</sup>

The aim of these two specialized instruments is to prohibit the use of mercenaries and to criminalize both recourse to mercenaries and participation in

132 See e.g., the criteria in the 1998 EU Code of Conduct on Arms Transfers. (EU Code of Conduct on Armament Exports, 5 June 1998, 8675/2/98 Rev 2.)

133 See e.g., Elke Krahnemann, “Regulating private military companies: What role for the EU?”, *Contemporary Security Policy*, No. 26, 2005, p. 103, and “Regulating military and security services in the European Union”, in Bryden and Caparini, above note 129, p. 190.

134 OAU Doc CM/433/Rev.I Annex 1 (1972). This convention entered into force on 22 April 1985 and, at the time of writing, has been ratified by 27 states.

135 *United Nations Treaty Series*, Vol. 2163, p.75. This convention entered into force on 20 October 2001 and, at the time of writing, has been ratified by 28 states.

hostilities as a mercenary. International humanitarian law tackles the issue of mercenaries from a rather different angle. It neither prohibits the use of mercenaries nor criminalizes their activities. Instead, it focuses on the status to be granted to them if captured.

## Mercenaries and international humanitarian law

Article 47 of Additional Protocol I lays down a definition of mercenaries and provides that persons falling within this definition are not entitled to prisoner-of-war status if captured.<sup>136</sup>

### *The definition of mercenary*

Without reviewing the six conditions in Article 47(2) individually, some aspects of the definition nevertheless warrant highlighting. First, the conditions have to be met cumulatively. In practice this makes it difficult for a person to fall within the definition of mercenary.<sup>137</sup>

Secondly, the requirement in condition (b) that the person concerned does in fact take a direct part in hostilities significantly limits the scope of the definition. Many persons who provide significant support to belligerents and who would commonly be considered mercenaries are likely not to engage in activities that amount to “taking direct part in hostilities” within the meaning of international humanitarian law. Furthermore, the inclusion of this expression adds an element of complexity to the definition. As discussed above, the concept of “direct participation in hostilities” – although central to international humanitarian law since it determines the circumstances in which a civilian may lawfully be attacked – is not defined, and it is notoriously difficult to determine its precise limits.

Last but not least, mention must be made of condition (e), which has justifiably been described as rendering the definition of mercenary, and indeed Article 47 as whole, entirely devoid of any practical or legal significance. Article 47(2)(e) excludes from the definition anyone who is a member of the armed forces of a state party to the conflict. Thus, simply by incorporating mercenaries into its

136 Article 47(2) of Additional Protocol I defines as mercenary as any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party; (d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (e) is not a member of the armed forces of a party to the conflict; and (f) has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces.

137 The threshold was set intentionally high at the Diplomatic Conference on the Re-affirmation and Development of International Law, that negotiated the Additional Protocols of 1977, as “determination of a person’s status as a mercenary was likely to involve life or death consequences” and some states wanted to reduce the risk that the article could be used to deny combatant or prisoner-of-war status to legitimate combatants. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974–1977), Vol. XV, Committee III Report, Fourth Session, 17 March–10 June 1977, CDDH/407/Rev.1, para. 25.

armed forces, a state wishing to use them can avoid them being considered mercenaries even if all the other conditions are met. This course of action, already raised as a possibility during the Diplomatic Conference,<sup>138</sup> was in fact taken by Papua New Guinea in 1997 with regard to the employees of Sandline International, who were given “special constable” status.<sup>139</sup>

Moreover, from a more purely legal point of view the inclusion of condition (e) makes Article 47 redundant. A person who is not a member of a state’s armed forces – or of a militia or volunteer corps meeting the conditions of Article 4A(2) of the Third Geneva Convention – who takes direct part in hostilities, is an “unprivileged belligerent” or “unlawful combatant” and is not entitled to prisoner-of-war status in any event if captured. Accordingly, although Article 47 appears to be creating a new category of persons who are not entitled to prisoner-of-war status, it is merely reiterating an existing position, causing some commentators to refer to it as “a would-be fierce” provision.<sup>140</sup> Although a provision on mercenaries was included in Additional Protocol I for political reasons, it did not change existing law in any way. The sole contribution of Article 47 to the regulation of mercenaries has been to provide a definition that was subsequently used, with some minor changes, in the specialized conventions.

### *The effect of Article 47 on status*

The effect of Article 47 is to render persons falling within the definition of mercenaries “unprivileged combatants” or “unlawful combatants” with the same rights and obligations as any civilian who takes direct part in hostilities.<sup>141</sup>

138 See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974–1977), Vol. XV, Committee III Report, Third Session, 21 April–10 June 1976, CDDH/236/Rev.1, para 102.

139 Agreement for the Provision of Military Assistance between the Independent State of Papua New Guinea and Sandline International, 31 January 1997, available at <http://coombs.anu.edu.au/SpecialProj/PNG/htmls/Sandline.html>. Apparently a similar approach was adopted in relation to Executive Outcomes employees in Angola and Sierra Leone in the 1990ies.

140 Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict*, 1980, p. 328. For additional shortcomings of the definition see, *inter alia*, the presentation given by one of the experts at the first meeting of experts convened by the Commission on Human Rights in 2001. Commission on Human Rights, The Right of Peoples to Self-determination and its Application to Peoples under Colonial or Alien Domination or Foreign Occupation, UN Doc E/CN.4/2001/18, 14 February 2001, Annex: Report of the Meeting of Experts on the Traditional and New Forms of Mercenary Activities as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Geneva, 29 January–2 February 2001, para. 24.

141 Although Article 47 was adopted by consensus at the Diplomatic Conference, it was a compromise text, and had been the subject of considerable controversy – of a political rather than legal nature. Some states, notably those emerging from colonial domination or who had been the “victims” of mercenary activities, had wanted a stronger text requiring states to prohibit recruitment, training, assembly and operation of mercenaries and prohibiting their nationals from enlisting as mercenaries – the position subsequently adopted in the specialized conventions. Other states did not wish the Protocol to prohibit being a mercenary and mercenarism, and also considered that even the approach that was ultimately adopted, which focused on status, could in practice limit protection and, accordingly, did not belong in a treaty of a humanitarian nature such as the Additional Protocol – a view echoed by some commentators. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974–1977), Volume VI,

What does this mean in practice? Combatants have a right to participate in hostilities. If captured, they are entitled to be treated as prisoners of war and are protected by the Third Geneva Convention of 1949. Importantly, they may not be tried for merely participating in hostilities.

Mercenaries, on the other hand, are treated in the same way as civilians. They do not have the right to participate in hostilities. Should they do so and be captured, they are not entitled to prisoner-of-war status or, consequently, to the protection of the Third Geneva Convention, and they may be tried under national law for merely having participated in hostilities, even if they did not violate any rules of international humanitarian law.

This does not mean that captured mercenaries have no protection under international humanitarian law. They are protected by the Fourth Geneva Convention, and if they fall within the exceptions in that Convention, they are nonetheless still entitled to the fundamental guarantees found in Article 75 of Additional Protocol I.

The protections enshrined in Article 75 are extremely important from a practical point of view. Not only do they ensure that persons falling within the definition of mercenary are not deprived of all protection under international humanitarian law but, more specifically, include the express requirement that they be afforded minimum due process guarantees. This provision is particularly significant in view of the often summary criminal proceedings that have led to the executions of persons accused of mercenarism in the past.<sup>142</sup>

It should, however, be noted that Article 47 does not *prohibit* states from giving mercenaries prisoner-of-war status.<sup>143</sup> It merely provides that mercenaries, unlike members of states' armed forces, are not *entitled* to it as a matter of right.

Although actual national practice in this area is scarce, instances have been reported in which a state claimed to have granted prisoner-of-war status to

Plenary Meetings, Summary Records of the Thirty-Fourth to Forty-Sixth Meetings, CDDH/SR.41, pp. 156–204. For discussions of the negotiations see, *inter alia*, *Commentary: Additional Protocols*, above note 58, paras. 1789 et seq; Michael Bothe, Karl Partsch and Waldemar Solf (eds.), *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 1982, pp. 267 et seq; François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 2003, p. 628; Rosas, above note 51, pp. 392 et seq; Henry Van Deventer, “Mercenaries at Geneva”, *American Journal of International Law*, No. 70, 1976 p. 811; and Abdulqawi Yusuf, “Mercenaries in the Law of Armed Conflicts”, in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, 1979, pp. 113 et seq.

142 One example was the trial that took place in Angola in 1976 described in Mike Hoover, “The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War”, *Case Western Journal of International Law*, 1977, pp. 323 et seq. See also Edwin Nwogugu, “Recent Developments in the Law Relating to Mercenaries”, *The Military Law and Law of War Review*, No. XX-1-2, 1981, p. 11 at p. 17; and, more recently, Amnesty International Press Release “Equatorial Guinea: Trial of alleged coup plotters seriously flawed”, AFR/24/017/2004, 30 November 2004.

In recognition of this particular problem, an earlier draft of Article 47 proposed during the negotiations had included an express reference to the fact mercenaries were entitled to the protections of what became Article 75. This provision was ultimately removed as part of the compromise. CDDH/407/Rev.1, above note 137, para. 27.

143 Some states at the negotiations had called for such an approach. See *Commentary: Additional Protocols*, above note 58, para. 1795.

persons it considered as falling within the definition of mercenaries. For example, a 1988 report of the UN Secretary-General on the Iran-Iraq war reports Iran's assertion that it had captured third country nationals during the hostilities whom it alleged were mercenaries but, instead of trying them, had treated them like other prisoners of war.<sup>144</sup>

### *Non-international armed conflicts*

Article 47 of Additional Protocol I only applies in international armed conflicts, including occupation. International humanitarian law is silent as to the position of mercenaries in non-international armed conflicts. Moreover, as prisoner-of-war status does not exist in such conflicts, it is meaningless to say that someone is not entitled to it.

In practice this means that, in a non-international armed conflict, a person who would have fallen within the definition of mercenary had he/she participated in an international armed conflict is in the same position as anyone else who takes a direct part in hostilities. He/she is entitled to the protections laid down in common Article 3 to the Geneva Conventions, in Additional Protocol II and in the customary rules of international humanitarian law applicable in non-international armed conflict, but may be tried under national law merely for having taken part in the hostilities.

### *The obligation of mercenaries to respect international humanitarian law*

Although the one express reference to mercenaries in international humanitarian law focuses exclusively on their status, there is no doubt that mercenaries, like anyone else in a situation of armed conflict, must respect that law and may face individual criminal responsibility for any serious violations they may commit.

It is interesting to observe that to date in only one of the trials of persons accused of mercenarism were the defendants also accused of having committed acts that amounted to war crimes. This occurred in the aforementioned trial in Angola in 1976, where they were also charged with the murder of civilians and fellow mercenaries who had refused to fight.<sup>145</sup>

### The mercenary conventions

The position under international humanitarian law should be contrasted with that adopted by the two conventions dealing specifically with mercenaries: the 1977 Organization of African Unity Convention for the Elimination of Mercenarism in

<sup>144</sup> *Report of Mission dispatched by the Secretary-General on the situation of prisoners of war in the Islamic Republic of Iran and Iraq*, UN Doc S/20149, 24 August 1988, para. 65. This assertion appears to conflict with the ICRC's experience in relation to visits to alleged mercenaries detained by Iran during the same conflict as described in Bugnion, above note 141, p. 629.

<sup>145</sup> See above note 142.

Africa (OAU Convention) and the 1989 United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN Convention). The aim of these instruments is to prohibit recourse to mercenaries and criminalize mercenarism and being a mercenary.

Both instruments adopt definitions of mercenaries very similar to that in Article 47 of Additional Protocol I,<sup>146</sup> and the OAU Convention defines the crime of mercenarism, including persons who enroll in “bands” of mercenaries, and also those who enlist or in any way support such bands.<sup>147</sup> The definition of the crime is extremely broad, as is the range of potential perpetrators: individuals, groups, associations, state representatives and states themselves. The UN Convention takes a similar but narrower approach, making it a crime to take direct part in hostilities as a mercenary<sup>148</sup> or to recruit, finance or train mercenaries.<sup>149</sup> Both instruments require states parties to criminalize these offences under national law and to prosecute or extradite suspected persons.

The mercenary conventions do not mention the type of conflict to which they apply so, unlike Article 47 of Additional Protocol I, they can be presumed to apply in relation to involvement in both international and non-international armed conflicts.<sup>150</sup>

The OAU Convention also addresses the question of the *status* of persons falling within the definition. In Article 3 it asserts that mercenaries “shall not enjoy the status of combatants” but then rather surprisingly – considering that during the Diplomatic Conference it was mainly African states that called for a stricter position *denying* the granting of prisoner-of-war status to mercenaries – merely reiterates the rule laid down in Article 47 of Additional Protocol I, namely that mercenaries are not *entitled* to prisoner-of-war status if captured. The UN Convention, on the other hand, is silent on the question of status.

Three further aspects of the conventions deserve comment. First, in both instruments the sections relating to possible criminal proceedings against mercenaries contain a provision on judicial guarantees. Regrettably, however, both articles are weak, as they do not refer to international human rights as a minimum standard to be respected in such proceedings. The OAU Convention only requires mercenaries to be ensured the rights “normally granted to any ordinary person by the state on whose territory he is being tried.”<sup>151</sup> The UN Convention includes a reference to international law, but this merely states that “[a]pplicable norms of international law should be taken into account” during the

146 OAU Convention, Article 1 and UN Convention, Article 1.

147 OAU Convention, Article 2.

148 UN Convention, Article 3(1).

149 UN Convention, Article 2.

150 In fact, the UN Convention also applies to persons participating in a concerted act of violence aimed at overthrowing a government or otherwise undermining the constitutional order of a state or undermining its territorial integrity. UN Convention, Article 1(2).

151 OAU Convention, Article 11.

trials.<sup>152</sup> A clear assertion that human rights standards must be respected would obviously have been preferable.<sup>153</sup>

Secondly, the UN Convention – but not the OAU instrument – includes a safeguard clause for international humanitarian law.<sup>154</sup> The primary aim of this provision appears to relate to questions of status, which, it will be recalled, are not mentioned in the UN Convention. However, this provision is important as it addresses the interface between the position and rights of persons having taken direct part in hostilities under international humanitarian law and the mercenary conventions more generally.

The proper articulation of this interplay is important for a number of reasons. To give a concrete example, under international humanitarian law in international armed conflicts there is a presumption of entitlement to prisoner-of-war status. In cases of doubt as to such entitlement, the status of the person concerned must be determined by a competent tribunal.<sup>155</sup> Pending the tribunal's decision, captured persons are entitled to the protection of the Third Geneva Convention. Absent a safeguard clause, the mercenary conventions could be interpreted as removing this presumption and entitlement to a review of status. This is not a purely theoretical concern but one with very immediate and significant consequences for the protection of persons accused of mercenarism. The safeguard clause implicitly preserves these rights.<sup>156</sup>

The safeguard clause also, to some extent, remedies the UN Convention's failure to affirm the application of human rights fair trial standards, as it imports into it the safeguards found or referred to in international humanitarian law. Most notable are those in Article 75 of Additional Protocol I for persons tried in connection with international armed conflicts, and the prohibition in common Article 3(d) of the Geneva Conventions on "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" for those tried in relation to involvement in non-international conflicts.

Finally, mention should be made of the reference in the UN Convention to ICRC visits to persons deprived of their liberty on suspicion of crimes under the Convention. Article 10(4) preserves:

152 UN Convention, Article 11.

153 Other UN instruments that adopt a similar, "criminalize, prosecute or extradite" approach contain far more affirmative language with regard to the minimum judicial guarantees to be ensured during criminal proceedings. See, for example, Article 14 of the 1997 International Convention for the Suppression of Terrorist Bombings.

154 Article 16 of the UN Convention provides as follows: [t]he present Convention shall be applied without prejudice to: a. The rules relating to the international responsibility of states; b. The law of armed conflict and international humanitarian law, including the provisions relating to the status of combatant or prisoner of war.

155 Third Geneva Convention, Article 5, and Additional Protocol I, Article 5.

156 See Declaration of the International Committee of the Red Cross on the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, United Nations General Assembly, item 144, 44th session, November 1989.

“the right of any state party having a claim to jurisdiction in accordance with Article 9, paragraph 1(b), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.”

This provision, although subsequently adopted in other UN conventions that criminalize a particular activity and require states to prosecute or extradite suspects,<sup>157</sup> also raises issues concerning the interface between the UN Convention and international humanitarian law.

Pursuant to the Geneva Conventions, the ICRC has a right to visit persons deprived of their liberty in connection with an international armed conflict.<sup>158</sup> Persons held under the UN Convention could obviously fall within this mandate. This right is not dependent on the ICRC being invited to communicate with and visit the person in question by their state of nationality or residence as envisaged in Article 10(4). Thanks to the safeguard clause, however, it is clear that this provision in no way limits or affects this right.<sup>159</sup>

### Are the positions under international humanitarian law and the specialized conventions incompatible?

A recurring question is whether the different approaches of international humanitarian law and the specialized conventions to the same category of persons can be reconciled or give rise to inconsistencies.

Although the difference may cause some understandable initial confusion, compounded by the fact that the definitions in the specialized conventions are drawn from international humanitarian law, the different approaches taken to mercenaries by these two bodies of law do not in fact give rise to any problems as a matter of law.<sup>160</sup>

International humanitarian law and the mercenary conventions have different focuses and aims, but their respective approaches can co-exist and are complementary. One body of law, international humanitarian law, addresses the status of persons falling within the definition of mercenaries as well as their

157 See, e.g., Article 7(5) of the 1997 International Convention for the Suppression of Terrorist Bombings and Article 9(5) of the 1999 International Convention for the Suppression of the Financing of Terrorism.

158 Third Geneva Convention, Article 126, and Fourth Geneva Convention, Article 143.

159 In view of the importance of retaining its independent access to persons deprived of their liberty in relation to an armed conflict, the ICRC made a declaration to the UN General Assembly at the time of the adoption of the UN Convention, recalling its right to visit persons deprived of their liberty, regardless of whether it had been invited by their state of nationality or citizenship. The declaration emphasized that it was vital for the ICRC to retain the freedom to either accept or refuse any such invitation. It also pointed out that in such circumstances the ICRC would not consider itself as acting on behalf of the requesting state but would work independently and solely on the basis of humanitarian considerations. ICRC Declaration, above note 156.

160 This conclusion was confirmed during a meeting held in 1988 between representatives of the ICRC and Prof Tullio Treves, Vice-Chairman Special Committee of the UN General Assembly for the Drafting of a Convention Against the Recruitment, Use, Financing and Training of Mercenaries, ICRC Document 88/1578, 16 December 1988, ICRC Ref 130, 215(00).

specific protections and, implicitly, their obligations: like all actors in situations of armed conflict, mercenaries must respect international humanitarian law. The specialized conventions, for their part, address the legality of the phenomenon more broadly. They regulate state behavior by limiting the circumstances in which states may have recourse to mercenaries – a dimension not covered by international humanitarian law.

With regard to individuals, the specialized conventions have a purpose different to that of international humanitarian law, namely to establish individual criminal responsibility. This is done in a manner that does not give rise to inconsistencies with the question of status as addressed by international humanitarian law. In fact, the two approaches form a complementary and coherent system for prosecuting civilians who take direct part in hostilities and who fulfill the other conditions of the mercenary definitions. International humanitarian law neither provides immunity for such direct participation in hostilities, nor requires states to criminalize it. The bases for doing so are the specialized conventions as implemented in national criminal law. The contribution of international humanitarian law to any proceedings that may take place is to lay down minimum conditions of treatment during detention, including the right to visits by the ICRC, and to require that minimum judicial guarantees be ensured.

### Are the staff of PMCs/PMCs mercenaries?

Obviously here, too, there is no single answer. Like everyone else, they may only be considered mercenaries if they meet all the conditions of Article 47 of Additional Protocol I or the relevant specialized convention. The cumulative conditions are notoriously difficult to meet – a point made convincingly by Best’s much-quoted view that “a mercenary who cannot exclude himself from this definition deserves to be shot – and his lawyer with him.”<sup>161</sup> The specific characteristics of PMCs/PSCs and of the market for their services make it even more unlikely that any but a small minority of their employees could fall within the definition.

As a preliminary point, it should be noted that the definition of mercenaries, both in Article 47 and in the specialized conventions, focuses on natural and not legal persons. Therefore it is the employees of PMCs/PSCs who must fulfill the conditions and not the companies. While this is not problematic *per se* it can lead to unexpected results, as will be seen.

Key factors in determining the status of PMC/PSC employees will be, first, the identity of their client. As discussed above, the possibility exists that if hired by a state and if certain conditions are met, the staff of PMCs/PSCs may be considered members of the armed forces of that state and consequently, by virtue of condition (e) of Article 47(2), would fall outside the definition.<sup>162</sup> Again, in view

161 Best, above note 140, p. 328.

162 For the sake of simplicity, reference is only made to the provisions of the definition in Article 47 of Additional Protocol I, but the comments are equally applicable to the definitions in the two specialized conventions.

of the policies underlying the reduction of the number of armed forces and outsourcing of military tasks, it is unlikely that this will happen, but not impossible.

Next, assuming that the requirements of motive and actual gains in condition (c) are likely to be satisfied in most cases, conditions (a) and (b), which require the person to be specially recruited in order to fight in an armed conflict and actual direct participation in hostilities, will probably exclude most persons. Available information tends to show that the majority of PMCs/PSCs operating in Iraq and Afghanistan, for example, were not specifically hired to take direct part in hostilities, but rather to provide a vast array of logistic and support services to the armed forces. Indeed, the only domestic regulation adopted to date specifically regulating the use of contractors by the armed forces of a state expressly precludes contractors from carrying out activities that are “inherently governmental” – a term that includes combat operations.<sup>163</sup>

Similarly, although many PMCs/PSCs are providing security services – often armed – to a variety of entities other than states, these activities only rarely amount to direct participation in hostilities. Even in those cases where they do, the use of force is unlikely to have been expressly envisaged at the time of hiring, as required in condition (a), but is more likely to have been a reaction to changing realities on the ground.

One final condition likely to exclude many employees of PMCs/PSCs from the definition is the requirement in condition (d) that the person in question “is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict.” By way of example, this excludes from the definition all US, UK and Iraqi employees of PMCs/PSCs hired by these states or any other actor in Iraq.

Furthermore, this requirement leads to results that appear arbitrary, drawing what can only be baseless distinctions between persons of different nationalities. Continuing to use Iraq as an example, this nationality requirement means that a US national and a Chilean national could be working side by side, employed by the same PMC/PSC on the same contract and carrying out exactly the same activity, but the US national would not be considered a mercenary whereas the Chilean would. There seems to be no reason for criminalizing the behavior of one person but not the other.

Without entering into a discussion of the merits and feasibility of amending the mercenary definition,<sup>164</sup> the nationality requirement is the part of it

163 US Department of Defense Instruction Number 3020.41, above note 35, para. 6.1.5.

164 A review of the work of the Commission on Human Rights on the topic of mercenaries and, in particular, of that of the two Special Rapporteurs on Mercenaries, Mr Enrique Bernales Ballesteros and his successor Dr Shahista Shameen, as well as of the Working Group on Mercenaries, which took over the mandate in 2005, is beyond the scope of the present article. It should be mentioned, however, that a possible amendment of the definition of mercenary in the UN Convention has been the subject of discussion for a number of years, including in a series of three meetings of experts held in 2001, 2002 and 2004. UN Doc E/CN.4/2001/18, 14 February 2001; UN Doc E/CN.4/2003/4, 24 June 2002, and UN Doc E/CN.4/2005/23, 18 January 2005. In her 2005 report to the United Nations General Assembly, the Special Rapporteur, *inter alia*, recommended that the Sixth Committee of the General Assembly or the

that appears most out of touch with present-day realities. While during negotiation of Additional Protocol I such a requirement responded to the concern of states about *foreign* interference in conflicts, today it excludes a large proportion of the persons providing military services and also draws unwarranted distinctions between people carrying out the same activities. To avoid such arbitrary results it has been suggested that, at the very least, this condition should be read as referring to the nationality of the companies rather than that of individual employees.

## Conclusion

As stated at the outset, a binding legal framework that regulates the operations of PMC/PSC staff in situations of armed conflict does exist. There is therefore no need to develop new rules at the international level.

This is not to say that the position is straightforward as a matter of law or that there are no challenges in implementing the obligations in practice. In order to determine the status and consequent obligations of the staff of PMCs/PSCs, some of the most complex questions of international humanitarian law have to be tackled, such as who are combatants and what amounts to taking direct part in hostilities. These are questions that have to be answered on a case-by-case basis.

In terms of enforcement of the law, although clear obligations do exist for bringing persons suspected of serious violations of international humanitarian law to justice, prosecutions are rare. This is unfortunate. It promotes impunity, deprives victims of redress, provides no deterrence against future violations and may give the impression that there is no applicable law, thus fuelling the risk of further violations.

Moreover, the present article has only addressed the position under international humanitarian law – the simplest dimension of the legal framework regulating the operations of PMCs/PSCs. But international humanitarian law only applies in times of armed conflict. Whenever companies operate in other contexts, this body of law is not relevant to their activities, which are then regulated by the local criminal law – and possibly human rights law. Also, even when they operate in states experiencing armed conflict, international humanitarian law is pertinent only to acts committed in the context of and associated with the conflict. Many of the activities of companies do not have this connection and are thus only regulated by local law – and, again, possibly human rights law. The extent to which human rights law applies to the activities of PMCs/PSCs is a far more complex legal issue than the position under international humanitarian law and is still in need of detailed analysis.

International Law Commission carry out a review of the definition of mercenaries. UN Doc A/60/263, 17 August 2005, para. 60.

To come back to the legal framework outlined in this article, a number of suggestions can be made to try to address some of the legal complications mentioned, as well as some of the policy concerns.

First, the issues raised by the types of activities that may be performed by PMC/PSC employees and the doubts about their status if they take direct part in hostilities could be resolved if states precluded such persons from carrying out activities likely to amount to direct participation in hostilities *unless* they are incorporated into the armed forces. Such an approach would have numerous advantages. It would clarify any doubts as to the status of the persons concerned upon capture as, regardless of whether they had actually taken direct part in hostilities, they would be entitled to prisoner-of-war status. It would also avert the risk that PMC/PSC employees could be considered mercenaries, as they clearly would not fall within the definition. Finally, it would subject them to the command and control of the military hierarchy and to the military disciplinary system. This would address the concerns expressed by members of the armed forces as to their lack of control over PMC/PSC employees<sup>165</sup> and bring these within the armed forces' sophisticated framework for ensuring respect for international humanitarian law. From the point of view of the employees, although as members of the armed forces they would be exposed to the risk of attack at any time, it would avert the risk of criminal responsibility as "unprivileged belligerents", "unlawful combatants".<sup>166</sup>

Secondly, states could consider expanding their courts' jurisdictional bases to increase possible avenues for bringing proceedings for violations committed by PMC/PSC staff. Approaches centered on the liability of the company, as opposed to that of its employees, would be preferable for a number of reasons: individual criminal responsibility already exists, companies have far deeper pockets for the payment of compensation and holding the company accountable is more likely to have an impact on its future practices. Possible avenues could include establishing the criminal and or civil liability of companies for acts that amount to serious violations of international humanitarian law and granting courts extraterritorial jurisdiction in respect of such acts.

Thirdly, states that frequently hire PMCs/PSCs could consider adopting directives setting out their position and policy on certain key issues. These could include the types of activities that may be performed by PMC/PSC staff,

165 This point was vividly made by Major William Epley: [t]he closer the function to the sound of battle, the greater the need to have soldiers perform the function because of the greater need for discipline and control. (William Epley, *Contracting in War: Civilian Combat Support of Fielded Armies*, US Army Center of Military History, 1989, 1–6.)

166 The United Kingdom has adopted a creative approach for dealing with this question. The 1996 Sponsored Reserve Act requires a specified portion of the workforce of a government contractor to be members of a military reserve component. Under this arrangement, in time of need, the British government "sponsors" reservist PMC/PSC employees who are mobilized and deployed as uniformed members of the armed forces, where they operate under the command and control of military commanders. As members of the armed forces they are entitled to take direct part in hostilities and to prisoner-of-war status when captured. See, e.g., Blizzard, above note 73, pp. 10 et seq. and references therein.

requirements as to the vetting and training of staff, a clear allocation of responsibility between the state and the company for such matters and for exercising control and discipline over the employees, rules relating to sub-contracting, and also mechanisms for reporting and investigating allegations of violations of international humanitarian law. Additionally, public procurement regulations could be modified to include requirements, such as staff vetting and training, to be met by PMCs/PSCs in order to promote respect for international humanitarian law. Such measures could substantially help states meet their responsibility to ensure respect for international humanitarian law by the companies they hire.

Finally, states of nationality of PMCs/PSCs that provide services abroad and the states in whose territories the companies operate could consider adopting legislation regulating the provision of such services. This would enable them to promote respect for international humanitarian law and to address a number of other issues. A regulatory framework would permit the state of nationality of companies to exercise some control over the activities of its companies abroad, which is essential in order, *inter alia*, to avoid the risk of companies acting in violation of the state's legal obligations and foreign policy interests. Regulation would also permit the state in whose territory PMCs/PSCs operate to determine the types of activities that may be performed by private actors, to demand compliance with certain minimum standards, including those with regard to the carrying of weapons, and to obtain empirical information as to the numbers of companies and their employees operating in its territory.

# Private military companies: their status under international humanitarian law and its impact on their regulation

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## **Abstract**

*States are increasingly hiring private military companies to act in zones where armed conflicts are occurring. The predominant feeling in the international community is that it would be best to regulate such companies. Cognizant of much confusion as to the status of the employees of private military companies under international humanitarian law, this article explains the laws on mercenaries, combatants and civilians and explores how private military companies' employees may fall into any of those categories. It demonstrates that the concept of mercenarism is unhelpful for regulating these companies and that it is unlikely that many of the employees of these companies can be considered to have combatant status. The article considers possible consequences of private military companies' employees having the status of civilians under international humanitarian law and their potential impact on regulating these companies effectively.*



Some of the newest armed non-state parties operating in unstable states and conflict situations come from an unusual source: the private sector. Ever since the

2003 invasion and occupation of Iraq, with Coalition forces buoyed by the presence of upwards of 20,000 individuals employed by private military companies (PMCs), the role, status, accountability and regulation of those companies has been hotly debated. States are vitally aware of the need to address the proliferation of private military companies – impelled as much by concerns about losing control of their monopoly over the use of violence and the impact of that industry on national military policy as by a willingness to uphold their obligations under international law. Two incidents in particular have driven the discourse.<sup>1</sup> First, the killing and mutilation of four employees of the private military company Blackwater and the following assault on Fallujah in April 2004 using “overwhelming force” have led to questions about the relationship of the military to these contractors and the accuracy of calling them “civilian” contractors. Second, the implication of civilian contractors of the private military company CACI in the torture of internees at the Abu Ghraib detention facility has drawn attention to the qualifications of such contractors for the tasks they are performing, as well as to their accountability for human rights abuses they may commit.<sup>2</sup> Although some US military personnel have been tried in courts-martial for their actions at Abu Ghraib, none of the private contractors allegedly involved has been brought to court on criminal charges.<sup>3</sup>

To a great extent the debates around private military companies fall within wider debates about the privatization of government functions.<sup>4</sup> The myriad policy decisions that the rise of this industry demands are best left to others; this article does not seek to judge or condemn these companies but merely to provide a picture as to how international humanitarian law applies to them, for when it comes to the status of private military company employees, confusion

1 These two examples have been officially recognized by the former Special Rapporteur on the right of peoples to self-determination and the application of that right to peoples under colonial or alien domination or foreign occupation, Shaista Shameem, Special Rapporteur on Mercenaries, in her annual report, “Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”, UN Doc. E/CN.4/2005/14, para. 50.

2 See e.g. Mark Bina, “Private military contractor liability and accountability after Abu Ghraib”, *John Marshall Law Review*, Vol. 38 (2005), p. 1237; Heather Carney, “Prosecuting the lawless: Human rights abuses and private military firms”, *George Washington Law Review*, Vol. 74 (2006), p. 317; Laura Dickinson, “Government for hire: Privatizing foreign affairs and the problem of accountability under international law”, *William and Mary Law Review*, Vol. 45 (October 2005), p. 135. For a pre-Abu Ghraib article, see Craig Forcece, “Deterring “militarized commerce”: The prospect of liability for “privatized” human rights abuses”, *Ottawa Law Review*, Vol. 31 (1999/2000), p. 171.

3 Both the Fay Report and the Taguba Report recommended referral to the US Department of Justice for potential criminal prosecution. See Major General George R. Fay, AR 15–6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 130–34, 23 August 2004, online: <<http://www4.army.mil/ocpa/reports/ar15-6/index.html>> (visited 20 September 2006). The report enumerates incidents in which private contractors were allegedly involved, including (but not limited to) rape (Incident 22), use of “unauthorized stress positions” (Incident 24), use of dogs to aggress detainees (Incidents 25 and 30), and humiliation (Incident 33). See also pp. 131–4 for MG Fay’s findings regarding the civilians (private military company employees) he investigated. See also <<http://www.dod.mil/pubs/foi/detainees/taguba/>> (visited 20 September 2006) for the report of Major General Antonio M. Taguba, Article 15–6, Investigation of the 800th Military Police Brigade (Taguba Report).

4 F. Schreier and M. Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Geneva, 2005, online: <[www.dcaf.ch](http://www.dcaf.ch)> (visited 13 November 2006).

abounds. Governments repeatedly assert that PMC employees are “civilian contractors”, implying that they do not perceive these individuals as combatants. A minority of the international community treats all PMCs as bands of criminal mercenaries,<sup>5</sup> yet employees of some PMCs are attempting to benefit from combatant status to protect themselves against civil lawsuits brought in the United States for their role in torturing prisoners in Abu Ghraib prison.<sup>6</sup> In the burgeoning academic literature on the subject, many authors consider and reject the possibility that individuals employed by private military companies are mercenaries, but fail to elucidate what their status is if they are not mercenaries.<sup>7</sup>

This paper therefore seeks to set the record straight as to the legal status of PMCs and their employees under international humanitarian law. This exercise is essential, as it is only when their status is understood and accepted that they can be regulated effectively. After an outline of the PMC industry, a brief overview will be provided of the law on mercenaries in international law and international humanitarian law, drawing on examples from Iraq. The question as to whether private military company employees are combatants or civilians according to accepted legal definitions will then be discussed. A word on their existing accountability for violations of international humanitarian law is also appropriate.<sup>8</sup> The starting point is that it is patently incorrect to state that “these [private military companies] act in a void, virtually free from legal restraints”.<sup>9</sup> The paper will conclude with recommendations and considerations that states may wish to take into account when developing regulatory schemes for private military companies.

## Background: scope of the industry

A few words on this subject will help to generate a clear picture of what we are dealing with. According to a report of a meeting of experts on the PMC industry, held under the auspices of the United Nations, there is a very large number of companies operating in an industry worth US\$100 billion.<sup>10</sup> It is thus a force to be

5 Until the former Special Rapporteur on Mercenaries was replaced in 2004, this was the position of the UN Special Rapporteur for 16 years. See e.g. UN Doc E/CN.4/1997/24 (20 February 1997), paras. 92–111.

6 Taguba Report, above note 3; *Ibrahim v. Titan*, Civil Action No. 04-1248 (JR), and *Saleh v. Titan* Case No. 04CV1143 R (NLS).

7 An important exception is Michael Schmitt, who does not treat the mercenary question at all but who provides an excellent analysis of civilian and combatant status and direct participation in hostilities by private military company employees. See his “War, international law, and sovereignty: Re-evaluating the rules of the game in a new century – humanitarian law and direct participation in hostilities by private contractors or civilian employees”, *Chicago Journal of International Law*, Vol. 5 (January 2005) p. 511.

8 The responsibility of states for the actions of these companies is beyond the scope of this paper; however, an excellent starting point on this subject is the report of the Expert Meeting on Private Military Companies: Status and State Responsibility for their Actions, Geneva, 29–30 August 2005, available at <[http://www.cudih.org/communication/compagnies\\_privees\\_securite\\_rapport.pdf](http://www.cudih.org/communication/compagnies_privees_securite_rapport.pdf)> (visited 15 August 2006) (hereinafter CUDIH Report).

9 Carney, above note 2, p. 323.

10 See the “Report of the Third Meeting of Experts on traditional and new forms of mercenary activity”, UN Doc. E/CN.4/2005/23, para. 12.

reckoned with and will not disappear overnight. As for the types of services they provide, Peter Singer divides PMCs into three “business sectors”: (i) military provider firms supplying “direct, tactical military assistance” that can include serving in front-line combat; (ii) military consulting firms that provide strategic advice and training; and (iii) military support firms that provide logistics, maintenance and intelligence services to armed forces.<sup>11</sup> In Iraq, the tasks of these “civilian contractors” have ranged from logistics support to guard duties and training – that is, from construction of military bases and food preparation for the military to providing security for US military bases in Iraq and personal security for members of the (now defunct) Coalition Provisional Authority, as well as weapons management and training of new Iraqi military and police forces. This force, if considered as a cohesive whole, is the second-largest contingent in Iraq after the US military, and comprises more individuals than all other contingents of the Coalition combined.<sup>12</sup>

Private military companies have also been involved alongside regular armed forces in training military personnel in the former Yugoslavia, are active in Afghanistan and built camps for displaced persons in Macedonia during the Kosovo conflict. Some humanitarian organizations regularly hire them to provide security for their operations, in addition to the many reconstruction firms that hire them in Iraq and elsewhere. Private military companies provide security for private corporations engaged in extraction industries (primarily oil and diamonds), in particular in Africa. In Angola, for example, domestic laws require such companies to bring their own security forces, many of which may end up engaged in battles with local rebel groups.<sup>13</sup> The PMC industry not only provides security: in the late 1990s a private military company composed primarily of South African special forces from the former apartheid regime, called Executive Outcomes, was engaged by the governments of Angola and Sierra Leone to fight rebels in those countries whom national forces there had failed to stop. While that company is praised for its efficiency (especially by industry lobbyists), its record of compliance with international humanitarian law is questionable.<sup>14</sup> Other PMCs

11 Peter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, New York, 2003. Others divide the companies into as many as five categories. See, for example, the taxonomy of H. Wulf, reproduced in Schreier and Caparini, above note 4, pp. 39–41. Wulf divides the companies between (i) private security companies; (ii) defence producers; (iii) private military companies; (iv) non-statutory forces; and (v) mercenaries. He further divides category (iii) into PMCs which provide consulting; logistics and support; technical services; training; peacekeeping and humanitarian assistance; and combat forces.

12 See James Coleman, “Constraining modern mercenarism”, *Hastings Law Journal*, Vol. 55 (2004), p. 1493; Peter Singer, “The private military industry and Iraq: What have we learned and where to next?”, Policy Paper, Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2004.

13 See Singer, above note 11, pp. 9ff.

14 Singer indicates that they used cluster bombs and fuel air explosives, *ibid.* Nathaniel Stinnett says that EO commanders reportedly ordered their pilots to just “kill everybody”. See his Note on “Regulating the privatization of war: How to stop private military firms from committing human rights abuses”, *Boston College International and Comparative Law Review*, Vol. 28 (2005), p. 211, at p. 215. The fact that these companies are perceived as efficient may pose a challenge for those who defend international humanitarian law, which does not prioritize efficiency above all else.

have been engaged in more dubious practices such as assisting in coups d'état. Attention to such companies and calls for their international regulation have furthermore recently been bolstered by Sir Mark Thatcher's guilty plea in his trial for planning and organizing a coup in Equatorial Guinea in collaboration with a private military company.<sup>15</sup> The US Central Intelligence Agency (CIA) is also known to engage private companies to work in South America in its "war on drugs", which sometimes end up fighting against the FARC in Colombia.<sup>16</sup> In short, the private military company industry is clearly multifaceted and complex, operating around the globe in many different situations.

## Mercenaries

One often hears the employees of private military companies being referred to as "mercenaries". The word evokes a strong emotional reaction among many – be it romantic notions of loners exercising an age-old profession, or vigorous condemnation of immoral killers and profiteers of misery and war. Nonetheless, lawyers and governments seeking to regulate these companies must look to the legal meaning of the term. As will be shown, the legal concept of mercenarism is not particularly helpful for resolving the dilemma as to how to regulate private military companies.

Mercenaries are dealt with in two international conventions that specifically aim to eliminate them through the criminalization of mercenary activities. In addition, mercenaries are dealt with in international humanitarian law under Additional Protocol I. While the definition of mercenaries is similar in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries,<sup>17</sup> the then Organization of African Unity Convention for the Elimination of Mercenarism in Africa<sup>18</sup> (together known as "the mercenary conventions") and under Additional Protocol I, the consequence of being deemed to be a mercenary is different. In a nutshell, under the mercenary conventions, if states parties thereto have adopted implementing legislation, persons who fulfil the definition of a mercenary may be prosecuted for the distinct crime of being a mercenary. Under international humanitarian law, in contrast, it is not a violation of the Geneva Conventions or Protocols to be a mercenary and mercenarism in and of itself does not engender international criminal responsibility; simply, a mercenary does not benefit from prisoner-of-war status if captured. A mercenary as defined

15 Thatcher pleaded guilty to allowing use of aerial support but denied any knowledge of what it was being used for.

16 Former Special Rapporteur Enrique Ballasteros refers to such use in his final report as Special Rapporteur, UN Doc E/CN.4/2004/15, paras. 26 and 32.

17 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, UNGA Res. A/RES/44/34, entered into force 20 October 2001 (hereinafter the UN Convention).

18 Convention for the Elimination of Mercenarism in Africa, Organization of African Unity, Libreville, 3 July 1977, CM/817 (XXXIX), Annex II, Rev. 3 (entered into force 22 April 1985) (hereinafter the AU Convention).

under Additional Protocol I may therefore be punished under the internal laws of the detaining power, if it so chooses, for the fact of having directly participated in hostilities, but may be prosecuted for being a mercenary only if that state also has separate legislation designating mercenarism as a distinct crime. A further distinction between the two regimes is that mercenary status is relevant under international humanitarian law only in international armed conflicts (since combatant status and its privileges exist only in those conflicts), whereas the mercenary conventions may also apply in situations of non-international armed conflict.

No sweeping conclusion can be drawn that all private military company employees are mercenaries, either under the mercenary conventions or under international humanitarian law.<sup>19</sup> Under both these bodies of law, the definition requires an individual determination on a case-by-case basis. Indeed, this factor alone renders the mercenary conventions sorely inadequate as a method of controlling (suppressing) or regulating the PMC industry as a whole.

### Mercenaries under international humanitarian law

Since the mercenary conventions adopt a definition of mercenaries similar to that established in Article 47 of Protocol I, we shall use that definition as our starting point. Article 47.2 of Additional Protocol I stipulates:

A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

The definition in Article 47 is widely viewed as being virtually “unworkable” owing to the six cumulative conditions that a person must fulfil in order to be considered a mercenary.<sup>20</sup> Despite the awkwardness of the

19 This fact did not stop the former UN Special Rapporteur on Mercenaries, Enrique Ballasteros, from painting all with the same brush. See UN Doc. E/CN.4/2004/15, esp. para. 57 (2003).

20 See in particular Françoise Hampson, “Mercenaries: Diagnosis before prescription”, *Netherlands Yearbook of International Law*, Vol. 3 (1991), pp. 14–16. See also George Aldrich, “Guerrilla combatants and prisoner-of-war status”, *American University International Law Review*, Vol. 31 (1982), p. 881, for a concise but accurate overview of the technicalities of Article 47.

definition, the ICRC study on customary law has determined that this provision forms part of customary international law.<sup>21</sup> The consequence of being held to be a mercenary is established in the first paragraph of Article 47: “A mercenary shall not have the right to be a combatant or a prisoner of war.” However, Protocol I specifies that even if someone has been unlawfully participating in hostilities and does not have the right to prisoner-of-war status, that person nonetheless benefits from the protection of Article 75 of the Protocol (fundamental guarantees).<sup>22</sup> Under international humanitarian law, it is the detaining power that would make the determination whether a person is a mercenary by establishing a “competent tribunal” when prisoner-of-war status is called into question.<sup>23</sup>

Yet the Geneva Conventions and their Additional Protocols arguably do not oblige a detaining power to deny a person POW status if he or she meets the requirements of Article 47. The text says that mercenaries “shall not have the right” to be prisoners of war. This may be interpreted to mean they cannot claim the right to prisoner-of-war status that combatants enjoy, but may benefit from it should the detaining power choose to accord it nonetheless; or it may mean that a detaining power must not grant mercenaries prisoner-of-war status. The fact that the Diplomatic Conference which adopted Protocol I declined requests to phrase the consequence of mercenary status more categorically indicates that the act of being a mercenary is not in itself a violation of international humanitarian law.<sup>24</sup> International humanitarian law does not overtly seek to suppress the use of mercenaries, but merely provides options for states that wish to do so. The consequences of not benefiting from combatant immunity may be severe: an individual may face trial and conviction for murder if he has killed a combatant while participating in hostilities. In this way, the loosening of protection normally offered by international humanitarian law may indirectly discourage many from

21 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, Rules, ICRC and Cambridge University Press, Cambridge, 2005, Rule 108. The customary law study incorporates by reference the definition in Article 47 of Additional Protocol I. However, it is noteworthy that the United States long ago rejected the notion that Article 47 is customary law; see M. J. Matheson, “Remarks”, in “Session One: The United States position on the relation of customary international law to the 1977 Protocols additional to the 1949 Geneva Conventions”, *American University Journal of International Law and Policy*, Vol. 2 (1987), p. 426.

22 The extension of this protection to those who do not enjoy combatant status is specified in P I, Article 45.

23 Article 5.2 of GC III obliges a detaining power to constitute “a competent tribunal” to determine, if any doubt arises, the status of an individual who claims POW status. Article 45 of Protocol I imposes the same requirement.

24 Y. Sandoz, C. Swinarski and B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Dordrecht, 1987, para. 1795 (hereinafter *ICRC Commentary*). The authors of the *Commentary* point out that some delegations had sought more “stringent” wording, to the effect that mercenaries “shall not be accorded” prisoner-of-war status (emphasis added), but that in the end a more neutral position was adopted. Moreover, the criminal prosecution to which mercenary status may lead includes prosecution “for acts of violence which would be lawful if performed by a combatant, in the sense of the Protocol, and for the sole fact of having taken a direct part in hostilities”, but the authors of the *Commentary* make no mention whatsoever of prosecution for the mere fact of being a mercenary (see para. 1796). See also Abdulqawi A. Yusuf, “Mercenaries in the law of armed conflicts”, in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, pp. 113–27, esp. p. 124.

putting themselves in such a vulnerable position, but international humanitarian law does not per se regulate this category of persons. Finally, under the ICC Statute it is not a crime to be a mercenary.<sup>25</sup>

It should be noted that the weakening of protection for a group of persons is highly unusual and goes against the tenor of the rest of humanitarian law. Prisoner-of-war status may be denied to mercenaries, despite a general intention to widen protection as much as possible, because of the “shameful character of mercenary activity”.<sup>26</sup> The elements of the allegedly “shameful character” of mercenary activity are related to the fact that persons engaging in it seem to be motivated only by private gain (as opposed to notions that soldiers are uniquely driven to their profession by their strong sense of patriotic duty to their country) and have no interest in the conflict because they are not nationals of a state that is party to the conflict.<sup>27</sup> There is general repugnance that certain individuals do not shrink from an opportunity to make a profit in the face of war and suffering. On the other hand, some use a historicist argument to decry the moves to punish mercenaries, pointing to the fact that mercenaries have been used since at least 2094 BC (i.e. since the first recorded wars).<sup>28</sup> Others argue that many soldiers enlist in the army merely to earn a living, and that the definition reflects an unrealistic adherence to notions of patriotism and honour.<sup>29</sup>

## Mercenaries under the mercenary conventions

As noted above, the mercenary conventions essentially reiterate the definition of mercenaries as set out in Article 47 of Protocol I.<sup>30</sup> The conventions then establish the elements of related crimes: individuals who meet the definition of being a mercenary and who directly participate in hostilities commit an offence,<sup>31</sup> and even the attempt of direct participation also constitutes an offence under the UN Convention on mercenaries. In addition, Article 2 of the UN Convention stipulates that “Any person who recruits, uses, finances or trains mercenaries ... commits an offence for the purposes of the Convention”; it thus includes a number of ways of participating in the crime without actually being present and fighting in a theatre of hostilities. Each convention has an additional definition of “mercenary” specifically intended to address situations where the goal is to

25 Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 2002.

26 ICRC *Commentary*, above note 24, para. 1794.

27 See A. Behnsen, “The status of mercenaries and other illegal combatants under international humanitarian law”, *German Yearbook of International Law*, Vol. 46 (2003), p. 494 at p. 497. Françoise Hampson, above note 20, makes a similar observation (p. 16).

28 See e.g. Singer, above note 11, p. 20. See also Todd Milliard, “Overcoming post-colonial myopia: A call to recognize and regulate private military companies”, *Military Law Review*, Vol. 176 (2003), p. 1ff.

29 In a more modern context, the difficulties experienced by states and the international community in effectively disarming groups of fighters who move from one conflict to another in unstable states in sub-Saharan Africa is not to be treated lightly.

30 The AU Convention definition repeats Article 47 verbatim; the UN Convention leaves out Article 47.2(b) but then adds it as an element of the offence.

31 Article 3 of the UN Convention and Article 1.3 of the AU Convention.

overthrow a government, and, in the case of the African Union Convention, there are special provisions relating to the involvement of state representatives in such cases.<sup>32</sup> The UN Convention has been ratified by only 28 states and entered into force in 2001.<sup>33</sup> The African Union Convention entered into force in 1985. It may be worthy of note that none of the states that have significant numbers of private military companies operating from or on their territory are states parties.<sup>34</sup>

### Case study from Iraq: are the employees of private military companies mercenaries?

Drawing on examples of private military companies operating in Iraq in 2003 and early 2004 (i.e. while the conflict could still unquestionably be classified as international), it can be concluded that some individuals working for such companies may get caught by Article 47 of Protocol I and by the mercenary conventions. Consider, for instance, the hypothetical (but entirely possible) case of a South African former special forces fighter who may have been hired to provide close protection services for the leaders of the Coalition Provisional Authority in Iraq. Proceeding through the six parts of the definition, we must enquire, first, whether the fact of being hired as a bodyguard would constitute recruitment “in order to fight”; it is important to recall here that the phrase “to fight” under international humanitarian law is not synonymous with an offensive attack,<sup>35</sup> therefore persons hired to defend a (military) person but who engage in defensive combat can fall under Article 47.2(a) and also meet the second criterion. However, it is understood that to meet this criterion the individual should be recruited specifically to fight in the particular conflict in question, not as a general employee. Aside from the fact that protecting a US commander may itself constitute direct participation in hostilities, there have been reports of heavy fighting by private military companies. One well-known instance occurred in Najaf in 2004, where individuals from one PMC were engaged with enemy fighters, fired “thousands of rounds of ammunition” and had to call in one of the company’s own helicopters not to evacuate them, but to drop more ammunition.<sup>36</sup> Some PMC employees thus easily satisfy the second requirement of directly participating in hostilities (sub-para. (b)). As for the third criterion (sub-para. (c)), individuals acting as bodyguards of the US occupation commanders earned up to US\$2,000 a day, considerably more than a US private earns in a month and,

32 Article 5 of the AU Convention.

33 Ratifications as of 7 September 2006.

34 The lists of states that have ratified the UN Convention and the AU Convention are available at <[www.icrc.org](http://www.icrc.org)> (visited 13 November 2006).

35 Article 49(1) of Additional Protocol I states, ““Attacks” means acts of violence against the adversary, whether in offence or in defence.”

36 David Barstow, Eric Schmitt, Richard A. Opiel Jr and James Risen, “Security firm says its workers were lured into Iraqi ambush”, *New York Times*, 9 April 2004, p. A1. The ambush referred to in the headline is the attack on Blackwater contractors in Fallujah on 30 March 2004 that led to the overwhelming US response and considerable destruction of that city. Other examples abound, including a battle at Kut. See Daniel Bergner, “The other army”, *New York Times*, 14 August 2005, (Magazine) p. 29.

in the case of South African fighters, are not nationals of a Party to the conflict (fourth criterion, sub-para. (d)). As for the fifth criterion (being a member of the armed forces of a party to the conflict, sub-para. (e)), suffice it to say briefly at this point that employees of these companies are not members of the armed forces; this criterion will be discussed in more detail below.<sup>37</sup> Finally, South Africa did not send its soldiers (or ex-soldiers) to Iraq on official duty. There were notably also some 1,500 Fijian soldiers who joined private military companies in Iraq. Since they were not sent on official duty by Fiji, they would not be covered by the sixth requirement (sub-para. (f)) and thus prevented from falling foul of Article 47 if they happen to meet the other five criteria. It is thus not impossible that some individuals working for private military companies in Iraq could meet the legal definition of a mercenary. However, the definition clearly remains useless as a regulatory tool for the thousands of Iraqi, US and UK nationals who work there for such companies. Furthermore, its complexity renders it ineffective for those working elsewhere in situations of non-international armed conflict around the world.

The analysis of the status of PMC employees frequently goes no further than to conclude whether or not they qualify as mercenaries.<sup>38</sup> But this determination does not resolve the question as to what PMC employees are allowed to do in conflict situations. If PMCs are to be regulated, it is imperative to consider whether PMC employees are civilians or combatants.

## Combatants

### Are private military companies' employees combatants for the purposes of international humanitarian law?

There are at least three distinct reasons why it is essential to know whether PMC employees are combatants: first, so that opposing forces know whether they are legitimate military objectives and can be lawfully attacked; second, in order to know whether PMC employees may lawfully participate directly in hostilities; and the third reason, related to the second, is in order to know whether PMC employees who do participate in hostilities may be prosecuted for doing so.

Combatant status is tied to membership in the armed forces of a party to a conflict<sup>39</sup> or to membership of a militia or volunteer force that belongs to a party to the conflict and fulfils specific criteria.<sup>40</sup> When evaluating the status of PMC employees it is therefore essential to assess their integration (under Article 4A(1)

37 See section below on “Combatants”.

38 See, e.g., Juan Carlos Zarate, “The emergence of a new dog of war: Private international security companies, international law, and the new world disorder”, *Stanford Journal of International Law*, Vol. 34 (Winter 1998); Coleman, above note 12; Milliard, above note 28.

39 Article 4A(1) of the Third Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949 (GC III), and Article 43 of Additional Protocol I thereto (P I).

40 GC III, Article 4A(2).

of the Third Geneva Convention or Article 43 of Protocol I) into the armed forces, or their capacity to meet the requirements to qualify as a militia in the sense of Article 4A(2) of that Convention. Under Article 4A(1), it must be ascertained whether an individual has been incorporated into a state's armed forces according to the laws of the state. Under Article 4A(2), the group as a whole must be assessed to determine whether it meets those requirements.

The first means by which PMC employees may qualify as combatants – which corresponds inversely to the fifth criterion of the definition of a mercenary – is to determine whether they are members of the armed forces of a party to the conflict. Article 43.2 of Protocol I stipulates that “Members of the armed forces of a Party to a conflict ... are combatants, that is to say, they have the right to participate directly in hostilities.”<sup>41</sup> It is thus necessary to assess whether private military company employees are incorporated within the armed forces of a party to a conflict, as defined in Article 43.1 of Protocol I or Article 4A(1) of the Third Geneva Convention. It is conceivable that in rare cases they might be. Indeed, if all of them were so incorporated, that would solve all regulation issues and pose no problems for their categorization under international humanitarian law. However, the whole point of privatization is precisely the opposite – to devolve on the private sector what was previously the preserve of government authorities. It would seem to be at variance with the philosophy of outsourcing to contend that private military companies are nonetheless members of a state's armed forces.<sup>42</sup>

International humanitarian law does not prescribe specific steps that must be taken by states in order for people to be registered in their armed forces under Article 4A(1) of the Third Geneva Convention or under Article 43 of Protocol I; that is a matter of purely internal law.<sup>43</sup> Incorporation therefore depends on the will and internal legal regime of the state in question. However, it is clear that some form of official incorporation is necessary, especially since Article 43.3 of Protocol I imposes a specific obligation on states that incorporate their own police forces or other paramilitary forces into their armed forces to inform the opposing side.<sup>44</sup> This suggests that international humanitarian law anticipates that although it is a matter of domestic law as to how members of armed forces are recruited and registered within a state, it should be understandable to opposing forces precisely who constitutes those forces. In addition, one must be careful not to confuse the rules on attribution for the purpose of holding a state responsible for the acts of private contractors it hires with the rules on government agents that legally have

41 Article 4A(1) of GC III does not explicitly state that those who have the right to prisoner-of-war status also have the right to participate directly in hostilities.

42 Nevertheless, it should be noted that one expert at the Expert Meeting argued that Article 43 is sufficiently broad to encompass private military companies within its purview. See CUDIHR Report, above note 8, pp. 10–11.

43 Michael Schmitt, in “Re-evaluating the rules”, notes that some states require certain civilians performing key functions to serve in the armed forces as reservists, indicating that it would be easy for states that wish to incorporate civilians into their forces to do so. Above note 7, p. 524.

44 Article 43.3 states, “Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.”

combatant status.<sup>45</sup> Even though it may be possible to attribute the acts of an employee of a private military company to a state, that relationship to a state, although perhaps sufficient for purposes of state responsibility, is not sufficient to make an individual part of a state's armed forces. The example from Iraq has shown that states hiring PMCs rather tend to emphasize that those individuals are civilians – for instance, the regulations passed by the Coalition Provisional Authority in Iraq obliged them to comply with human rights law, which would be sorely inadequate if the United States, as occupying power, knew or believed that they were part of its armed forces.<sup>46</sup>

The second means for a group to qualify for combatant (or prisoner-of-war) status under the Geneva Conventions is to meet the requirements laid down in Article 4A(2) of the Third Convention,<sup>47</sup> which stipulates that the following also are entitled to prisoner-of-war status:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory ... provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

While it is not the purpose of this exposé to review the complexities of Article 4A(2) in detail, a few reminders may be helpful. First, the opening paragraph requires that the militia must “belong ... to a Party to the conflict”. Second, the four requirements must *all* be met by the group as a whole. This article thus demands that each private military company be considered on its own. While this is normal, a company-by-company analysis nonetheless has disadvantages. International humanitarian law must be applied in such a way as to make it reasonably possible for combatants to comply with it. If it is virtually

45 See the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN GAOR 55th Sess. Supp. No. 10, A/56/10, especially Draft Articles 5 and 8.

46 Order 17 passed by the Coalition Provisional Authority in Iraq, CPA/ORD/27 June 2004/17 (Revised), available online at <<http://www.cpa-iraq.org>> (visited 13 November 2006). In addition, Article 51 of GC IV prohibits an occupying power from forcibly recruiting protected persons into its armed forces, and even prohibits “pressure or propaganda which aims at securing voluntary enlistment”. In view of the thousands of Iraqis hired by private military companies to perform tasks such as guarding oil pipelines, it could be queried whether the United States or the United Kingdom would be in breach of that provision if private military companies were considered to have been incorporated into the armed forces of the then occupying powers.

47 Although this category of combatants may be subsumed under Article 43 of Protocol I, it remains helpful to consider it separately.

impossible for opposing forces to know which PMC employees are accurately perceived as having combatant status (and therefore as legitimate military objectives), and which PMC employees are civilians and possibly even protected persons (the shooting of whom could constitute a grave breach of the Geneva Conventions), the resulting confusion could discourage any attempt to comply with humanitarian law. It is essential to bear in mind that in Iraq, at least, there are more than one hundred different private military companies operating. The members of many of these may wear uniforms and look very much like Article 4A(2) forces but may in fact be civilians. Certainly, status determination is often a difficult question, even for some members of the armed forces (e.g. in covert operations); nevertheless, the proliferation of parties with an ambiguous status in situations of armed conflict exacerbates the problem. Clearly, this debate falls squarely within the heated debates of lawful versus “unlawful” combatants, and any determination on their status may have consequences for the overall debate.

Some commentators assert that civilian contractors would only rarely fulfil all four requirements of Article 4A(2). In particular, Michael Schmitt argues that many of them lack uniforms and are not likely to be subject to a responsible command.<sup>48</sup> Furthermore, Schmitt argues that two other requirements of Article 4A(2) scuttle the chances of PMCs being considered militia forces, namely independence from the armed forces yet belonging to a party to the conflict. Those PMCs that most probably “belong” to the United States (in that they carry out services directly for the US forces) lack the independence necessary to be considered a separate militia, but remain outside the actual armed forces. Those PMCs that enjoy greater independence by virtue of the fact that they may be subcontracted by a reconstruction agency, on the other hand, are less likely to “belong” to a party to the conflict.<sup>49</sup> These arguments are persuasive. In addition, whether and how such companies “belong” to a party to a conflict can also be measured by the responsibility for their actions that the affiliated government would accept.<sup>50</sup> It could in fact be argued that when states make a conscious choice to engage non-military personnel from the private sector to perform certain tasks, then to qualify those persons somehow as a kind of paramilitary force for the purposes of Article 4A(2) flies in the face of logic.<sup>51</sup> Admittedly, some PMCs could

48 Schmitt, above note 7, pp. 527ff. Again, it is important to bear in mind that although there is anecdotal evidence of some companies wearing quasi-military uniforms, there are hundreds of companies that are hired by armed forces and construction firms and humanitarian agencies. There will be considerable variation.

49 Ibid., pp. 529ff.

50 Kenneth Watkin cites the case *Military Prosecutor v. Kassem* (1971) 42 ILR 470, 477 to illustrate this point. The fact that no government accepted responsibility for the fighters’ actions led the Israeli government to deny prisoner-of-war status to captured fighters. See Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy*, Harvard University, HPCR Occasional Paper Series No. 2, Cambridge, Mass., 2005, p. 26.

51 GC III does provide an opportunity for states to employ civilians who accompany their forces (a kind of outsourcing) and to grant them the protection of prisoner-of-war status, but does not accord those individuals combatant status. See Article 4A(4) of GC III and discussion below.

qualify as combatants under Article 4A(2), but many would not.<sup>52</sup> It is worth bearing in mind that the qualification of some PMCs as such is not a panacea. Many PMCs may distinguish themselves from local civilians through their attire, but considering the plethora of companies, it will be very hard for an enemy to distinguish one PMC from another, the employees of which do not come under Article 4A(2) and whom it would be a crime to target directly.

A teleological interpretation of Article 4A(2) also militates against using that article to define PMC employees as combatants: use of the said provision to justify their categorization as combatants runs counter to its historical purpose, which was to allow for partisans in the Second World War to have prisoner-of-war status.<sup>53</sup> Those partisans are much more easily equated with the remnants of defeated armed forces or groups seeking to liberate an occupied territory than with PMCs. Indeed, the “resistance” role of these militias was a (sometimes thorny) factor in granting them prisoner-of-war status.<sup>54</sup> Granting combatant status to security guards hired by an occupying power turns the purpose of Article 4A(2) on its head, for it was not intended to allow for the creation and use of private military forces by parties to a conflict, but rather to make room for resistance movements and provide them with an incentive to comply with international humanitarian law. The very definition of mercenaries some thirty years later that seeks to remove combatant status from precisely such private forces is further evidence that the original purpose of Article 4A(2) remained paramount through the 1970s. While there is no obligation to restrict the interpretation of Article 4A(2) to its historical purpose, advertence to that historical purpose provides some indication of the inadequacy and inappropriateness of using that provision in the context of modern private military companies.

Moreover, a final argument against including PMCs in the entitlement to combatant status under Article 4A(2) is that it is precisely this category that is most at risk of later being designated mercenaries. Given the cumulative criteria for designation as a mercenary, PMCs could avoid this problem if they were to recruit employees only from states that are parties to the conflict concerned (since being a national of a party to the conflict is a factor for excluding a person from mercenary status). At present, however, the problem remains that even if the argument that some PMC employees are combatants via the operation of Article 4A(2) of the Third Geneva Convention is accepted, many persons may lose their incentive to abide by humanitarian law since they can be excluded from prisoner-of-war status.

We must conclude that there is only a very limited basis in law for some PMCs in Iraq to be classified as combatants under international humanitarian law. Nonetheless, the lack of clarity of the status of such contractors is illustrated by the

52 See Schmitt, above note 7.

53 Jean Pictet, *The Geneva Conventions of 1949: Commentary III Geneva Convention*, ICRC, Geneva, 1952, pp. 52ff.

54 *Ibid.*, pp. 53–9. When one considers the loosening of requirements in Article 43 to enable certain guerrilla fighters to have combatant status, it is evident that the incentive to do so remains essentially the same – to enable those engaging in anti-colonial wars, i.e. fighting against a more powerful oppressor, to be protected as combatants under humanitarian law if they respected the threshold requirements.

fact that governments involved in Iraq are consulting their legal counsel on the matter; furthermore, representatives in the US Congress have requested clarification on the status and use of PMCs.<sup>55</sup> The reasons for pressing for a finding that they are combatants are understandable – their obligations would be clear and they would perhaps have greater incentive to endeavour to abide by international humanitarian law. On a more abstract, theoretical level, Kenneth Watkin insists that “the question must be asked whether the criteria for attaining lawful combatant status adequately reflect the nature of warfare and fully account for those who participate in it”.<sup>56</sup> Nevertheless, a number of factors, including the law, militate against finding that PMCs are combatants and against the argument that such an interpretation will come to be held widely enough to be effective. Since the discourse augurs against PMC employees having the status of combatants, it is imperative to consider the ramifications of such persons having the status of civilians.

## Civilians

Since every person must be either a combatant or a civilian, according to the logic of international humanitarian law,<sup>57</sup> if PMC employees are not combatants, they are civilians. This factor carries important consequences when we consider options for the regulation of such companies, because civilians do not have a right to participate directly in hostilities. If private military company employees were to do

55 See, e.g., D. Rothwell, “Legal Opinion on the Status of Non-Combatants and Contractors under International Humanitarian Law and Australian Law”, 24 December 2004, available online at <<http://www.privatemilitary.org/legal.html>> (visited 13 November 2006). A number of senators in the United States have requested the Comptroller General of the United States to investigate the use of private military firms in Iraq by the DoD and the CPA: Letter to Comptroller Walker from Senators C. Dodd, R. Feingold, J. Reed, P. Leahy and J. Corzine of 29 April 2004 (available online at <<http://dodd.senate.gov/index.php?q=node/3270&pr=press/Releases/04/0429.htm>>, (visited 1 October 2006). In addition, Ike Skelton, a Ranking Democrat in the Committee on Armed Services of the US House of Representatives has written to Donald Rumsfeld, Secretary of Defense, to request “a breakdown of information regarding private military and security personnel in Iraq. Specifically ... which firms are operating in Iraq, how many personnel each firm has there, which specific functions they are performing, how much they are being paid ... what the chain of command is for these personnel, what rules of engagement govern them, and how disciplinary or criminal accusations are handled if any such claims are levied against them”. See also Letter from the Honorable Ike Skelton to Secretary of Defense Donald Rumsfeld, 2 April 2004.

56 See Watkin, above note 50, p. 16. Note, however, that in general Watkin is dealing with the challenge of unlawful combatants related to the US “war on terror” – that is, those who fight against the United States.

57 Some authors argue that a third status of neither combatants nor civilians is possible. The argument is that there may be a category of “unlawful combatants” who do not benefit from either the Third or the Fourth Geneva Conventions, owing to the fact that they have been directly participating in hostilities without enjoying combatant status. However, even if this interpretation were to prevail, that category would be of no assistance whatsoever for private military company employees, since advocates of that theory insist that the protection offered to that group is even less than any other. See Knut Dörmann, “The legal situation of “unlawful/unprivileged combatants””, *International Review of the Red Cross*, Vol. 85, No. 849 (March 2003), pp. 45–74, for a comprehensive overview of this issue.

so even on a somewhat regular basis, the ability of international humanitarian law to protect the rest of the civilian population could be compromised. It is therefore essential to be aware of the potential consequences of direct participation by PMCs in hostilities in order to devise regulatory schemes that will help to diminish adverse effects. After discussing direct participation in hostilities with specific reference to PMCs, this article will explore some of the possible ramifications; these will then be taken up in the section on suggestions for regulation below.

From the start it must be pointed out that a regulatory scheme that would simply prohibit private military company employees from participating directly in hostilities would be insufficient to address this issue, owing to several features of international humanitarian law itself. First, the concept of what constitutes direct participation in hostilities is fluid and relatively undefined. Second, the fact that there is no distinction under international humanitarian law between fighting to attack and fighting to defend means that it is meaningless to stipulate that such employees may only defend.<sup>58</sup> Finally, even a regulatory scheme permitting PMC employees only to defend civilian objects comes up against the fact that the concept of what is a military objective is not static under humanitarian law. Almost any object can become a military objective under certain circumstances, potentially changing the role of the person guarding that object if he or she fights off attackers. These three factors will now be considered in more detail.

The first hurdle is thus the question of what constitutes direct participation in hostilities.<sup>59</sup> The ICRC *Commentary* categorizes it as “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces”.<sup>60</sup> However, direct participation cannot be understood so broadly as to include any acts that could be construed as helping one side or another. The ICRC admonition that “[t]here should be a clear distinction between direct participation in hostilities and participation in the war effort” must be kept in mind when considering PMCs.<sup>61</sup> It is true that to consider all the support activities of PMC employees as direct participation in hostilities is inappropriate and risks removing the protection of non-combatant status from many other civilians working in war-related industries. Careful lines must be drawn with a view to how such categorizations may affect all non-combatants. Support and logistics activities conducted by civilians, such as catering and construction and maintenance of bases, are not seen as direct participation in hostilities. The theory that individuals working in industries helpful to the overall war effort (such as those in munitions factories) are quasi-combatants has been widely discredited. The fact that Article 4A(4) of

58 P I, Article 49.

59 For a brief but excellent overview of the legal concept of direct participation in hostilities, see Jean-François Quéguiner, “Direct participation in hostilities under international humanitarian law”, Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, November 2003, available at <<http://www.reliefweb.int/rw/lib.nsf/db900SID/LHON-699DBP?OpenDocument>> (visited 13 November 2006).

60 ICRC *Commentary*, above note 24, para. 1944, on P I, Article 51.3.

61 *Ibid.*

the Third Geneva Convention provides for civilians to perform tasks such as supplying the armed forces with food and shelter but to retain their civilian status indicates that PMC employees may not be perceived as directly participating in hostilities merely for performing such support services.

However, logistics personnel (when they are members of the armed forces) are sometimes called in to support troops if those troops need extra help in a tight battle.<sup>62</sup> In Iraq, for instance, officers have reported that their troops have been so thinly stretched that in contested areas they have at times left only the kitchen staff to guard the base.<sup>63</sup> If the kitchen staff are employees of a private security company, they are put in the awkward position of guarding and fighting for a legitimate military objective, which is likely to mean that they are directly participating in hostilities. Thus, even though international humanitarian law provides for circumstances in which logistics personnel are civilians but enjoy protection as prisoners of war, it does not allow for such civilians to engage in combat beyond personal self-defence.<sup>64</sup> In the discourse on PMCs, the problem of a lack of back-up armed forces (logistics staff) is perceived as merely a strategic issue. Yet increased reliance on civilian contractors in these roles has important implications for international humanitarian law if they are indeed called upon to act in a way that could be construed as direct participation in hostilities.

The second and third issues highlighted above raise similar problems, since they illustrate that the determination whether a person actually does directly participate in hostilities does not necessarily depend on whether that person intended to do so. The problems posed by the lack of distinction between offensive and defensive attacks are best illustrated by the use of private military companies as security guards. We are accustomed to the use of private security guards in domestic settings patrolling shopping malls, public buildings and banks. But the use of private security guards cannot be easily transposed to a situation of international armed conflict without creating the possibility that they, though civilians, will be led to participate directly in hostilities. Article 49.1 of Protocol I states, ““Attacks” means acts of violence against the adversary, whether in offence or in defence.” US Defence Secretary Donald Rumsfeld argued that the PMCs that were operating in Iraq were only there to defend, not to attack, apparently unaware that this distinction made no difference as far as international humanitarian law is concerned.<sup>65</sup> Thus a private security guard who fires back is directly participating in hostilities if the attacking party is a party to a conflict. If, on the other hand, the attack is carried out by common criminals for general criminal reasons, then the private military company employee need not fear that

62 Peter Singer notes that this occurred during the Second World War at the Battle of the Bulge, but it also occurred as recently as Somalia in the early 1990s. See Singer, above note 11.

63 *New York Times*, April 2005.

64 Pictet's *Commentary*, above note 53, unfortunately does not specify this point, but perhaps because it is self-evident since these persons are not combatants.

65 See the Reply of Secretary of Defense Rumsfeld to the Honorable Ike Skelton of 4 May 2004, available at <[http://www.house.gov/skelton/5-4-04\\_Rumsfeld\\_letter\\_on\\_contractors.pdf](http://www.house.gov/skelton/5-4-04_Rumsfeld_letter_on_contractors.pdf)> (visited 1 October 2006).

engaging with those criminals raises the spectre of direct participation in hostilities.<sup>66</sup> It should be noted, however, that since occupying powers and states may enact laws outlawing and criminalizing resistance fighters, this distinction may be extremely difficult to discern. If a private military company employee engages with individuals from an outlawed resistance group, the fact that they are also criminals under the occupying powers' laws does not mean that the PMC employee is participating in a police operation rather than directly participating in hostilities. It is both the nature of the operation combined with the status of the individual (or the capacity in which he fights) that is determinative. PMC employees must therefore be highly trained to distinguish between police operations and military operations.

Finally, objects can become military objectives according to their nature, location, purpose or use.<sup>67</sup> There is no set list of military objectives.<sup>68</sup> If an object being guarded by a PMC employee suddenly becomes a military objective because of its use (for example, a building normally used for civilian purposes is, unbeknownst to him, temporarily filled with combatants) and he continues to guard it, is he a civilian unlawfully participating in hostilities? What happens when the object ceases to be used for military purposes and he continues to guard it? Does he then cease to participate in hostilities? How can such a change in status reasonably be expected to be understood and taken into account by opposing forces? Specifying in any regulatory scheme that PMCs may not be used to guard any object that is military in nature would help to diminish this problem, but it cannot eliminate it altogether.

### Consequences of direct participation in hostilities for participants and possible ramifications of private military companies' participation for the general civilian population

Normally, civilians are immune from attack. This is the basic principle of distinction in the conduct of hostilities. However, civilians lose their entitlement under the Conventions and Protocols to protection from attack for such time as they directly participate in hostilities.<sup>69</sup> In addition, individuals may be punished through the criminal justice system for directly participating in hostilities. Arguably the protection of the general civilian population may be indirectly affected by increased use of private military companies as security guards, in particular because the use of PMCs in that role may sow confusion with respect to the doctrine on human shields and direct participation in hostilities. Since it is

66 The fact that security operations by such personnel often go beyond mere police operations is illustrated by the Najaf incident described above, as well as the fact that many are known to arm themselves with grenades and other non-police-type arms.

67 P I, Article 52.

68 See M. Sassòli and L. Cameron, "The protection of civilian objects: Current state of the law and issues *de lege ferenda*", in N. Ronzitti and G. Venturini (eds.), *The Law of Air Warfare: Contemporary Issues*, eleven international publishing, Utrecht, 2006, pp. 35–74, at pp. 39–41.

69 P I, Article 51.3.

notoriously difficult to establish whether individuals acting as human shields are doing so of their own accord, a straightforward application of humanitarian law demands that no distinction be made between voluntary and involuntary human shields. Instead, all civilians, even those seated in front of a weapons factory, must be regarded as normal civilians protected from attack and any possible injury to them must be taken into account when assessing the proportionality of an attack on a military objective. Widespread use of PMCs as security guards threatens on the contrary to throw a spanner in the works and to encourage acceptance of a distinction between voluntary and involuntary human shields.

The range of activities carried out by PMCs and the variety of personnel employed by them makes it difficult to discuss in brief direct participation in hostilities and human shields. Some PMC employees clearly have combat roles (such as target selection or even participation in combat) and therefore evidently do participate directly in hostilities. However, a significant number of PMC employees are engaged in guard duties. In terms of assessing direct participation in hostilities, this activity falls into a grey zone; it has no clear place along a sliding scale of evaluation and can even correspond to the use of human shields. For example, one PMC in Iraq hired more than 17,000 Iraqis to “guard” an oil pipeline against looters, but also possibly against insurgents. If PMCs are used to guard military objectives, one could say they are engaging in combat, as one author argues (in relation not only to PMCs, but to all civilians).<sup>70</sup>

However, those who would reject a distinction between voluntary and involuntary human shields with respect to direct participation in hostilities may be inclined to adopt that distinction when it comes to PMCs. At first glance, they do seem to straddle the line between civilians and combatants and appear to be somewhat more willing participants than we might suppose a regular civilian to be. But one must be careful with that argument, for how can a PMC civilian be distinguished from a civilian who is voluntarily or involuntarily acting as a human shield? If, in order to avoid problems with whether a military object can be attacked (or for the proportionality calculation), we hold that any civilian employee of a PMC who is simply guarding a military object – as much from interference by criminals as from anything else – is participating in hostilities, then we may more easily conclude that, at the very least, “voluntary” human shields directly participate in hostilities, thereby lowering or eliminating the protection from attack that is normally foreseen for civilians. The discussion above regarding the changing nature of objects as military objectives has shown, however, that it is just as difficult to ascertain whether a PMC security guard simply standing in front of something that becomes a military objective is thereby participating in hostilities of his own accord, as it is to ascertain the willingness of members of the general civilian population to have placed themselves in front of a military objective. Besides, how can one know whether the PMC employees standing guard in front of a military objective are there to protect it from criminals or from attack

70 Schmitt, above note 7, p. 541.

by the enemy? Widespread looting during situations of conflict means that the first hypothesis is not at all unrealistic. Finally, a belligerent that places private security guards in front of all of its military objectives, or even likely or possible military objectives, may in fact be acting in violation of Article 51.7 of Protocol I.

Second, the mechanisms normally available to implement and enforce discipline and compliance with international humanitarian law are not available to private military companies. States have codes, such as the US Uniform Code of Military Justice, which allows US forces to try and convict members of its armed forces for violations of the law, and the consequences for not following orders may be severe for individual enlisted personnel. The lack of such a disciplinary mechanism for non-armed-forces personnel poses a risk for the civilian population that is qualitatively different from the one discussed above – a potential direct risk to them at the hands of private military company employees.<sup>71</sup> This argument is not intended to be alarmist or as a statement that all PMC employees are more likely to violate humanitarian law than regular soldiers. Many PMCs employ elite, highly trained ex-military service persons whose knowledge of and compliance with humanitarian law may be beyond reproach. However, these companies make a profit by hiring thousands of individuals who essentially furnish cheap labour and whose level of training and skill is very likely to be more limited.<sup>72</sup> In the absence of a clear disciplinary mechanism, we must question the ability of PMCs to ensure that their employees abide by humanitarian law and human rights law.

Finally, there is an important ramification for the employees themselves of PMCs. If private military company employees are civilians and they participate in hostilities, the consequences for them are identical to the consequences of being a mercenary: they may be punished through the criminal justice system for their participation in hostilities. Of course, this does not necessarily carry punishment for the separate crime of mercenarism (but, as critics of Article 47 have identified with respect to mercenaries, it entails the same worrisome lack of incentive for such personnel to respect humanitarian law if they do participate in hostilities).<sup>73</sup> Moreover, the fact that they have no immunity if they do participate in hostilities may come as a surprise to individuals employed by a registered company subject to a regulatory scheme in which they are not designated as mercenaries by the licensing state. In my view, regulatory frameworks must oblige companies hiring individuals to divulge their potentially vulnerable legal status.

A recent Instruction issued by the US Department of Defence that aims to regulate closely the activities of PMC employees, and imposes detailed requirements for those that are likely to directly participate in hostilities, illustrates

71 A number of articles outline the legal complexities of enforcing law extraterritorially for civilians in the case of the United States. See, e.g., Bina, above note 2.

72 This factor was highlighted in the Abu Ghraib investigations and has been identified even by some employees of PMCs.

73 Lawyers for the plaintiffs against CACI in fact argue that the company had a positive incentive not to respect IHL in order to gain more lucrative contracts.

that the US military is both aware of these issues and concerned about them.<sup>74</sup> Such regulation of these companies is welcome but inadequate, given that PMCs are not only employed by the military but also by reconstruction companies and many others. Regulation needs to be able to address all of them.

### A special status for private military companies' employees?

International humanitarian law does not allow for a category of “quasi-combatants”. It may nonetheless be tempting to argue that PMC employees are somehow combatants, as many of them could be classified as persons accompanying the armed forces who are accorded prisoner-of-war status. Employees of PMCs that provide catering services and build bases for the armed forces – Singer’s military “support” companies – would indeed be entitled to prisoner-of-war status if they have been authorized to carry out those activities by the forces they are accompanying.<sup>75</sup> This extension of prisoner-of-war status was provided for in the Third Geneva Convention; however, these persons are not combatants and are not entitled to participate in hostilities. While the commentary on Article 43 of Protocol I does not deal with the category of persons who are entitled to prisoner-of-war status but are not combatants,<sup>76</sup> this conclusion is self-evident from a simple reading of Article 50 of Protocol I and Article 4 of the Third Convention. Article 50 of Protocol I defines civilians as those persons not described in Article 4A(1), (2), (3) and (6) of the Third Convention. Consequently, *a contrario*, those persons listed in Article 4A(4) (logistical support personnel accompanying armed forces) must be civilians. Since Article 43 of Protocol I specifies that only combatants have the right to participate in hostilities, it must be concluded that civilian logistics employees do not have the right to participate in hostilities. Moreover, the commentary on Article 43 clearly states, “All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of “quasi-combatants”, which has sometimes been used on the basis of activities related more or less directly with the war effort.”<sup>77</sup>

International humanitarian law provides a coherent framework to cover all persons who find themselves in a situation of armed conflict. It is thus perhaps ironic that the biggest employer of civilians in PMCs which have a growing record of taking part in hostilities is the very state that is vehemently and vociferously

74 Department of Defense Instruction No. 3020.41 (3 October 2005) on “Contractor Personnel Authorized to Accompany the U.S. Armed Forces”.

75 GC III, Article 4A(4). It is not clear whether authorizations for such persons accompanying the armed forces have been issued in all cases. Schmitt indicates that many PMCs are engaged by other contractors, not by the US military itself. Thus, not even all of those providing logistical support would necessarily meet the requirements of GC III, Article 4A(4). This is the usual interpretation of the status of this type of PMC under IHL. See J. McCullough and C. Edmonds, “Contractors on the battlefield revisited: The war in Iraq and its aftermath”, Briefing Papers, Second Series, 2004, p. 4, available at <[http://www.friedfrank.com/govtcon/pdf/briefing\\_papers\\_2.pdf](http://www.friedfrank.com/govtcon/pdf/briefing_papers_2.pdf)> (visited 13 November 2006).

76 See ICRC *Commentary*, above note 24, paras. 1659–1683.

77 *Ibid.*

opposed to recognizing basic protection for those whom it considers to be “unlawful combatants” in another context.<sup>78</sup> Indeed, voluntarily creating a pool of “good” but potentially “unlawful combatants” while simultaneously condemning other (non-private sector) civilian participants in hostilities verges on hypocrisy.

In sum, it is unlikely that many of the growing numbers of private military companies we are witnessing can be legally regulated by existing international law on mercenaries, owing to the complex definition of that concept. Also, most will probably not satisfy the criteria to benefit from combatant status. The vast majority have the status of civilians under humanitarian law.

## Responsibility and accountability

Finally, it is important to have a clear understanding of the existing responsibility of employees of private military companies when conceiving a regulatory scheme. Contrary to some apparent misconceptions, even if private military company employees are civilians, they may still be prosecuted for violations of international humanitarian law. Individual criminal responsibility does not depend on a person’s status – civilians and combatants are equally capable of committing and being prosecuted for war crimes and grave breaches of the Geneva Conventions.<sup>79</sup> The current impunity with regard to Abu Ghraib is thus the result of an apparent lack of political will to prosecute civilians who have been implicated in violations of humanitarian law, and is not the result of an international legal vacuum with regard to these individuals.

There is much consternation over human rights abuses committed by private military companies, and many articles have been written suggesting ways of ensuring that responsibility is assumed for these acts.<sup>80</sup> As for all non-state entities, more arguments must be brought to demonstrate why they may also be accountable for violations of human rights than are necessary to show the responsibility of individuals under international humanitarian law. One way of making human rights legally binding on private military companies is by construing them as state agents; another is to write human rights obligations directly into contracts concluded with these companies.<sup>81</sup> A further mechanism would write human rights obligations into the licensing or regulatory scheme under which private military companies are incorporated.<sup>82</sup> Clearly, these

78 The author prefers the term “unprivileged belligerent” to “unlawful combatant” and does not subscribe to the theory that “unlawful combatants” are not civilians. The term is used simply for the sake of the argument.

79 The most recent affirmation of this principle is given by the ICTR in *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-I, Judgment (Appeals Chamber), 1 June 2001, para. 444. This applies for non-international and international armed conflicts.

80 See, e.g., the articles listed in note 2 above.

81 Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 299–310.

82 Ibid.

solutions do not necessarily represent the law as it stands now, but rather reflect the direction in which the law should go. Civil cases have already been brought in the United States against some companies for abuses committed in Abu Ghraib. Even though civil suits against private individuals are one method of enforcing responsibility for violations of human rights, the road to accountability may be long, considering that first-instance judges have held that public international law (human rights, prohibition of torture) does not bind private individuals, with the result that the Alien Tort Claims Act cannot be used to sue employees of the private military company Titan for abuses in the prison.<sup>83</sup> This holding may be challenged in a higher court, but nonetheless reflects the still nebulous binding quality of international human rights law on private individuals.

### Options for regulation

Unfortunately, only a brief survey of these issues is possible within the scope of this paper. Many seek to regulate by changing the definition of what is a mercenary.<sup>84</sup> Others advocate the adoption of an international convention, taking the approach that the transfer of military services can be regulated in much the same way as the transfer of military goods.<sup>85</sup> Political scientists tend to argue for national regulation, including licensing and oversight mechanisms;<sup>86</sup> this appears to be the approach of the government of the United Kingdom and the Swiss government.<sup>87</sup> A number of companies within the industry itself have proposed

83 *Ibrahim v. Titan*, Civil Action No. 04-1248 (JR), 391 F. Supp. 2d 10, 12 August 2005, Memorandum by Justice Robertson, in which he states, “the question is whether the law of nations applies to private actors like the defendants in the present case. The Supreme Court has not answered that question ... but in the D.C. Circuit the answer is no”. See also *Saleh v. Titan*, Civil Action No. 05-1165 (JR) US District Court for the District of Columbia, Memorandum Order, in which Justice Robertson reiterates his earlier holding more forcefully. Those holdings appear to be in direct contradiction to the District Court’s determination in *Kadic v. Karadzic*, 70 F. 3d 232 (2d Cir 1995), reiterated in *Presbyterian Church of Sudan v. Talisman*, 244 F. Supp. 2d 289 (2003), that “individuals committing [violations of *jus cogens*] may also be liable under international law”. Nonetheless, in the PMC cases, Judge Robertson also held that under international law, torture requires an element of state involvement, thereby providing an additional reason for excluding this basis for litigation under the Alien Tort Claims Act. See *Saleh v. Titan*, *ibid*.

84 See, e.g., Ellen Frye, “Private military firms in the new world order: How redefining “mercenary” can tame the “dogs of war”, *Fordham Law Review*, Vol. 73 (2005). She proposes to redefine mercenaries so that PMC operatives fall within the definition of a mercenary and are criminalized under the UN Mercenary Convention. Her definition would encompass only those PMC employees who are not citizens or subjects of the territory/country in which they are acting. However, we know that many security companies in Iraq have hired local Iraqis to act as security guards. This poses very different problems for the schema of IHL civilians/combatants, but nonetheless remains outside the framework. Moreover, it is highly unlikely that the Additional Protocols will be amended to make such a change, given the resistance of all parties to opening them up for revision.

85 See Milliard, above note 28, Appendix A: Proposed Draft Convention: International Convention to Prevent the Unlawful Transfer of Military Services to Foreign Armed Forces.

86 See Caroline Holmqvist, *Private Security Companies: The Case for Regulation*, SIPRI Policy Paper No. 9, January 2005; Schreier and Caparini, above note 4; Singer, above note 11.

87 United Kingdom, Green Paper, *Private Military Companies: Options for Regulation*, Stationery Office, London, 2002; Rapport du Conseil fédéral sur les entreprises de sécurité et les entreprises militaires privées, Swiss Federal Council, 2006, esp. Section 6.

their own code of conduct, apparently seeking to demonstrate a will to self-regulate.<sup>88</sup> To my mind, none of the proposed solutions satisfactorily addresses the challenges for international humanitarian law posed by the possibility that employees of such companies may end up participating in hostilities without being properly integrated into the armed forces of a state party to a conflict. For instance, one proposed convention admits the possibility that some contractors may take a direct part in hostilities, but despite the fact that the proponent is a military lawyer, his only solution is that “Engaging in direct combatant activities shall subject the licensed military service provider to the highest scrutiny by the Authorizing State and the United Nations High Commissioner for Human Rights, including, but not limited to, enhanced reporting requirements and deployment of monitoring teams from the Authorizing State, United Nations, or International Committee of the Red Cross.”<sup>89</sup> It is unclear why the author of this proposal would advocate the High Commissioner for Human Rights as ideal for scrutinizing direct combat, except perhaps for want of another candidate. Ideally, in my view, any state wishing to employ a PMC whose employees are likely to engage in combat would integrate those individuals into its armed forces through its normal recruitment procedures.

If a private military company is deployed in a region where a state’s armed forces are already active, the licensing regime could provide for an extension of that state’s normal military jurisdiction so that violations of humanitarian law and human rights law can be dealt with effectively on the spot. But in the case of a private military company being deployed where none of the home state’s armed forces are present, there is no easy solution for maintaining discipline and enforcing humanitarian law.<sup>90</sup> A licensing scheme could require that a state contracting and importing services from a private military company be prohibited from granting immunity for criminal violations of law. It can be surmised, however, that a state having recourse to large numbers of private military companies will probably not be in a position to enforce the law on a large scale.

At its April 2005 session, the Human Rights Commission adopted a resolution ending the mandate of the UN Special Rapporteur on Mercenaries and creating a working group instead. The Working Group is mandated in paragraph 12(e) of the resolution specifically to address all three types of private military companies and, in addition, to “prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities”.<sup>91</sup> In the Report of the Third Meeting of Experts on traditional and new

88 See the website of the umbrella organization, International Peace Operations Association, and in particular its Code of Conduct of 31 March 2005, available at <[www.ipooonline.org](http://www.ipooonline.org)> (visited 13 November 2006).

89 See Milliard, above note 28, Proposed Draft Article 1.5.

90 This may be the case, for example, in Afghanistan should the United States withdraw all of its forces yet leave the PMCs it has hired and that are already operating there to remain in support of NATO and/or ISAF.

91 E/CN.4/RES/2005/2, “The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”, Commission on Human Rights, 38th meeting, 7 April 2005 (adopted by a recorded vote of 35 votes to 15, with two abstentions. See Chapter V of E/CN.4/2005/L.10/ Add.5).

forms of mercenary activities (a meeting separate from the Working Group described above), the experts “generally agreed that an important way to regulate PMCs was by setting thresholds for permissible activity, systems of registration in the host States and oversight mechanisms that included prior approval by host States of PMCs’ contractual arrangements”.<sup>92</sup> While this suggestion is certainly welcome, the complexity of what constitutes direct participation in hostilities nonetheless remains. It remains to be seen whether the new Working Group will adopt the approach of the group of experts.

Since a new international convention is unlikely, we should consider other options for regulation. In my view, the Working Group could also create a code of minimum human rights standards that such companies must respect. Since all states are bound by the same international humanitarian law of international armed conflicts, there is no problem as to what international humanitarian law applies. On the other hand, it is very difficult to know which rules of human rights law apply. First, there is the problem of private companies and private individuals having obligations under human rights law. Second, there is the problem of which human rights laws and obligations apply. Is it the American Declaration? The European Convention on Human Rights? The African Charter on Human and Peoples’ Rights? The International Covenant on Civil and Political Rights? Thus the Working Group could establish a code of minimum human rights obligations that states should or ideally must incorporate into their licensing schemes and contracts. A clear understanding of what laws and legal standards apply will make it easier to improve the monitoring and accountability of such firms. In setting out such a code, however, the Working Group should nonetheless insist that PMCs in situations of armed conflict, whatever their responsibilities, must also abide by international humanitarian law.

Most importantly, states should be encouraged to regulate companies registered and/or headquartered in their jurisdiction, hired by them, or hired by other corporations registered in their jurisdiction.<sup>93</sup> Companies should have to go through very strict licensing procedures.<sup>94</sup> Moreover, it can be argued that since states have an obligation under Article 1 common to the four Geneva Conventions to ensure respect for those Conventions, they must ensure that these companies and their employees are trained in international humanitarian law, even if the state has to offer to provide such training. In addition, companies themselves should be obliged to disclose to employees their potentially vulnerable position if, in the course of their work, they do participate directly in hostilities. Finally, special rules for incorporating such companies may also help to avoid problems that are associated with the industry, such as trafficking in individuals in order to increase the labour pool.<sup>95</sup>

92 E/CN.4/2005/23 at para. 93.

93 This three-pronged approach appears to be the way in which the ICRC and the Swiss government may address the issue. See *Rapport du Conseil fédéral*, above note 87.

94 Most political scientists approve of the idea of a licensing regime. See note 86 above.

95 US Department of State Trafficking in Persons Report 2006, June 2006, p. 19, available at <[www.state.gov/g/tip/rls/tiprpt/2006](http://www.state.gov/g/tip/rls/tiprpt/2006)> (viewed 20 September 2006).

## Conclusion

Private military companies are demonized by some and touted as the future of the world's peacekeeping forces by others.<sup>96</sup> As the 100 billion dollar (US) industry begins to look for a future beyond Iraq, it is starting to lobby for a prominent role in peacekeeping, especially in peace enforcement operations where states are reluctant to send their own soldiers. The UN Assistant Secretary-General for Peacekeeping Operations is not enthusiastic about the idea, insisting that the responsibility to protect must rest with states; nonetheless, current efforts to regulate the industry must not turn a blind eye to the companies' ambitions. Regulation for the present can only be effective if the status and existing responsibility of these players under humanitarian law is widely understood and accepted. Given the much more complex questions raised by the application of international humanitarian law and human rights law in peace operations, and given the civilian status of most private military company employees, this is not conceivably a feasible solution in the immediate future.

96 Max Boot, "Darfur solution: Send in the mercenaries", *Los Angeles Times*, 31 May 2006, p. B13. See also Kristen Fricchione, "Casualties in evolving warfare: Impact of private military firms" proliferation on the international community", *Wisconsin International Law Journal*, Vol. 23 (Fall 2005), who takes up the argument that PMCs could be used in peace operations without resolving the extremely delicate matter of participation by peace forces in hostilities and the lack of combatant status for private military company employees; and Victoria Burnett et al., "'Who takes responsibility if one of these guys shoots the wrong people?': The hiring of contractors for military tasks extends even to their use in peacekeeping operations. But, as the final part of an FT investigation reveals, concerns remain over how they should be held to account and regulated", *Financial Times*, 12 August 2003, p. 16.

# Corporate actors: the legal status of mercenaries in armed conflict

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## **Abstract**

*Corporate actors are taking on an increasingly significant role in the prosecution of modern warfare. Traditionally, an analysis of the law applicable to corporate actors in armed conflict commences with inquiry into the law as it applies to mercenaries. As such, the rise of the private military industry invites a reconsideration of the conventional approach to mercenaries under international law. This article critically surveys the conventional law as it applies to mercenaries, and considers the extent to which corporate actors might meet the legal definitions of a “mercenary”. It demonstrates that even mercenaries receive protection under international humanitarian law.*



The debate about the definition and status of mercenaries is not new. It is one which has provoked a polarized response from different groups of nations, with some arguing that mercenary activity should be prohibited outright, and others contending that mercenaries should not receive any differential treatment under international law. In the second half of the twentieth century, objections to mercenary activity were grounded in concerns about preserving the right of post-colonial states to self-determination. This approach is reflected in the language adopted by the United Nations in its persistent consideration of the use of mercenaries “as a means of violating human rights and impeding the exercise

of the right of peoples to self-determination”<sup>1</sup>. Until recently, legal consideration of corporate actors in armed conflict was limited to the question of mercenaries. Contemporary interest in corporate actors, however, is largely attributable to the role of private military contractors in Iraq and elsewhere. Private military contractors are not necessarily mercenaries under international law but, like mercenaries, they are perceived to act according to commercial or private interests in armed conflict. The significance of the private military industry in present-day warfare calls for a re-examination of the role and regulation of corporate actors in armed conflict.

The role of corporate actors in Iraq has attracted considerable international attention, particularly in the light of reports that in some instances private military contractors have been specifically targeted and subjected to degrading treatment.<sup>2</sup> This is unquestionably the kind of conduct that international humanitarian law seeks to prevent, and it has led to concern in humanitarian circles. The role of corporate actors in Iraq has also attracted the attention of governments. The impetus behind the UK Green Paper on options for regulation of the industry,<sup>3</sup> for example, was the British government’s concern that highly trained members of the British armed forces, particularly SAS troops, were resigning (or taking leave of absence) to assume contract positions in Iraq.<sup>4</sup> The South African government has gone one step further, with the flood of South African contractors to Iraq prompting a formal review of the country’s mercenary legislation.<sup>5</sup>

- 1 See, by way of an illustrative sample: “Report of the Third Meeting of Experts on traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”, December 2004, UN Doc. E/CN.4/2005/23; “Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”, submitted by the Special Rapporteur of the Commission on Human Rights, UN GAOR, 49th sess., Annex, UN Doc. A/49/362 (1994); Resolution on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, GA Res. 59/178, 59th sess., 74th plen. mtg, UN Doc A/RES/59/178 (3 March 2005); Shaista Shameen, “Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”, Report of the Special Rapporteur on the right of peoples to self-determination and its application to peoples under colonial or alien domination or foreign occupation, UN Doc A/60/263 (2005).
- 2 See, e.g., “Bodies mutilated in Fallujah attack”, *BBC News* (UK), 31 March 2004, available at <[http://news.bbc.co.uk/2/hi/middle\\_east/3585765.stm](http://news.bbc.co.uk/2/hi/middle_east/3585765.stm)> (visited 2 Nov. 2006).
- 3 Private Military Companies: Options for Regulation, British Foreign and Commonwealth Office (Green Paper), 2002 (hereinafter UK Green Paper).
- 4 Robert Fisk and Severin Carrell, “Britain’s secret army in Iraq: Thousands of armed security men who answer to nobody”, *Independent* (UK), 28 March 2004, available at <[http://news.independent.co.uk/world/middle\\_east/story.jsp?story=505826](http://news.independent.co.uk/world/middle_east/story.jsp?story=505826)> (visited 2 Nov. 2006).
- 5 The South African Commission on the Review of the Regulation of the Private Security Industry is charged with examining the efficacy of the Regulation of Foreign Military Assistance Act (Act 15 of 1998) as well as the Private Security Industry Regulation Act 2001 (Act 56 of 2001). The Commission’s documents are available at <<http://www.crsi.co.za>> (visited 2 Nov. 2006). The Commission took submissions on the Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Bill (Bill 42 of 2005). See, e.g., Mariette le Roux, “South Africa: What are 5000 South Africans doing in Iraq?”, South African Press Association, 6 July 2006.

Private military activity in Iraq also gives rise to questions about the *accountability* of corporate actors in armed conflict.<sup>6</sup> Private military companies have tended to assert that, in the absence of a specific legal framework to deal with corporate actors, their industry is “self-regulated”. For example, prior to its cessation of operations in 2004, Sandline International asserted, “In the absence of a set of international regulations governing Private Military Companies, Sandline has adopted a self-regulatory approach to the conduct of our activities.”<sup>7</sup> On the contrary, international humanitarian law and mercenary-specific conventions do provide an international framework for the regulation of private military contractors. Unfortunately, that legal framework is disjointed and, in some respects at least, contradictory. Sandline’s depiction of the industry as “self-regulated” is an example of how private military contractors, and the governments that support them, sometimes take advantage of the ad hoc nature of international attempts to regulate corporate actors.

In this article I do not purport to address the normative implications of the private military industry. This is not to detract from the concerns of states, particularly within post-colonial Africa, that have actively and consistently opposed the use of corporate actors in waging war on their soil. These concerns continue today. In a scathing piece on this year’s mercenary scandal in Kenya, a local reporter captured the essence of post-colonial anxiety regarding corporate actors, claiming failure to suppress mercenary activity amounts to “the kind of paralysis ... which in the past allowed 12 mercenaries to land at an African country in the morning and overthrow the Government by lunch time”.<sup>8</sup> There may well be room for a stronger international legal framework to prohibit the use of corporate actors in armed conflict. However, that is a question for another article.<sup>9</sup>

Instead, I write against the backdrop of the law as it stands today. I outline some of the difficulties with the specific treatment of mercenaries under international law and highlight the disparity between international humanitarian law and mercenary-specific conventional law. Perhaps most importantly, I demonstrate how international humanitarian law binds and protects mercenaries.

6 Most notoriously, private contractors have been implicated in the Abu Ghraib torture scandal, prompting Alien Tort litigation in the United States. To date, the plaintiffs have been unsuccessful in their respective actions. See *Saleh v. Titan Corp.*, 436 F.Supp.2d 55 (DDC 2006) and *Ibrahim v. Titan Corporation*, 391 F.Supp.2d 10 (DDC 2005). For academic consideration of the issue, see Tina Garmon, “Domesticating international corporate responsibility: Holding private military firms accountable under the Alien Tort Claims Act”, *Tulane Journal of International and Comparative Law*, Vol. 11 (2003), pp. 325–54, and Jennifer L. Heil, “African private security companies and the Alien Tort Claims Act: Could multinational oil and mining companies be liable?”, *Northwestern Journal of International Law and Business*, Vol. 22(3) (2002), pp. 291–310.

7 “Corporate overview”, Sandline International, available at <[www.sandline.com/company/index.html](http://www.sandline.com/company/index.html)> (visited 2 Nov. 2006).

8 “The makings of a civilian coup”, *Sunday Nation* (Kenya), 18 June 2006.

9 For an excellent consideration of the question of state responsibility for the actions of private military contractors, see “Private military contractors: Status and responsibility for their actions”, report of the Expert Meeting on Private Military Contractors, CUDI, Geneva, 29–30 Aug. 2005.

## Terminology and questions for international humanitarian law

Traditionally, an analysis of the law applicable to corporate actors in armed conflict commences with an inquiry into the law as it applies to mercenaries. In examining the specific legal provisions dealing with mercenaries, it is necessary to turn to two primary issues. The first relates to the threshold definitional question of who is to be labelled a mercenary. The second is to determine the consequences of mercenary status. In the next section, I shall consider the present status of the law in respect of these two issues.

The increasing use of “private military contractors” in the modern sense raises further questions.<sup>10</sup> Private military contractors tend to be seen as predominantly motivated by monetary gain rather than ideological or patriotic allegiance.<sup>11</sup> This raises the question: are private military contractors “mercenaries” for the purposes of international humanitarian law? If not, what is their status? It is critical to note that the term “private military contractor” is one of art rather than law – no international legal instruments make reference to or define the term, or its synonyms.<sup>12</sup> All too often, political commentators and corporate actors attempt to use “private military contractor” as a term of exception, arguing that contractors are neither bound nor protected by international humanitarian law. The term “mercenary” takes on a number of definitions under international legal instruments, but its use is not reserved for legal discourse. Instead, the “mercenary” label is frequently “applied to express the speaker’s disapproval, rather than to describe an individual satisfying the specific criteria under international law”,<sup>13</sup> taking on a political rather than legal meaning. In order to defuse the loaded uses of these terms, I shall instead use the expression “corporate actor” to refer inclusively to those actors who are variously considered to be mercenaries and private military contractors, except where the law makes specific reference to “mercenaries”.

## Conventional treatment of mercenaries

It was with considerable reluctance that states at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in

10 For examples of academic interest in the issue, see the work of Peter Warren Singer and others: Peter Warren Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, Ithaca and London, 2003; Peter W. Singer, “Corporate warriors: The rise of the privatized military industry and its ramifications for international security”, *International Security*, Vol. 26(3) (2002), p. 186; Peter W. Singer, “Peacekeepers, Inc”, *Policy Review*, Vol. 119 (2003), available at <<http://www.policyreview.org/jun03/singer.html>> (visited 2 Nov. 2006); Deborah D. Avant, *The Market for Force: The Consequences of Private Security*, Cambridge University Press, New York, 2005; Deborah Avant, “Mercenaries”, *Foreign Policy*, Vol. 143 (2004), p. 20; Robert Mandel, *Armies without States: The Privatization of Security*, Lynne Rienner, Boulder, 2002.

11 It is on this basis that many commentators distinguish “mercenaries” from “volunteers” under international humanitarian law. See, e.g., Marie-France Major, “Mercenaries and international law”, *Georgia Journal of International and Comparative Law*, Vol. 22(1) (1992), pp. 103–50, at p. 111, citing Yves Sandoz and Abdulgawi Yusuf.

12 Such as “private security contractor” or “civilian contractor”.

13 Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 299–300.

Armed Conflicts<sup>14</sup> acquiesced in the demands of Organization of African Unity (OAU)<sup>15</sup> and socialist nations to insert a provision dealing specifically with mercenary activity.<sup>16</sup> The constant tug-of-war between states seeking an inclusive system of international humanitarian law and states seeking a formal, exclusionary categorization of corporate actors in armed conflict has undoubtedly undermined the force of the mercenary-specific conventional law. This is so in terms of the limited number of states willing to ratify the mercenary-specific conventions,<sup>17</sup> and in terms of the wording of mercenary-specific articles in general international humanitarian law instruments.

### International humanitarian law instruments

The overarching concern of the international humanitarian law instruments is to provide protection, including legal protection, in times of armed conflict, and it is rare for the conventions to sideline particular categories of actor. International humanitarian law's approach to mercenaries is controversial in this respect. The mercenary provisions have a primarily symbolic significance, to the extent that mercenaries are the subject of particular attention and are accorded fewer protections than combatants. However, there are difficulties with the conventional definitions of "mercenary", and international humanitarian law instruments do little to clarify the legal consequences of mercenary status. A brief outline of the conventional treatment of mercenaries under international humanitarian law is given below.

#### *The Hague Conventions of 1907*

While the Hague Conventions do not expressly refer to mercenaries, Hague Convention V deals with the implications of mercenary activity in terms of neutrality.<sup>18</sup> Article 4 provides that corps of combatants are not to be formed, nor are recruiting agencies to be opened, on the territory of a neutral state to assist belligerents in an armed conflict. Article 5 places a direct responsibility on the neutral state to ensure that the acts to which Article 4 refers do not take place on

14 Geneva, 1974–7 (hereinafter Diplomatic Conference of 1977).

15 Now the African Union.

16 Many states were at pains to express their difficulty with the provision, although Article 47 of Protocol I to the 1949 Geneva Conventions was ultimately adopted by consensus (CDDH/SR.41, 26 May 1977). *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (CDDH)*, Federal Political Department, Berne, 1978, Vol. VI, p. 488.

17 Of 192 UN Member States only 16 have signed and 28 have become party to the UN Convention: Status of Multilateral Treaties Deposited with the Secretary-General, UN Treaty Series (October 2006). Only eight of the parties to the UN Convention are African Union member states. Of 53 African Union member nations, only 31 signed and 27 ratified or acceded to the OAU Convention. See "List of Countries which have signed, ratified/acceded to the Convention for the Elimination of Mercenarism in Africa", available at <<http://www.africa-union.org>> (visited 19 Oct. 2006).

18 Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, of 18 October 1907 (Hague Convention V).

its territory. The effect of Article 17 is that an individual who acts in favour of a belligerent by taking up arms as a mercenary or private military contractor “cannot avail himself of his neutrality”. Nonetheless, the same article provides that such an individual is still entitled to the level of protection afforded to nationals of belligerent states.

### *The Geneva Conventions of 1949 and the 1977 Additional Protocols*

Mercenaries receive no mention in any of the four Geneva Conventions of 1949.<sup>19</sup> The first mainstream international humanitarian law instrument to deal specifically with mercenaries was the 1977 Additional Protocol I thereto.<sup>20</sup> It applies exclusively to international armed conflicts and fewer states are party to it than to the Geneva Conventions of 1949. Nevertheless, the ICRC considers Article 47 of Additional Protocol I as reflecting customary international humanitarian law.<sup>21</sup>

This mercenary provision was first proposed in 1976 by the Nigerian delegation to the Diplomatic Conference, albeit in slightly different terms.<sup>22</sup> In 1977, following significant debate and consideration of the issue by a working group,<sup>23</sup> the article was adopted by consensus. Many delegations stated that they supported the inclusion of the provision, “in the spirit of compromise”.<sup>24</sup> Indeed, the working group dealing with the mercenary provision reported that “It should not be thought that all delegates were fully satisfied with the final text.”<sup>25</sup>

Article 47.1 of Additional Protocol I provides that individuals who are found to be mercenaries are to be deprived of the rights of combatant or prisoner-of-war status. Article 47.2 defines a mercenary as any person who:

19 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949; Geneva Convention (III) relative to the Treatment of Prisoners of War, of 12 August 1949; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.

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

21 See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Vol. 1: Rules*, ICRC and Cambridge University Press, Geneva, 2005, pp. 391–5. Rule 108 reads: “Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial.”

22 The Nigerian delegation proposed an article in the following terms (CDDH/236/Rev.1) (note 16): 1. The status of combatant or prisoner of war shall not be accorded to any mercenary who takes part in armed conflicts referred to in the Conventions and the present Protocol. 2. A mercenary includes any person not a member of the armed forces of a party to the conflict who is specially recruited abroad and who is motivated to fight or to take part in armed conflict essentially for monetary payment, reward or other private gain.

23 See “Report to Committee III on the work of the Working Group submitted by the Rapporteur”, Geneva, 17 March–10 June 1977, CDDH/III/369.

24 See note 35 below. The Australian delegation went so far as to comment that, if the provision had been put to a vote, it would not have been able to vote in favour: Australia (CDDH/III/SR.58 at 205).

25 “Report to Committee III on the work of the Working Group submitted by the Rapporteur”, CDDH/III/369 and Corr.1., Geneva, 17 March–10 June 1977.

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a Party to the conflict material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; *and*
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.<sup>26</sup>

Legal commentators expressly acknowledge that Article 47 of Additional Protocol I was inserted to appease African nations and was intentionally narrow in its scope of application.<sup>27</sup> For an individual to be classified as a mercenary under Article 47.2, he or she must meet all six requirements, (a) to (f). It is virtually impossible to find an individual who falls within the Article 47.2 definition of a mercenary.<sup>28</sup>

One of the most contentious requirements of Article 47.2 is contained in subparagraph (c) and relates to motivation. For some, it is essential that the definition distinguishes mercenaries from other actors on the basis of their motivation. As one commentator has suggested, “it is impossible satisfactorily to define a mercenary without reference to his motivation”.<sup>29</sup> Some state delegations to the Diplomatic Conference of 1977 were of the same mind.<sup>30</sup>

The second limb of subparagraph (c), that the mercenary must “in fact, [be] promised by or on behalf of a Party to the conflict material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that Party”, is an attempt at mitigating the subjectivity of the motive requirement, balancing it with an objective test that can be more easily adjudicated by an outsider. Nevertheless, the wording of subparagraph (c) is such that the excessive material compensation requirement is *in addition* to the motive requirement, as is apparent from the use of the word “and” to join the two limbs. This leaves unresolved the difficulties with

26 Emphasis added.

27 See, e.g., Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 3rd edn, ICRC, Geneva, 2003, p. 90.

28 This point is widely acknowledged. For example, the US position is that “[t]he definition of ‘mercenary’ in [Protocol I] is so narrow that few persons would fit within it”: US, *Air Force Commanders’ Notebook*, 1980, §5-3, as cited in Henckaerts and Doswald-Beck, above note 21, Vol. 2, ch. 33, pp. 2576–7. See also Peter W. Singer, “War, profits and the vacuum of law: Privatized military firms and international law”, *Columbia Journal of Transnational Law*, Vol. 42 (2004), p. 521, at p. 524.

29 Riley Martin, “Mercenaries and the rule of law”, *Review of the International Commission of Jurists*, Vol. 17 (1977), p. 51, at p. 53.

30 See, e.g., Syrian Arab Republic, CDDH/III/SR.57, p. 196; Cameroon and Mali, CDDH/III/SR.57, p. 201.

interpreting an individual's motivation for participation in hostilities. Indeed, as the United Kingdom's Diplock Committee stated in its 1976 report on the recruitment of mercenaries:

any definition of mercenaries which required positive proof of motivation would ... either be unworkable or so haphazard in its application as between comparable individuals as to be unacceptable. Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it.<sup>31</sup>

This concern about the difficulty in judicially assessing an individual's motivation stands in addition to more general concerns as to the desirability of attaching motive to legal status in armed conflict.

The shortcomings of Article 47 are clearest when we read it in the light of the rest of the Protocol. Although the article goes some way to providing a *definition* of mercenary activity, it is of little significance when we consider the *consequences* of mercenary status under Protocol I. The only consequence flowing from Article 47 is that mercenaries are not entitled to combatant or prisoner-of-war status. In other words, Article 47 is presented as an exception to the rules regarding who can be a combatant. However, as Keith notes, the provision is "concerned to isolate a category within a wider group" who, as a matter of law, are not combatants.<sup>32</sup> Article 43.2 of Additional Protocol I defines a combatant as a member of the armed forces of a party to the conflict (with the exception of medical and religious personnel).<sup>33</sup> Yet Article 47.2(e) requires that a mercenary "is not a member of the armed forces of a Party to the conflict". This means that any individual who satisfies the definition of a mercenary is not entitled to combatant status in the first place. Article 47 cannot be considered a true exception to the rules regarding combatant and prisoner-of-war status because, when read together with Article 43, it is effectively rendered meaningless.

When considering the consequences of mercenary status, it is important to note that even those individuals who are classified as mercenaries for the purposes of Additional Protocol I are afforded certain protections under international humanitarian law. Despite being deprived of combatant and prisoner-of-war status, mercenaries are to be treated as non-combatants who have taken part in hostilities. Such individuals are entitled to the protection of the "fundamental guarantees" contained in Article 75 of the same Protocol.<sup>34</sup> The Article 75 fundamental guarantees are broad in scope and include the right to be treated humanely in all circumstances and the right to be protected against

31 Diplock Committee, Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries (UK Cmnd. 6569, 1976), at [7].

32 Kenneth J. Keith, "The present state of international humanitarian law", *Australian Yearbook of International Law*, Vol. 9 (1985), pp. 13–35, at p. 23. See also Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 3rd edn, ICRC, Geneva, 2003, p. 90.

33 Cf. Third Geneva Convention, Art. 4.1.

34 Additional Protocol I, Art. 45.3.

murder, torture, corporal punishment and outrages upon person dignity. Article 75.4 guarantees the right to a fair trial and due process in respect of penal offences. Delegations to the Diplomatic Conference of 1977 were firm in their insistence that mercenaries were to be protected by these fundamental guarantees. Indeed, a number of states explicitly indicated that they would read the article as affording mercenaries the right to be protected by Article 75.<sup>35</sup> Such a position was consistent with the overall aims of the Diplomatic Conference of 1977. Accordingly, the popularly held view that mercenaries receive no protection under international humanitarian law is misguided.

### Mercenary-specific instruments

The primary focus of mercenary-specific conventions has been to criminalize mercenary activity. Many of the definitional difficulties with Article 47 of Additional Protocol I also apply to the mercenary-specific conventions. In terms of the consequences of mercenary status, the conventions depart in a number of respects from the legal position adopted in that article.

#### *The Draft Luanda Convention*

In 1976 the International Commission of Inquiry on Mercenaries produced a Draft Convention on the Prevention and Suppression of Mercenarism in Luanda, Angola (Draft Luanda Convention).<sup>36</sup> The preamble to that convention refers to the drafting states' concern at "the use of mercenaries in armed conflicts with the aim of opposing by armed force the process of national liberation from colonial and neo-colonial domination". Article 1 defines the "crime of mercenarism" as liable to be committed by individuals, groups or associations, representatives of states and states themselves. The elements of the crime are roughly drafted. The relevant legal person is guilty of the crime of mercenarism if he or she, "with the aim of opposing by armed violence a process of self-determination", commits any of the following acts:

- (a) organises, finances, supplies, equips, trains, promotes, supports or employs in any way military forces consisting of or including persons who are not nationals of the country where they are going to act, for personal gain, through the payment of a salary or any other kind of material recompense;
- (b) enlists, enrolls or tries to enrol in the said force;
- (c) allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control

35 See, e.g., the explanations of the representatives for: Italy (CDDH/III/SR.57, p. 193); Australia (CDDH/III/SR.57, p. 195); Portugal (CDDH/III/SR.57 at 198); United States (CDDH/III/SR.57, p. 199); Ireland (CDDH/III/SR.57 at 199); Canada (CDDH/III/SR.57, p. 201); and Sweden (CDDH/III/SR.57, p. 202).

36 Draft Convention on the Prevention and Suppression of Mercenarism (produced by the International Commission of Inquiry on Mercenaries in June 1976).

or affords facilities for transit, transport or other operations of the abovementioned forces.

The Luanda definition of the “crime of mercenarism” is considerably remote from Protocol I’s definition of a mercenary, but it formed the basis for debate and discussion at the Diplomatic Conference of 1977.<sup>37</sup> Importantly, the Draft Luanda Convention was the first product of efforts to deal with mercenaries at a regional level.

### *The Organization of African Unity Convention*

In Libreville in 1977 the OAU adopted the Convention for the Elimination of Mercenarism in Africa (OAU Convention).<sup>38</sup> The OAU Convention is more structured in its approach than the Draft Luanda Convention. Article 1.1 of the OAU Convention mirrors the Protocol I definition of a mercenary in all respects but for that part of the definition that deals with motivation. Whereas Protocol I includes in its criteria the requirement that a person be “motivated to take part in the hostilities essentially by the desire for private gain” and, in fact, be “promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party”, the OAU Convention, in Article 1.1(c), simply requires that a party to a conflict (or its representative) promises the person “material compensation”.

The most significant difference between the OAU Convention and Protocol I, however, is the aspect of criminalization. The OAU Convention’s provisions dealing with criminality are broad and loosely drafted. Under the OAU Convention it is a criminal offence to be a mercenary, and mercenaries are also criminally responsible for any specific criminal acts they commit in course of duty. Pursuant to Article 1.2, the crime of mercenarism is also the subject of unusually extended forms of participation.<sup>39</sup> Article 3 provides that mercenaries are not to enjoy the status of combatants and are not entitled to prisoner-of-war status. Article 7 requires each state party to ensure that the crime of

37 Jean de Preux, “Article 47: Mercenaries”, in Yves Sandoz et al.(eds.), *Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, ICRC, Geneva, 1977, p. 572.

38 Adopted in Libreville, Gabon, on 3 July 1977 and entered into force on 22 April 1985. OAU Doc CM/817 (XXIX) Annex 11 Rev.

39 Like the Draft Luanda Convention, the OAU Convention extends criminal liability to “the individual, group or association, representative of a State and the State itself who with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State, that practises any of the following acts: (a) Shelters, organises, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries; (b) Enlists, enrolls or tries to enrol in the said bands; (c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above mentioned forces”.

mercenarism is “punishable by severest penalties under its laws, including capital punishment”.<sup>40</sup>

### *The United Nations Convention*

The International Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN Convention)<sup>41</sup> was opened for signature in 1989, but did not come into force until October 2001. Like the OAU Convention, the UN Convention is concerned with defining the “crime of mercenarism”, and setting out measures for its enforcement. The UN Convention’s definition of a mercenary is divided into two parts. The first part is similar in its terms to Protocol I’s definition, except that it excludes the requirement that the person “does in fact take part in the hostilities”.<sup>42</sup> This alone renders the UN Convention’s definition of mercenary status broader than that in Protocol I. However, part two of the definition is broader still. It states:

2. A mercenary is also any person who, in any other situation [that is, not in the context of an armed conflict]:
  - (a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
    - (i) overthrowing a Government or otherwise undermining the constitutional order of a State; or
    - (ii) undermining the territorial integrity of a State;
  - (b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
  - (c) is neither a national nor a resident of the State against which such an act is directed;
  - (d) has not been sent by a State on official duty; and
  - (e) is not a member of the armed forces of the State on whose territory the act is undertaken.

As such, the UN Convention provides a much lower threshold for assigning “mercenary” status to an individual. The implications of this weakening of the definition are compounded by the fact that the UN Convention criminalizes all mercenary activity.

40 To this extent, the OAU Convention conflicts with Article 75.2(iii) of Protocol I, which prohibits corporal punishment.

41 Opened for signature 4 Dec. 1989, 29 ILM 91 (entered into force 20 Oct. 2001), annex to GA Res 34, UN GAOR, 72nd plen. mtg, 44th sess., supp. no. 43, at 590, UN Doc A/44/43 (1989).

42 UN Convention, Art. 1.1; cf. Protocol I, Art. 47.1(b).

## *The International Law Commission Draft Code*

The International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind (ILC Draft Code)<sup>43</sup> also made specific reference to mercenaries. Article 23.2 defined a mercenary in the same terms as the OAU Convention, except that (like the UN Convention) it did not include the requirement that a mercenary "does in fact take part in the hostilities".<sup>44</sup> The crime of "recruitment, use, financing and training of mercenaries" was omitted from the second reading of the ILC Draft Code in 1995.<sup>45</sup> The ILC Draft Code formed the basis of the initial drafting of the Rome Statute for the International Criminal Court. In line with the ILC's position, the International Criminal Court does not hold jurisdiction over a "crime of mercenarism", although the matter may be revisited when states parties come to consider the definition of aggression, in accordance with Articles 5, 121 and 123 of the Rome Statute.

## **Concluding remarks**

It is clear that not all corporate actors fall within the definition of a mercenary under international law. Indeed, due to the narrow scope of the definitions, very few individuals are classified as mercenaries. However, in singling out mercenaries as a specific category of actor in armed conflict, Protocol I and the mercenary-specific conventions deliver a firm message that mercenarism (or perhaps, more broadly, corporate combat) is at least discouraged under international law.

There are some significant differences between international humanitarian law and the mercenary-specific conventions. The major point of distinction is that Protocol I does not criminalize mercenary activity, whereas the mercenary conventions do. The only consequence of Article 47 of Protocol I is to deprive the mercenary of combatant or prisoner-of-war status. As I have discussed, an individual who falls within the Article 47.2 definition is not entitled to combatant status in any case. It is reasonable to suggest that international humanitarian law's treatment of mercenaries is more symbolic than practical. The mercenary-specific conventions, on the other hand, spell out more significant consequences for the mercenary in terms of criminal sanctions. The mercenary can be criminally punished for his or her *status* as a mercenary, as well as for any other criminal conduct in the course of being a mercenary. However, the mercenary-specific conventions have not translated into a significant body of prosecutions for the crime of mercenarism. With a few notable exceptions, such as the Angolan

43 The Draft Code, which included "recruitment, use, financing and training of mercenaries" in its list of international crimes, was adopted by the ILC on first reading, at its forty-third session in 1991. *The Work of the International Law Commission*, 6th edn, UN, Geneva, 2004, Vol. 1.

44 See UN Convention, Art 1.1.

45 At its 47th session, in 1995, the Commission considered the 13th report of the Special Rapporteur. The Special Rapporteur had omitted from his report six of the 12 crimes included on first reading, including "recruitment, use, financing and training of mercenaries". UN, above note 43.

mercenary trials,<sup>46</sup> most reported “mercenary” prosecutions have in fact been prosecutions under existing domestic law, with charge sheets that make no mention of the word “mercenary”.<sup>47</sup> To this extent, the implications of the mercenary-specific conventions have not been as far-reaching as was perhaps originally anticipated.

Importantly, while Additional Protocol I expressly states that mercenaries are not entitled to combatant or prisoner-of-war status, mercenaries do not fall into a legal vacuum. They are still entitled to the Protocol’s fundamental guarantees. This is of critical significance, as it is in line with the general effort to ensure that international humanitarian law’s protection extends to the widest possible range of individuals in armed conflict.

The mercenary provisions of international conventions are likely to be the subject of increased debate (and, perhaps, revision), in the light of the rise of the private military industry. If there is to be law reform in this area, it is important to bear in mind the difficulties with the existing conventional law. At the same time it is important to ensure that individuals are protected, as well as bound, by international humanitarian law in situations of armed conflict. However strong the stand nations might take in prohibiting mercenary activity, it is of critical importance that mercenaries be entitled to the fundamental guarantees of international humanitarian law and, where responsible for committing criminal offences, be duly prosecuted according to law.

46 In the famous Angolan trials of 1976, the defendants were convicted of “the crime of being mercenaries ... in a mercenary war of aggression carried out with the aim of extinguishing the independence of the country, enslaving, oppressing, and dividing the Angolan people and pillaging the natural resources of the territory for the benefit of foreign, neo-colonialist and imperialist interests”: M. S. Hoover, “The laws of war and the Angolan trial of mercenaries: Death to the dogs of war”, *Case Western Reserve Journal of International Law*, Vol. 9(2) (1977), pp. 323–406, Appendix 1 (Indictment). Note, however, that the Angolan mercenary trials preceded the adoption of the OAU and UN Mercenary Conventions.

47 For example, in June 2006, a French court convicted Bob Denard of “belonging to a gang who conspired to commit a crime”. While Bob Denard was widely dubbed a “mercenary” in the media for his role in four attempted coups in the Comoros Islands, he was not convicted of a specific “mercenary” offence. See “French ‘dog of war’ spared jail”, *BBC News* (UK), 20 June 2006, available at <<http://news.bbc.co.uk/2/hi/europe/5097618.stm>> (visited 2 Nov. 2006).

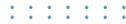
# Promoting compliance of private security and military companies with international humanitarian law

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## **Abstract**

*Private security and military companies have become a ubiquitous part of modern armed conflict and post-conflict reconstruction. Their diverse clients include governments in the developed and developing world alike, non-state belligerents, international corporations, non-governmental organizations, the United Nations, and private individuals. The implications of this proliferation of private security and military companies for international humanitarian law and human rights are only beginning to be appreciated, as potential violations and misconduct by their employees have come to light in Iraq and Afghanistan. The author critically examines the theoretical risks posed by private military and security company activity with respect to violations of international humanitarian law and human rights, together with the incentives that these companies have to comply with those norms. Empirical evidence is also presented to expand on this theoretical framework. Taking a multidisciplinary approach, the author draws on law, international relations theory, criminology, economics, corporate strategy and political economy, as well as psychology and sociology, to analyse the competing “risk-factors” and “compliance levers” that interact at each level of private military and security company activity to enhance or reduce the likelihood of a violation occurring. These findings are then applied by the author to assess emergent measures to deal with private security and military companies outside the legal sphere, including a programme of the International Committee of the Red Cross and the advent of the International Peace Operations Association.*



## Introduction

Private security companies<sup>1</sup> and private military companies<sup>2</sup> have become a ubiquitous part of modern armed conflict and post-conflict reconstruction.<sup>3</sup> The implications of this proliferation of private military and security company activity for international humanitarian law<sup>4</sup> are only beginning to be realized as potential violations by their employees come to light.<sup>5</sup>

Despite a wealth of legal and political science literature on private security and military companies, no truly systematic analysis has been undertaken to illuminate the theoretical risks of violations of international humanitarian law by such companies and the incentives they have to comply with it. The result is an incomplete picture that fails to adequately appreciate the complex interrelationship between each component of private military and security company activity and their impact on compliance with international humanitarian law. Compounding this blind spot in the literature is the limited recourse that has been had to relevant multidisciplinary tools of analysis and empirical evidence.

Recognizing these concerns, this article sets out to identify and examine critically examine the competing “risk factors” and “compliance levers” (or incentives) that interact at each level of private military and security company

- 1 Private security companies are companies that provide defensive armed protection for premises or people, capable of defending against guerrilla forces or serving as personal bodyguards. By contrast, Non-lethal services providers (NSPs) provide logistical support such as de-mining, laundry and food services. Doug Brooks, “Protecting people: The PMC potential: Comments and suggestions for the UK Green Paper on regulating private military services”, 25 July 2002, pp. 2–3.
- 2 Private military companies include both “active PMCs willing to carry weapons into combat, and passive PMCs that focus on training and organizational issues”. Ibid.
- 3 The industry is expected to grow from US\$55.6 billion in 1990 to \$210 billion by 2010. Paul Keilthy, “Private security firms in war zones worry NGOs”, 11 August 2004, online at AlertNet, <<http://www.alertnet.org/>> (visited 23 October 2006).
- 4 “[T]he personnel of private military and security companies must respect international humanitarian law and can be prosecuted if they commit war crimes.” See “The ICRC to expand contacts with private military and security companies”, International Committee of the Red Cross, 4 August 2004, online at <<http://www.icrc.org/>> (visited 23 October 2006).
- 5 See, e.g., in Afghanistan, *United States v. Passaro*, No. 5:04-CR-211-1, 2004 WL 1431014 (E.D.N.C.) (Central Intelligence Agency contractor charged with two counts of assault with a dangerous weapon with intent to do bodily harm, and two counts of assault resulting in serious bodily injury against a detainee); Shaista Shameem, “Report of the Special Rapporteur: Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”, Commission on Human Rights, 61st Sess., UN Doc. E/CN.4/2005/14, 8 December 2004, p. 14 (three United States contractors found guilty by an Afghan court in September 2004 for torture, running a private prison and illegal detention); in Iraq, Major General Taguba, *Article 15–6 Investigation of the 800th Military Police Brigade*, 2004, online at <[http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf)> (Taguba Report, implicating private military and security company interrogators and translators in the abuse of Iraqi prisoners at the Abu Ghraib detention facility) (visited 23 October 2006); but see HC 577 Private Military Companies: Options for Regulation 2001–02, Foreign and Commonwealth Office (United Kingdom), The Stationary Office, London, 12 February 2002, pp. 17, 19 (hereinafter UK, Options for Regulation) (private military and security companies often respect international humanitarian law and human rights better than national armies or peacekeeping forces).

activity to enhance or reduce the likelihood of a violation of international humanitarian law. The relevant levels of analysis are (i) states of incorporation of private security and military companies; (ii) states from which personnel of private security and military companies are recruited; (iii) states in which private security and military companies actually operate; (iv) clients of private security and military companies; (v) the private security and military company industry as a whole; (vi) individual private security and military firms (including their officers and directors); and (vii) employees of private security and military companies. At each of these levels, the strongest risk factors and compliance levers are explored from relevant multidisciplinary perspectives, including law, international relations, criminology, economics, management and political economy, as well as psychology and sociology. Empirical evidence is offered to illustrate the theoretical findings. This research concludes by linking these findings with emergent approaches *outside* formal law to promote private military and security company compliance with international humanitarian law.

## The compliance framework: risk factors and compliance levers

International relations scholar Elke Krahnmann describes the “functional fragmentation” of global security away from a state-centric model towards “multiple and separate authorities, including public or private actors”.<sup>6</sup> Nowhere is this more apparent than in private military and security company activity, with its many potential sites of normativity. There are risks that each player will contribute to an international humanitarian law violation occurring on the ground, but paradoxically, at the same time they have often powerful incentives to promote compliance. It is the result of this contest of risks and incentives that will largely determine whether international humanitarian law is respected. Deconstructing the main risks and countervailing incentives at play is the aim of the present analysis.

### State of incorporation

Most private security and military companies are incorporated in the United States, the United Kingdom and South Africa.<sup>7</sup> States of incorporation may contribute to the risk of international humanitarian law violations owing to the “charter shopping” phenomenon, weak extraterritorial regimes and the privileging of foreign policy interests rather than international humanitarian law concerns.

6 Elke Krahnmann, “The privatization of security governance: Developments, problems, solutions”, 1/2003, *Arbeitspapiere zur internationalen Politik*, p. 6, online at <<http://www.politik.uni-koeln.de/jaeger/downloads/aipa0103.pdf>> (visited 23 October 2006).

7 Carlos Ortiz, “Regulating private military companies: States and the expanding business of commercial security provision”, in Kees van der Pijl et al. (eds.), *Global Regulation: Managing Crises after the Imperial Turn*, Palgrave Macmillan, New York, 2004, p. 211.

Conversely, it is generally in the reputational and economic interests of these states to promote compliance with international humanitarian law.

### *The contribution of states of incorporation to risk of violations*

*Charter shopping.* Where the “legal environment” becomes too restrictive, companies may relocate to a more favourable jurisdiction, engaging in an economic phenomenon known as “charter shopping”.<sup>8</sup> When private security and military companies engage in charter shopping, this may contribute to the risk of an international humanitarian law violation if their new state of incorporation is one where “regulation is at best lax and often non-existent”.<sup>9</sup> There is anecdotal evidence that charter shopping took place after South Africa adopted laws in 1998 which the private military and security company industry denounced as “over-regulation” and “ungainly”.<sup>10</sup> Firms threaten that they “can become very nomadic in order to evade nationally applied legislation which they regard as inappropriate or excessive”.<sup>11</sup> However, this risk should not be overstated, because “companies [which] choose to base themselves offshore in order to avoid scrutiny ... pay a price in terms of perceived lack of legitimacy”.<sup>12</sup>

*The weakness of extraterritorial jurisdiction schemes.* With the notable exception of the United States and South Africa, most states are reluctant to exercise extraterritorial jurisdiction over their private security and military companies.<sup>13</sup> Even where laws authorize the extraterritorial regulation of national firms, there are significant monitoring problems.<sup>14</sup> Given that states of incorporation are generally unwilling or unable to monitor the international humanitarian law compliance of their private security and military companies (unless they are also the clients of those firms), there is an enhanced risk that violations will go undetected and unpunished, contributing to a sense of impunity that may further increase the likelihood of international humanitarian law violations recurring.

*Privileging foreign policy interests.* Private security and military companies may be an important extension of the foreign policy of their states of incorporation.

8 See generally Jacob S. Ziegel et al., *Cases and Materials on Partnerships and Canadian Business Corporations*, 3rd edn, Vol. 1, Carswell, Toronto, 1994, pp. 248–51.

9 Ortiz, above note 7, p. 218.

10 Brooks, above note 1, p. 5. South Africa is considering stricter legislation that could heighten these concerns: see *Prohibition on Mercenary Activities and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill, 2005* (South Africa) (on file with author).

11 “Private military companies: Independent or regulated”, Sandline International, 28 March 1998, p. 3, online at <<http://www.sandline.com/white/regulation.doc>> (visited 24 October 2006).

12 Henry Cummins, “Perception and profit: Understanding commercial military and security service provision”, Discussion Paper, Centre for Studies in Security and Diplomacy: University of Birmingham, 14 June 2002, p. 6; see also UK, *Options for Regulation*, above note 5, p. 21.

13 See generally, Ortiz, above note 7, pp. 217–218.

14 Ellen L. Frye, “Private military firms in the new world order: How redefining “mercenary” can tame the “dogs of war””, *Fordham Law Review*, Vol. 73 (2005), p. 2647.

For example, the United States Munitions List and International Traffic in Arms Regulations, which also govern military service contracts, are “updated and amended to reflect changing foreign policy goals”.<sup>15</sup> In the 1990s, these regulations prohibited US-based private security and military companies from working for certain parties in the former Yugoslavia, and in 2002 for the government of Zimbabwe.<sup>16</sup> The United Kingdom has stated that “it would retain reserve powers to prevent [private security and military companies] from undertaking a contract if it ran counter to UK interests or policy”.<sup>17</sup> Even without regulations in place, some British private military and security companies have a “stated policy ... to consult the Government before entering into any contract with a foreign client”.<sup>18</sup>

While both the United States and the United Kingdom have recognized detailed human rights and international humanitarian law commitments governing private military and security company activity in voluntary codes of conduct, such as the UN Global Compact “Voluntary Principles on Security and Human Rights”,<sup>19</sup> such obligations are conspicuously absent in national legislation. This strongly suggests that national regulation of the private military and security company industry has very little to do with promoting compliance with international humanitarian law; rather it is overwhelmingly concerned with the foreign policy and national security interests of states in which such companies are incorporated.

### *The incentives of states of incorporation to promote compliance*

*Reputational concerns and diplomatic repercussions.* International legal compliance literature postulates, among other things, that states “obey international law when it serves their short- or long-term self-interest to do so”.<sup>20</sup> In this case, states of incorporation will “ensure respect”<sup>21</sup> for international humanitarian law when it is in the interests of their reputation to do so. There is strong evidence that national regulatory activity is triggered by allegations of improper conduct by private security and military companies abroad.

South Africa faced international pressure to control notorious firms based there – notably Executive Outcomes – leading to the enactment of the Regulation of Foreign Military Assistance Act 1998.<sup>22</sup> Parliamentary consideration of private

15 Ortiz, above note 7, p. 213.

16 Ibid.

17 UK, Options for Regulation, above note 5, p. 25.

18 “We don’t operate in the shadows”, *Telegraph* (United Kingdom), Issue 1632, 3 December 1999, online at <<http://www.telegraph.co.uk/>> (visited 24 October 2006).

19 See UN Global Compact, Voluntary Principles on Security and Human Rights, posted 24 June 1992, online at <<http://www.unglobalcompact.org/>> (visited 24 October 2006).

20 Harold Hongju Koh, “Transnational legal process”, *Nebraska Law Review*, Vol. 75 (1996), p. 199; but see Markus Burgstaller, *Theories of Compliance with International Law*, Martinus Nijhoff, Leiden, 2005, p. 157–65.

21 See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949 (First Geneva Convention), 75 UNTS 973, Art. 1, online at <<http://www.icrc.org/>> (visited 24 October 2006).

22 Ortiz, above note 7, p. 215; Regulation of Foreign Military Assistance Act (South Africa), No. 15 of 1998.

military and security company regulation in the United Kingdom was spurred by the “Arms to Africa” affair involving a former British colonel, Tim Spicer, of the now defunct Sandline International, which had offices in London.<sup>23</sup> In the United States there has been a flurry of legislative activity in the wake of the prisoner abuse scandal at Abu Ghraib, in which US contractors were implicated.<sup>24</sup>

*Economic interest in the legitimacy of national private military and security companies.* Henry Cummins argues that states of incorporation have an economic interest in fostering a perception that their private military and security companies are legitimate.<sup>25</sup> While it is true that many states of incorporation potentially benefit from the tax revenues and the contribution to gross national product of their said companies, the strength of this incentive should not be overstated. It is also based on the assumption that “bad” private security and military companies are unprofitable – an assumption that is challenged below.

### States of personnel

Private military and security company personnel hail from an increasingly diverse group of states. While most personnel were traditionally ex-military members from developed countries, there is now a trend for private security and military companies to hire former combatants from developing countries such as Colombia, Guatemala, El Salvador, Nicaragua and Chile.<sup>26</sup> In Iraq local recruitment is increasing, with the effect that the ratio of expatriate to local staff is 1:10. This has caused problems for firms such as Aegis Defense Systems, which failed a recent US government audit that found that its Iraqi employees were insufficiently vetted.<sup>27</sup>

### *The contribution of states of personnel to risk of violations*

*Monitoring problems and weak extraterritorial enforcement.* As discussed in detail above with respect to states of incorporation, states of personnel are even less likely to be in a position to monitor geographically remote violations of international humanitarian law by their nationals. Extraterritorial claims of

23 UK, Options for Regulation, above note 5, p. 6.

24 See, e.g., Contractor Accountability Act of 2004 (United States), HR 4387, 18 May 2004; MEJA Clarification Act of 2004 (United States), 108th Congress, 2nd Sess., HR 4390, 19 May 2004; Stabilization and Reconstruction Civilian Management Act of 2005 (United States), 109th Congress, 1st Sess., S 209, 31 January 2005; International Security Enhancement Act of 2005 (United States), 109th Congress, 1st Sess., HR 1361, 17 March 2005; Transparency and Accountability in Security Contracting Act (United States), 109th Congress, 1st Sess., 26 April 2005; Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, S 2400, § 864, 865, 1021.

25 See Cummins, above note 12, p. 9.

26 Sonni Efron, “Troops for hire”, *Edmonton Journal*, 2 August 2005, p. E11 (Proquest); see also Richard Norton-Taylor, “Army fears loss of top troops to private firms”, *Guardian* (United Kingdom), 8 August 2005, online at Corpwatch, <<http://www.corpwatch.org/>> (visited 24 October 2006).

27 Tony Capaccio, “U.S. military tightens rules for contractors in combat zones”, *Bloomberg*, 27 October 2005, online at IPOA, <<http://www.ipoaonline.org/>> (visited 24 October 2006).

jurisdiction solely on the basis of nationality of the offender remain relatively rare in practice.

### *The incentives of states of personnel to promote compliance*

*Diplomatic repercussions.* Throughout history and up to the present day, many states have opted to impose prohibitions on their citizens engaging in military activity abroad without the approval of the sovereign or state, reflecting foreign policy concerns including the diplomatic repercussions of being perceived as indirectly participating in a war.<sup>28</sup> Most recently South Africa, for example, was concerned that it was being seen as indirectly supporting the US-led war in Iraq, as well as a coup plot in Equatorial Guinea, because significant numbers of its nationals were allegedly working for private security and military companies in those countries.<sup>29</sup>

However, the diplomatic incentives of states of personnel are likely to be weaker than similar incentives of states of incorporation. This is due to the secrecy within the industry, which means that the identities of private military and security company personnel are usually kept in strict confidence.<sup>30</sup>

### State of operation

Private security and military companies have a significant operational presence in over fifty states around the world.<sup>31</sup> The most high-profile incidents of private military and security company activity since the end of the Cold War have taken place in the former Yugoslavia, Sierra Leone, Angola, Papua New Guinea, Afghanistan and Iraq. Some states, such as Angola, actually required foreign companies to “provide their own security by hiring PSCs”.<sup>32</sup> States where private security and military companies are active have relatively strong incentives to curb violations of international humanitarian law committed by these companies when they act for non-state clients. However, this is limited to the extent to which the

28 See, e.g., *A Proclamation Prohibiting His Majesties Subjects to Enter into the Service of Foreign Princes and Lands*, Sovereign, 1685–1688: James II, England and Wales, reproduced in *Early English Books Online: 1641–1700*, UMI, Ann Arbor, Mich., 1999–2005, p. 962:5; Penal Code (Sweden), 1999:36, c. 18: s. 4, online at Buffalo Criminal Law Center, <<http://wings.buffalo.edu/law/bclc/sweden.pdf>> (visited 24 October 2006); Crimes (Foreign Incursions and Recruitment) Act 1978 (Australia), Act No. 13 of 1978 as amended to Act No. 104 of 2004, s. 6(1); Foreign Enlistment Act (Canada), R.S.C. 1985, c. F-28; Shameem, above note 5, p. 7 (Namibian law).

29 Claude Voillat, “Private military companies: A word of caution”, online at Humanitarian Practice Network, <<http://www.odihpn.org/report.asp?ID=2675>> (visited 24 October 2006); see also “Memorandum on the object of the Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill, 2005” (South Africa) (on file with author).

30 See, e.g., CACI, “Employees in Iraq”, 4 November 2004, online at <[http://www.caci.com/iraq\\_faqs.shtml](http://www.caci.com/iraq_faqs.shtml)> (visited 24 October 2006).

31 Shameem, above note 5, p. 12.

32 *Private Military Firms: Working Group on Private Military Companies*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, 2004, p. 12.

state of operation has full control over its territory – something that may be doubtful during an armed conflict.

### *The contribution of states of operation to risk of violations*

*Loss of full control over national territory; insufficient resources for monitoring.* The risk of international humanitarian law violations by private security and military companies in states of operation stems mainly from practical considerations resulting from the very existence of an armed conflict. States of operation frequently lose some measure of effective control over their national territory during an armed conflict and have insufficient resources available to devote to monitoring private security and military companies. For example, as an occupying power, and thus effectively acting as the state of operation, only in the rarest cases has the US military intervened to deal with allegations of improper private military and security company behaviour. Indeed, when personnel from Zapata Engineering were detained in Fallujah by US marines for allegedly shooting indiscriminately at civilians, this action only took place when the soldiers actually witnessed the alleged violation firsthand.<sup>33</sup> Likewise, in Afghanistan it was only after the United States as the state of operation had regained almost full control over its territory that it appears to have begun to investigate and prosecute private military and security company employees for alleged violations.<sup>34</sup>

Additionally, private security and military companies that are hired by opposing parties in the conflict are likely simply to be treated as “the enemy”, and will thus be ignored as an independent player with which to engage in a dialogue concerning international humanitarian law compliance.

### *Incentives of states of operation to promote compliance*

*Protecting the political support base from violations.* Political economy theory suggests that government officials will respond to situations that could affect their individual interests as politicians, such as their political base weakening or turning against them.<sup>35</sup> For example, empirical studies have found a direct correlation between increases in defence spending and electoral cycles in states facing armed conflict.<sup>36</sup> States of operation therefore have an incentive to regulate private security and military companies working in their territory, which is in line with their obligations under international law “to ensure respect for IHL [international

33 “Army Chief notes “problematic” potential of armed contractors on the battlefield”, *Defense Daily International*, Vol. 6, Issue 35, 9 September 2005, p. 1 (Proquest).

34 In September 2004, three American private military company personnel were sentenced to 10 years’ imprisonment by an Afghan court for torture, running a private prison and illegal detention: Shameem, above note 5, p. 14.

35 See, e.g., “Administrative & civil service reform”, World Bank Group, online at <<http://www1.worldbank.org/prem/acr/mainpage.html>> (visited 24 October 2006).

36 Alex Mintz and Michael D. Ward, “Electoral cycles and defence spending in Israel: An analysis of quarterly data”, in Andrew L. Ross (ed.), *The Political Economy of Defence: Issues and Perspectives*, Greenwood Press, New York, 1991, pp. 135–7, 150–1.

humanitarian law] and exercise what's known as "due diligence", by doing what's necessary to prevent and punish violations committed by individuals or entities operating on or from their territory".<sup>37</sup>

In Papua New Guinea the activities of Sandline International became a major election issue such that "every sitting Member of Parliament had to face this criticism whether they were part of the Government or not".<sup>38</sup> In Iraq, the Coalition Provisional Authority responded to the proliferation of private security and military companies by promulgating Coalition Provisional Authority Memorandum No. 17, which, *inter alia*, requires all private security and military companies, their officers and personnel to be "vetted" "to ensure that any criminal or hostile elements are identified".<sup>39</sup> Private security and military companies risk forfeiture of a US\$25,000 bond and the suspension or revocation of their operating licence if there is a reasonable basis for believing that they have violated applicable law.<sup>40</sup> They may be permitted to continue operations if they promptly terminate the employment of personnel who allegedly violated the law, and co-operate with law enforcement officials.<sup>41</sup>

## Clients

The clients of private security and military companies are quite diverse and include states, non-state armed groups, corporations, non-governmental organizations (NGOs), international organizations such as the United Nations, and private individuals.<sup>42</sup> Sandline International founder Tim Spicer ominously admitted that "our clients may not be democratically elected in terms we all understand in the West, but they are supported".<sup>43</sup> Despite this diversity of clients, there is some degree of similarity in the risks and incentives regarding the private military and security companies that they hire.

### *Contribution of clients to risk of violations*

"*Othering*" perpetrators. Clients may hire private security and military companies to undertake certain activities in order to distance themselves, politically or perhaps even legally, from improper or unpopular activities by those companies they hire.<sup>44</sup>

37 ICRC, above note 4.

38 *Aita Ivarato v. Peti Lafanama and Electoral Commission of Papua New Guinea* [1998] PGSC 27 (28 August, 1998) (Supreme Court of Papua New Guinea) (PacLII).

39 "Coalition Provisional Authority Memorandum Number 17: Registration Requirements for Private Security Companies (PSC)" (Iraq, CPA/MEM/26 June 2004/17, 26 June 2004, s. 2(5).

40 *Ibid.*, ss. 3(3), 4(2)(b).

41 *Ibid.*, s. 4(2)(b).

42 Even the ICRC admits to hiring these firms, but "only in exceptional cases and exclusively for the protection of premises". ICRC, above note 4.

43 Andrew Gilligan, "Inside Lt. Col. Spicer's new model army", *Telegraph* (United Kingdom), Issue 1276, 22 November 1998, online at <<http://www.telegraph.co.uk/>> (visited 24 October 2006).

44 For an example of *political* distancing generally, see Kevin A. O'Brien, "Leash the dogs of war", *Financial Times*, 20 February 2002, online at Global Policy Forum, <<http://www.globalpolicy.org/>> (United States hiring DynCorp to conduct the Kosovo monitoring force) (visited 24 October 2006).

Criminologists Ruth Jamieson and Kieran McEvoy argue that states attempt to “obfuscate their responsibility in state crime through “othering” both perpetrators and victims”,<sup>45</sup> including “the use of private-sector mercenaries and military firms to outsource state deviance”.<sup>46</sup> Political scientist Peter Singer agrees that a key risk of private security and military companies is that they “allow governments to carry out actions that would not otherwise be possible, such as those that would not gain legislative or public approval”.<sup>47</sup> State crime may be circumscribed by media exposure, but criminologists caution that the power of this control is variable, depending on the ideological alignment of media outlets and their access to or ability to discover violations.<sup>48</sup> This combination of reliance on private security and military companies to “do the dirty work” and removal of democratic oversight is a troubling prospect that increases the risk of a violation of international humanitarian law.

It has also been suggested that “the large rewards offered for the capture of Al-Qaida members in Afghanistan have contributed to the expansion of private security activity in the country”.<sup>49</sup> This “reward” approach further distances the United States from allegations of alleged wrongdoing, since there is no direct relationship between these enterprising private security and military companies and the US government.

*Market demand for “aggressive” or “disreputable” services.* Economic theory suggests that market demand for a particular service will result in the emergence of a supplier willing to offer its services if it is profitable to do so. Even private security and military companies themselves have admitted that “the commercial reward being offered by a particular prospective client may simply be too great for the company to ignore, or perhaps the company is a maverick and more interested in working for unrecognised rebel groups rather than legitimate governments.”<sup>50</sup>

Deborah Avant has observed an increasingly strong pattern in the US hiring of private security and military companies to select so-called “cowboy” firms – those which take a more aggressive posture in the field. The consequence is that “the more the US chooses cowboy firms the more it is likely to influence a change in the norms that govern PSCs”.<sup>51</sup> In a more nuanced example, “MPRI [a US private security company] employees admitted that it was sometimes tough to

45 Ruth Jamieson and Kieran McEvoy, “State crime by proxy and juridical othering”, *British Journal of Criminology*, Vol. 45 (2005), p. 504.

46 Ibid.

47 P. W. Singer, “Outsourcing war”, *Foreign Affairs*, Vol. 84, Issue 2 (2005), p. 119 (Proquest).

48 Jeffrey Ian Ross, “The future of controlling state crime: Where do we go from here?”, in Jeffrey Ian Ross (ed.), *Controlling State Crime*, 2nd edn, Transaction Publishers, London, 2000, p. 423; see also “Media complicity in a “fine little war””, in Christina Jacqueline Johns and P. Ward Johnson (eds.), *State Crime, the Media, and the Invasion of Panama*, Praeger, Westport, Connecticut, 1994, p. 63

49 Shameem, above note 5, p. 14.

50 Sandline, above note 11, p. 2.

51 Deborah D. Avant, *The Market for Force: The Consequences of Privatizing Security*, Cambridge University Press, Cambridge, 2005, p. 228.

walk the line between advocating strict and clear adherence to the laws of war and developing a mutual understanding with the personnel they were training so as to better influence their judgments and behaviour in the future”.<sup>52</sup> Other implications of this phenomenon at the individual private military and security company level are discussed in detail later.

*Poor contract administration.* Management studies have shown that poor contract management and administration is a systematic problem, given that it is a “manual, time-consuming process” and because contract data are a mix of qualitative and quantitative findings that are not easily amalgamated for tracking and synthesis.<sup>53</sup> This is an especially serious problem, given that the “monitoring and sanctioning capacity of consumers” has been recognized as an important aspect of establishing client control over private military and security company activity,<sup>54</sup> but such management and oversight are frequently non-existent in practice.<sup>55</sup> Management studies have also shown that most service failures stem from misunderstanding by the customer as to how the service delivery process is to take place.<sup>56</sup> This is apparent in the Fay Report into prisoner abuses at Abu Ghraib, which found that US soldiers “never received any parameters or guidance as to how the CACI [a US private military company] personnel were to be utilized”, and they were “never informed that the Government could reject unsatisfactory CACI employees”.<sup>57</sup>

*Criminal liability of clients difficult to establish.* In many national jurisdictions, there are legal barriers to holding corporate clients criminally liable for the conduct of the private security and military companies they hire,<sup>58</sup> and these may add to the risk of an international humanitarian law violation occurring. A provision at the international level that would have allowed the International Criminal Court to have jurisdiction over corporate entities was notably rejected during negotiations.<sup>59</sup>

52 Ibid., p. 224.

53 Ashif Mawji, “Compliant or competitive: How about both?”, *Contract Management*, Vol. 45, Issue 8 (2005), p. 38, figure 1 (Proquest). For best practices in contract administration, see Gregory A. Garrett et al., “Managing contracts in turbulent times: The contract management maturity model”, *Contract Management*, Vol. 45, Issue 9 (2005), p. 48 (Proquest).

54 Avant, above note 51, p. 220.

55 Singer, above note 47.

56 Anders Gustafsson and Michael D. Johnson, *Competing in a Service Economy: How to Create a Competitive Advantage through Service Development and Innovation*, Jossey-Bass, San Francisco, 2003, p. 50.

57 Major-General George R. Fay, *AR 15–6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* (Fay Report), August 2004, p. 50, online at United States Department of Defense, <<http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>> (CACI was the firm hired to provide contractor interrogators at Abu Ghraib) (visited 24 October 2006).

58 ICRC, above note 4.

59 Rebecca Bratspies, ““Organs of society”: A plea for human rights accountability for transnational enterprises and other business entities”, *Michigan State Journal of International Law*, Vol. 13 (2005), pp. 25–7.

### *Incentives of clients to promote compliance*

*State responsibility for state clients.* The international law of state responsibility offers a limited counterbalance to the risk of “othering” discussed above. Under the Draft Articles on Responsibility of States for Internationally Wrongful Acts, a client state could incur international responsibility for violations of international humanitarian law committed by its private military and security companies if that firm was (a) empowered by law to exercise governmental authority; (b) acting on the instructions of, or under direction and control of, that state; or (c) exercising de facto governmental authority in absence/default of governmental officials.<sup>60</sup> Nevertheless, state responsibility remains a largely theoretical exercise that has only been infrequently invoked in practice. It is also significant that the US Department of Defense recently adopted regulations on private military and security company contractors which could have the effect of limiting some aspects of state responsibility of the United States for international humanitarian law violations committed by their contractors. These instructions specify that “functions and duties that are *inherently governmental* are barred from private sector performance.”<sup>61</sup>

*Market demand for “reputable” services.* A key distinction must be made between clients who hire private security and military companies with the expectation – as a purpose or contingency – that they may fail to fully respect international humanitarian law (as discussed above), and those who demand strict adherence to international humanitarian law norms. Some private security and military companies recognize that many clients have an interest in hiring firms that are “internationally acceptable”, and for this reason they favour a regime of certification.<sup>62</sup> Clients that demand “reputable” private security and military companies’ services may enhance compliance with international humanitarian law more generally throughout the market. So-called “blue chip” clients, such as the United Nations and the International Committee of the Red Cross (ICRC), have extremely strong incentives to only hire private military and security companies with a spotless record of international humanitarian law compliance. However, the market power of these international organizations is by no means predominant. The consequences of a market split between consumer demand for “disreputable” and “reputable” private military and security company services may be significant:

60 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted at 53rd Sess., November 2001, Arts. 5, 8, 9, online at ILC, <<http://www.un.org/law/ilc/>> (visited 24 October 2006). See also ICRC, above note 4; and see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986 (for “effective control” test).

61 US Department of Defense, *Instruction No. 3020.41: Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, 3 October 2005, s. 6.1.5 (emphasis added).

62 Sandline International, above note 11, p. 3.

Those who pay are both states and non state actors – to what degree will these different types of consumers come to agreement about what constitutes legitimate behavior or legitimate authorization? If they do not, *competing norms should weaken the hold of any norm on behavior*.<sup>63</sup>

*Client interest in proper service delivery and contractual protections.* Clients have a general economic and legal interest in obtaining what they contracted for – no more and no less. They accordingly have an incentive to ensure the proper delivery of private military and security company services, in the course of which international humanitarian law violations (where they are unanticipated) constitute a breach of the terms of service. An activist approach by “reputable” clients would see them demanding contractual mechanisms to monitor and punish violations of international humanitarian law by the private security and military companies they hire. According to the International Peace Operations Association (IPOA), a US-based industry association of private military and security companies, “contractual obligations can be much more specific and invasive than general guidelines and regulations. They could include military observers, increased transparency and detailed financial and legal penalties for noncompliance”.<sup>64</sup>

For example, the US Department of Defense’s contract with Titan Inc. to provide interrogation linguists at Abu Ghraib included a clause “that allows the Contracting Officer to direct the contractor to remove linguists from the theatre in which they are performing. This clause has been invoked on occasion for misconduct.”<sup>65</sup> But the limitations on any client’s ability to properly manage a contract must be borne in mind, as discussed above. It has also been argued that “in general, market mechanisms are blunt tools and markets offer fewer pathways for consumers to explain their choices than hierarchies offer to superiors.”<sup>66</sup>

*Civil liability of clients.* International legal scholars have pointed out that companies may be held civilly liable under the US Alien Tort Claims Act<sup>67</sup> for grave breaches of international humanitarian law.<sup>68</sup> Some have argued that there is a basis in existing case-law for corporate clients to be liable for international humanitarian law violations if there is a “substantial degree of cooperation”

63 Deborah Avant, “Market allocation of force and the prospects for global security professionals”, Conference “Beyond Terror: A New Security Agenda”, 3–4 June 2005, online at Watson Institute for International Studies, <<http://www.watsoninstitute.org/gbeyondterror/avant.htm>> (emphasis added).

64 Brooks, above note 1, p. 4.

65 Fay Report, above note 57, p. 48.

66 Avant, above note 51, p. 220.

67 Alien Tort Claims Act (United States), 28 USC §1350.

68 Gregory G. A. Tzetschler, “Corporate violator: The alien tort liability of transnational corporations for human rights abuses abroad”, *Columbia Human Rights Law Review*, Vol. 30 (1999), pp. 411–12.

between them and the private security and military companies they hire.<sup>69</sup> However, there has yet to be a case of a corporation being held liable under the Alien Tort Claims Act for the violations of a private military and security company that it has hired; it is an enactment that has been narrowed in scope in recent jurisprudence, continues to have significant jurisdictional hurdles to overcome in many cases, and is not replicated in other jurisdictions.<sup>70</sup> The limited possibility of civil liability of corporate clients for private military and security company violations committed abroad therefore remains a relatively weak compliance incentive at this point in time.

### The private military and security company industry

Through the lens of corporate strategy, the private military and security company industry would view its principal incumbent competitor as being public national armed forces. This realization brings with it both risks and incentives for compliance with international humanitarian law.

#### *The contribution of the industry to risk of violations*

*Certain interests are not conducive to observance of international humanitarian law.* One of the main “competitive advantages” of private security and military companies vis-à-vis national armed forces is the ability of the former to deploy quickly and project force rapidly. Claude Voillat of the ICRC has warned that this “pressure for profitability [is] not conducive to the solid integration of international humanitarian law into their business practices”.<sup>71</sup> These concerns are consistent with the risk identified in the sociology literature that “[e]conomic success, competition for scarce resources, and norm erosion”<sup>72</sup> may generate unlawful behaviour by organizations on a *systematic* basis.

*Blanket denials of international humanitarian law violations.* The private military and security company industry’s interest in being perceived as legitimate can increase the risk of international humanitarian law violations occurring if it leads the industry to issue blanket denials that any such violations have taken place. For its part, the IPOA denies that violations of human rights or international humanitarian law are widespread, arguing that “the majority of fears articulated by critics exist only as academic theory”.<sup>73</sup> Sandline International, while it was

69 Tina Garmon, “Domesticating international corporate responsibility: Holding private military firms accountable under the Alien Tort Claims Act”, *Tulane Journal of International and Comparative Law*, Vol. 11 (2003), p. 353.

70 See *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law*, International Peace Academy and Fafo, Allkopi Sarpsborg, Norway, 2002, pp. 14–15.

71 Voillat, above note 29.

72 Diane Vaughan, *Controlling Unlawful Organizational Behavior: Social Structure and Corporate Misconduct*, University of Chicago Press, Chicago, 1983, p. 62.

73 Brooks, above note 1, p. 4.

operating, chalked up claims of violations that it was alleged to have committed to propaganda by its clients' military opponents.<sup>74</sup> Similarly, despite reports implicating its personnel in potential violations of international humanitarian law at Abu Ghraib, CACI continues to deny any impropriety.<sup>75</sup>

An inability of the private military and security company industry to recognize the problem of violations is in itself a serious cause for concern. Issuing denials that violations are occurring is one thing – but making public the findings of investigations and prosecuting known offenders is another.

### *Incentives for the industry to promote compliance*

*Acceptance of industry's legitimacy.* Private security and military companies “are eager to present themselves as respectable bodies with a natural niche in the often complicated post-Cold War world order”.<sup>76</sup> If the private military and security company industry is to become a sustainable competitor to national armed forces, corporate strategy suggests that it must gain acceptance and legitimacy for respecting international humanitarian law. Henry Cummins describes legitimacy in this context as “moral advantage” based on “[r]eputation, transparency, history, [and] ethical conduct”.<sup>77</sup> The industry therefore has a powerful incentive to identify and “blacklist” firms within its midst that violate international humanitarian law.

Although this incentive has yet to manifest itself fully in practice, it is a realistic possibility. Many leading private security and military companies, particularly US firms, are members of the IPOA, which in 2005 adopted a Code of Conduct written largely by NGOs,<sup>78</sup> in which its members agreed to respect international humanitarian law:

In all their operations, Signatories will respect the dignity of all human beings and strictly adhere to all relevant international laws and protocols on human rights. They will take every practicable measure to minimize loss of life and destruction of property. Signatories agree to follow all rules of international humanitarian law and human rights law that are applicable as well as all relevant international protocols and conventions, including but not limited to:

- Universal Declaration of Human Rights (1948)
- Geneva Conventions (1949)
- Protocols Additional to the Geneva Conventions (1977)
- Protocol on the Use of Toxic and Chemical Weapons (1979)
- Voluntary Principles on Security and Human Rights (2000)

74 Sandline International, above note 11, p. 3.

75 CACI, above note 30.

76 Gilligan, above note 43.

77 Cummins, above note 12, p. 5.

78 Brooks, above note 1, p. 4.

... While minor infractions should be proactively addressed by companies themselves, Signatories pledge, to the extent possible and subject to contractual and legal limitations, to fully cooperate with official investigations into allegations of contractual violations and violations of international humanitarian law and human rights law.<sup>79</sup>

While no formal complaints have been made public by the IPOA, failure to respect the code of conduct may result in sanctions, including expulsion from the association. The IPOA has also created a standards committee that is charged with revising and enforcing the said code.<sup>80</sup> The viability of this emerging model is considered in more detail in the Conclusion below.

*Incumbent firms have greater interest in the industry's good reputation.* Long-standing or incumbent private military and security companies have a greater interest in protecting the reputation of the industry as a whole than do new entrants or upstarts,<sup>81</sup> because they have invested more in their brand equity. For example, the 24-year-old ArmorGroup, with headquarters in the United Kingdom, has stated, "It is also worrying that some companies are calling for immunity (from prosecution) in Iraq. We don't want immunity and we don't need it. We always go about our business within the laws of the countries where we work."<sup>82</sup> This suggests that speaking of a homogeneous "private military and security company industry" may be a simplification in view of the diversity of firms that constitute it. It is this diversity at the level of individual firms that is considered next.

## Individual private military and security companies

Jeff Herbst has "predicted that a distinction would emerge between upscale firms (that appeal to the United Nations, INGOs and other upstanding members of the international community by virtue of their willingness to abide by international law) and downscale firms (that appeal to non-lawful elements)".<sup>83</sup> Economic theory and corporate strategy, as well as practice, indicate that the private military and security company industry is maturing and that the market segmentation predicted by Herbst is thus beginning to take place at the individual firm level. Market segmentation is characterized by firms adapting or marketing their products or services to specific target groups of consumers. A firm is able to enhance its profitability by tailoring its offerings more closely to the preferences of particular types of customers; as a result, a brand or market reputation becomes

79 IPOA Code of Conduct, IPOA, 31 March 2005, online at <<http://www.ipoaonline.org/en/standards/code.htm>> (visited 24 October 2006).

80 IPOA, "Committees", online at <<http://www.ipoaonline.org/>> (visited 24 October 2006).

81 Voillat, above note 29.

82 Keilthy, above note 3.

83 Avant, above note 51, p. 221, referring to Jeffrey Herbst, "The regulation of private security firms", in Greg Mills and John Stremmler (eds.), *The Privatization of Security in Africa*, SAIIA Press, Johannesburg, 1999, pp. 122–5.

associated with the firm itself or the individuals running it.<sup>84</sup> With regard to individual private military and security companies this realization carries both incentives for compliance and risks of non-compliance with international humanitarian law.

### *The contribution by individual companies to risk of violations*

*Market segmentation – “aggressive” or “bad” firms.* One of the most significant risks to international humanitarian law is posed by private military and security companies that profit from their “bad” reputations in a segmented market. Certain clients may seek out firms that are willing to be more “aggressive” in their interpretation of international humanitarian law or even to violate it for a price.<sup>85</sup> Certain members of the private military and security company industry have recognized that some firms are attractive, in part, precisely because they are outside formal state armed forces, “far less trained, far less accountable, and already tainted, albeit slightly, with a whiff of dirty tricks”.<sup>86</sup>

By hiring these “bad” firms, clients may perceive a benefit in signalling that their posture is more aggressive in a given armed conflict or post-conflict environment, as the United States has done in private military and security company procurement in Iraq, prompted by the growing insurgency. This phenomenon is reflected in the decision to hire Aegis Defence Services, founded by Tim Spicer (founder of the now defunct Sandline International), to conduct “mobile vehicle warfare” as well as “counter-snipping”. Commentators have speculated that Spicer’s “history and record of taking on dicey tasks may have led him to be more attractive than the companies that *play more strictly by the rules*”.<sup>87</sup> Indeed, given the prospect of private military and security companies rebranding or reincorporating, it appears that the main way in which brand differentiation and market segmentation is taking place in this industry is through the identity of the officers or directors of these firms (such as Col. Spicer).

*Competition, declining quality of personnel, costs of vetting.* Increased demand for private military and security company services as a result of the armed conflicts in Afghanistan and Iraq has given rise to “[i]ntense competition [that] has driven down prices for security services. Political uncertainty and the escalation of violence have hampered reconstruction, delayed contracts and increased costs”.<sup>88</sup> This has caused some corporations to cut corners in their screening procedures.

84 See Malcolm McDonald and Ian Dunbar, *Market Segmentation*, Macmillan Business, London, 1995, pp. 15–16.

85 This would be a negative form of “benefit segmentation”, whereby consumers select a given service/product on the basis of the perceived benefits that it confers on them. See J. Paul Peter and Jerry C. Olson, *Consumer Behavior and Marketing Strategy*, 7th edn, McGraw-Hill Irwin, Boston, 2005, pp. 383–4.

86 Avant, above note 51, p. 227.

87 *Ibid.*, pp. 226–7 (emphasis added).

88 James Boxell, “Competition hits security groups in Iraq”, *Financial Times* (United Kingdom), 5 November 2005, p. 16.

For example, U.S. Army investigators of the Abu Ghraib prisoner-abuse scandal found that “approximately 35 percent of the contract interrogators lacked formal military training as interrogators”. In other cases, investigations of contractors serving in Iraq revealed the hiring of a former British Army soldier who had been jailed for working with Irish terrorists, and a former South African soldier who had admitted to firebombing the houses of more than 60 political activists during the apartheid era.<sup>89</sup>

However, other commentators argue that “[a]s competition intensifies, brand advantage becomes more significant, and the battle for solid market share begins in earnest”.<sup>90</sup>

### *Incentives for individual companies to promote compliance*

*Market segmentation – “good” firms.* Management literature indicates that corporate reputations are built on perception as opposed to facts, and a good corporate reputation may offer a competitive advantage in terms of “social credibility”.<sup>91</sup> The positive side of market segmentation, from an international humanitarian law point of view, is that certain firms will seek to build their business model around an excellent reputation for international humanitarian law compliance.<sup>92</sup> These firms must maintain their reputation or risk losing contracts and corporate opportunities.<sup>93</sup> For example, “Titan’s long anticipated sale to Lockheed Martin imploded, due at least partly to its alleged involvement in the Iraqi prison scandal [at Abu Ghraib].”<sup>94</sup> However, a problem in linking violations of international humanitarian law to particular private military and security companies arises because their employees are transient, sometimes working for several firms, with the result that “this complicates the development of corporate reputation as a link to accountability or control by clouding the information available.”<sup>95</sup> An enhanced flow of information could increase the extent to which clients can optimize their purchasing decisions.<sup>96</sup>

*Reducing legal uncertainty.* Private military and security companies operate in volatile security environments that frequently involve high degrees of legal

89 Singer, above note 47.

90 Cummins, above note 12, p. 8.

91 Arlo Kristjan O. Brady, *The Sustainability Effect: Rethinking Corporate Reputation in the 21st Century*, Palgrave Macmillan, New York, 2005, pp. 64–5.

92 See, e.g., Avant, above note 51, p. 221.

93 See Kevin T. Jackson, *Building Reputational Capital: Strategies for Integrity and Fair Play that Improve the Bottom Line*, Oxford University Press, Oxford, 2004, pp. 178–80; Joe Marconi, *Reputation Marketing: Building and Sustaining Your Organization’s Greatest Asset*, McGraw-Hill, Chicago, 2002, pp. 13–19.

94 “Still, Titan does not seem to have been cut out of the U.S. DoD procurement loop”. David Isenberg, “A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq”, British American Security Information Council, Research Report 2004.4, September 2004, p. 52, online at <<http://www.basicint.org/pubs/Research/2004PMC.pdf>> (visited 24 October, 2006).

95 Avant, above note 51, p. 222.

96 Ibid., p. 221.

uncertainty as to the status of their personnel and legitimacy of their activities. It is in the interest of individual private military and security companies to clarify the existing regulations and rules that govern them.<sup>97</sup> For example, incidents like the detention of personnel of the UK-based Logo Logistics Ltd in Zimbabwe on 7 March 2004 on suspicion of mercenary activity would have been a significant business disruption if we believe Logo officials' statements that their team was not deploying to participate in a coup d'état but was, in fact, headed for the Democratic Republic of Congo to assist a mining company with its security.<sup>98</sup>

*The possibility of civil and criminal liability.* Liability of private military and security companies as corporate entities for violations of international humanitarian law offers a theoretical incentive for them to respect those norms. However, the strength of this incentive is highly variable, depending on the jurisdiction(s) in question. According to the ICRC, civil liability for private military and security companies is "generally accepted" if these firms commit violations of international humanitarian law, although their criminal liability "is [very] limited in most countries".<sup>99</sup> At any rate, finding a viable forum may be difficult. Courts in a conflict or post-conflict zone are unlikely to be fully operative, and very few states of incorporation are willing to reach out extraterritorially to regulate the conduct of their private military and security companies abroad.<sup>100</sup> In practice, it has been difficult, outside a few high-profile cases, to establish and secure the civil liability of companies for grave violations of international humanitarian law.<sup>101</sup> Hence it is not surprising that, in global terms, the "the protection scheme cobbled together from these poor tools is hopelessly inadequate".<sup>102</sup>

## Employees of private military and security companies

As discussed above in the "States of personnel" section, private military and security company employees hail from an increasingly diverse set of countries. Sociology and psychology studies such as the *Roots of Behaviour in War*<sup>103</sup> project conducted by the ICRC may be extrapolated to demonstrate that private military and security company personnel present a greater inherent risk from an

97 Capaccio, above note 27.

98 Frye, above note 14, p. 2607.

99 ICRC, above note 4.

100 Ibid.

101 See Fafo, above note 70, pp. 13–15. Indeed, *Al Rawi v. Titan Corporation*, which is a class action claim in the US District Court for the Southern District of California, appears to be the first civil claim alleging violations of international humanitarian law by a private military and security company – in this case concerning the Abu Ghraib scandal. *Al Rawi et al. v. Titan Corporation et al.*, Complaint of Plaintiffs, 9 June 2004 (U.S. Dist. Ct. – S. CA) (Findlaw).

102 Bratspies, above note 59, p. 28; but see Garmon, above note 69.

103 *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, 2004.

international humanitarian law perspective than members of national armed forces.

### *The contribution of private military and security company employees to risk of violations*

*Non-membership of permanent military hierarchies and sense of impunity.* One of the main findings of the *Roots of Behaviour in War* study is that the behaviour of combatants is determined, in part, by their role in a group which demands adherence to norms, and their place in a hierarchical structure which can impose sanctions for violations of those norms.<sup>104</sup> Ted Itani, Humanitarian Issues Advisor to the Canadian Red Cross, explained further that a “sense of impunity from accountability or prosecution” and an “absence of discipline” are two factors explaining breaches of international humanitarian law by individuals in armed conflict.<sup>105</sup> Most disturbingly, none of the private military and security company personnel implicated in the Abu Ghraib violations has yet had to face criminal charges, despite the fact that some US soldiers have meanwhile been held accountable.<sup>106</sup> Such a situation contributes to a sense of impunity that increases the risk of an international humanitarian law violation. This risk is compounded by the secrecy of the private military and security company industry and the international mobility of their employees.

*Variable degree of training in international humanitarian law.* Insufficient integration of international humanitarian law into all aspects of military operations raises the risk of a violation taking place.<sup>107</sup> Claude Voillat of the ICRC has recognized that “another cause for concern is the poor training in international humanitarian law that some of these private actors receive, if they are trained at all.”<sup>108</sup> Interestingly, the US Department of Defense recently unveiled new requirements, based in part on post-Abu Ghraib recommendations, for a sub-category of private military and security company contractors termed “Contractors Deploying with the Force”. These individuals are subject to more rigorous vetting, and prior to deployment they must “validate or complete any required training (e.g.; Geneva Conventions; law of armed conflict; ...).”<sup>109</sup>

### *Incentives of private military and security company employees to promote compliance*

*International labour market.* Economic theory suggests that in labour markets characterized by repeated interactions between employers and employees (as in

104 Ibid., p. 15.

105 Remarks of Ted Itani, Canadian Red Cross Conference on Customary International Humanitarian Law, McGill University, Montreal, 1 October 2005.

106 Capaccio, above note 27; see Taguba Report, above note 5, and CACI, above note 30.

107 ICRC, above note 103, pp. 15–16.

108 Voillat, above note 29.

109 US Department of Defense, above note 61, s. 6.2.7.1.

the private military and security company industry where employees have been observed to work for several firms, as discussed earlier), “norm-driven behaviour” plays an important role, even in competitive markets.<sup>110</sup> According to Deborah Avant, the market may “punish” private military and security company employees who violate norms of international humanitarian law:

The career and network patterns among professionals in some parts of the world suggest that this may be a more robust control mechanism than the reputation of firms. Many individuals working for PSCs began their careers in military service but have since moved back and forth between service to the UN, service to PSCs, and service to INGOs ... *their future employment depends on their reputation for professionalism, [and] they should be more likely to behave according to professional norms.*<sup>111</sup>

*Criminal prosecution for violations.* Criminal prosecution of private military and security company employees for violations of international humanitarian law is theoretically possible, but such prosecutions are very unlikely in actual fact. Assertions of universal jurisdiction against them for violations of that nature are rare in practice. Under US law, which takes an aggressive approach to extraterritorial jurisdiction concerning private military and security company employees, significant gaps still arise in practice. In the *United States v. Passaro*, the accused, a Central Intelligence Agency (CIA) contractor, could not be charged under the Military Extraterritorial Jurisdiction Act because it only confers jurisdiction on contractors of the Department of Defense.<sup>112</sup> Instead, he was charged under US Code, Title 18, Section 7(9)(A), which was applicable only because the incidents of abuse allegedly took place at a US military base.<sup>113</sup> Nor will all violations of international humanitarian law necessarily incur individual criminal responsibility under international law; typically only violations which are “serious” in nature or are “grave breaches” of the 1949 Geneva Conventions or 1977 Additional Protocols may be prosecuted.

## Conclusion

Through the preceding multidisciplinary investigation of each level of private military and security company activity, several important insights emerge. First,

110 Simon Gächter and Armin Falk, “Reputation and reciprocity: Consequence for labour relations”, *Scandinavian Journal of Economics*, Vol. 104, Issue 1 (2002), pp. 1, 15.

111 Avant, above note 51, p. 223 (emphasis added); the applicability of this argument across local and expatriate personnel remains to be seen.

112 *Passaro*, above note 5; Military Extraterritorial Jurisdiction Act of 2000 (United States), 106th Congress, Public Law 106–523, 22 November 2000; see also MEJA Clarification Act of 2004 (United States), 108th Congress, 2nd Sess., HR 4390, 19 May 2004.

113 Human Rights Watch, “QandA: Private military contractors and the law: States have an obligation to prosecute perpetrators of war crimes in their courts”, 21 October 2004, online at Global Policy Forum, <<http://www.globalpolicy.org/>> (visited 24 October 2006). Notably, with reference to Iraq: “Many of the contractors working in Iraq worked for companies that had contracts not with the Defense Department, but with the Department of the Interior” (ibid.).

and most importantly, a deeper and more nuanced understanding of this modern phenomenon has been made possible. This stands in stark contrast to the sweeping generalizations often made by special interest groups in the private military and security company debate, which contribute little to appreciating the theoretical compliance risks and incentives such companies present from an international humanitarian law perspective.

Second, these findings may serve to help formulate a proactive agenda for reform, to improve international humanitarian law compliance by private military and security companies by maximizing incentives and mitigating risks identified above. This agenda should be informed by the fact that many of the most powerful risks and incentives with regard to such compliance have been shown to be grounded in behaviour and norms which fall *outside* formal law. If we are truly interested in promoting compliance with international humanitarian law by these pervasive non-state entities in modern armed conflict, we would be well advised to consider emergent approaches which similarly operate outside formal law, particularly in view of the disagreement within the international community on how to cope with private military and security company activity. Two initiatives which deserve greater support and development in this respect are the compliance mechanisms in the 2005 Code of Conduct of the IPOA,<sup>114</sup> and the initiative of the ICRC, which began in late 2004.<sup>115</sup>

The IPOA Code of Conduct, discussed in detail earlier, is premised on the strong incentive of the private military and security company industry to be perceived as legitimate, to “blacklist” violators of international humanitarian law in their midst and to marginalize firms that seek to profit from a “bad” reputation. While codes of conduct “can be important in setting expectations and norms within which the market works”,<sup>116</sup> it is unclear as yet whether the IPOA will consider it to be in the interests of the industry to discipline violating members. There is of course the problem that in ruling on whether to expel a member, the association would find itself in a conflict of interest. First, while it could be in the industry’s best interest to expel a violating member, the association could be concerned that the expulsion of members could deter new members from signing up for fear of being similarly expelled. Second, there is a risk that the association’s board, which is composed exclusively of private military and security company executives, may be more rigorous in sanctioning their competitors than their own companies.

These problems in the industry’s compliance mechanism can be mitigated to enhance the potential normative pull of the IPOA Code of Conduct. First, outside directors should be added to the board to manage the potential conflicts of interest discussed above. This is also a prudent measure for corporate governance more generally. Second, and more importantly, a graduated scale of remedial measures should be announced by the IPOA to promote private military and

114 IPOA Code of Conduct, above note 79.

115 ICRC, above note 4.

116 Avant, above note 51, p. 220.

security company compliance with international humanitarian law when an alleged violation occurs. These could include the following possible steps for the association to take: issuing an order for the impugned member to co-operate with public authorities in investigations and to implement appropriate internal disciplinary measures; imposing a confidential written sanction on the member; imposing a public written sanction on the member; ordering the impugned member to issue a private or public apology; requiring the member to pay a fine to the association or make a charitable contribution to an international humanitarian organization; overseeing the payment of restitution to identifiable victims of the member's wrongful conduct; requiring the member to establish more effective internal policies and procedures; mandating enhanced training in international humanitarian law for employees as well as officers and directors of the impugned member; requiring the member to monitor its operations for compliance with international humanitarian law and to report back to the association at regular intervals; for repeated or very serious violations, temporally suspending the member; and, in extreme cases, expelling the member from the association.<sup>117</sup> These recommendations could be adopted by the IPOA and the newly created British Association of Private Security Companies (launched in January 2006),<sup>118</sup> to accentuate the strong incentives for the industry to be perceived as legitimate through compliance, and to reduce the serious risk of individual firms benefiting from an "aggressive" or "bad" reputation.

Another initiative that warrants attention began in August 2004 when the ICRC announced its intention to set up a systematic programme to engage private military and security companies in a dialogue in order to promote their compliance with international humanitarian law.<sup>119</sup> This new initiative has the purpose of:

- (i) informing private military and security companies of their obligations under international humanitarian law;
- (ii) ensuring "transparent accountability processes exist to prevent and punish violations of these provisions";<sup>120</sup>
- (iii) encouraging private military and security companies to incorporate international humanitarian law into the training and military advice they offer to clients; and
- (iv) ensuring that private military and security companies do not inhibit ICRC access to victims of armed conflict.<sup>121</sup>

117 Many of these measures exist under national criminal law for corporate wrongdoing in Canada. See, e.g., Criminal Code (Canada), R.S.C. 1985, c. C-46, s. 732.1(3.1).

118 Peter Almond, "UK: War's fertile grounds for soldiers of fortune", *Sunday Times* (United Kingdom), 30 October 2005, online at Corpwatch, <<http://www.corpwatch.org/article.php?id=12711>> (visited 24 October 2006); "Andy Bearpark", Intelligence Online No. 511, 9 November 2005, online at <<http://www.intelligenceonline.com/>> (visited 24 October 2006).

119 Until now, contact between the ICRC and private military and security companies has been on an "informal basis". ICRC, above note 4.

120 Voillat, above note 29.

121 ICRC, above note 4.

Given the size of the industry, the ICRC's programme focuses on private military and security companies that are active in "conflict situations" or engaged in training and advising armed forces, their state of incorporation and their clients;<sup>122</sup> it is thus based on a "triangular strategy".<sup>123</sup> Before this approach was adopted, "there has been little or no engagement between [private military and security companies] and other stakeholders".<sup>124</sup>

The ICRC's initiative is an admirable effort addressed to at least three of the main players in private military and security company activity. It has the potential to align several strong incentives promoting compliance with international humanitarian law, including the motivations of individual firms that seek to profit from a "good" reputation for respecting international humanitarian law, the reputational and economic interests of states of incorporation, and clients' interest in proper service delivery. However, the ICRC programme would benefit from a more explicit and direct involvement of industry associations, in view of the role they may play as potential "sites of normativity" within the sector as a whole. Further, industry associations operate across armed conflicts, which has the benefit of ensuring that sustainable progress is made in instilling respect for international humanitarian law in the private military and security company sector. In addition, the ICRC should be careful not to fall into the same trap as the UN Global Compact, which has been very reluctant to include private military and security companies in the Voluntary Principles on Security and Human Rights,<sup>125</sup> "fearing that they will use the VPs as a way to garner new business".<sup>126</sup> One of the most powerful incentives for such a company to comply with international humanitarian law is, as shown above, the resulting enhancement of its corporate reputation. The desire to be of good standing is conducive to this progressive acceptance of norms, as are meetings with the ICRC. While this contact will be troubling to some, it is consistent with the ICRC's pragmatic approach to promoting compliance with international humanitarian law, and offers a more realistic prospect of doing so than the prevailing attitude towards private military and security companies, which ranges from ignoring them to unabashedly castigating them.

As with any multidisciplinary analysis, constructive criticism and refinement of the risks and incentives that have been identified in this article by experts in their respective fields should be welcomed. A collaborative development in our appreciation of the complexity of private military and security company activity will foster better understanding of the role of those companies in modern armed conflict, and provide valuable lessons for initiatives designed to promote compliance by these non-state entities with international humanitarian law.

122 Ibid.

123 Isenberg, above note 94, p. 66.

124 Cummins, above note 12, p. 2.

125 *Voluntary Principles*, above note 19.

126 Karen Ballentine, "Consolidation of the GC policy dialogue on the role of the private sector in zones of conflict: Identifying public policy options to promote conflict-sensitive business practices", 7–8 October 2004, p. 8, online at United Nations, <<http://www.unglobalcompact.org>> (visited 24 October 2006).

# Elements for contracting and regulating private security and military companies

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## **Abstract**

*Key issues raised by the use and operation of private military and security companies, particularly in conflict areas, are their accountability and how to control them. National regulation, however, is still rare. States have a role to play first as contractors. Considered selection, contracting and oversight procedures and standards may help promote respect for human rights and international humanitarian law by companies and their staff. Secondly, territorial and exporting states may consider adopting regulations to increase control and promote accountability. In view of this still largely unregulated phenomenon, this contribution considers elements of contracting and regulatory options.*



The use of private military and security contractors has grown significantly in recent conflicts, and not only in Iraq. Clients include the private sector (probably still the bulk of the industry's revenues in most countries), non-governmental organizations, international organizations and states. Not least due to the reduction of armed forces after the Cold War, governments are increasingly hiring private companies for tasks such as protecting persons and objects, military and

\* The contribution reflects the views of the author alone and not necessarily those of the Department of Foreign Affairs. The author would like to thank Emanuela-Chiara Gillard and Marina Caparini for their valuable comments on an earlier draft.

non-military, training and advising armed and security forces, providing expertise on maintaining and operating complex weapons systems, collecting intelligence and, less frequently, participating in combat operations.<sup>1</sup>

The transnational sale of private security and military services raises many policy-related, legal and practical issues. Private actors providing such services do not fall neatly within existing concepts and legal frameworks, not least since the international system is based on states and international law primarily refers to states. This modern trend indeed seems to scratch, if not potentially shake the state's (former?) monopoly on the use of force and activities in war.

Arming private contractors raises fundamental issues of transparency, control of the means of violence and accountability of the armed private actors, since their conduct may have serious and even lethal effects on third parties. The issues of control and accountability become particularly acute where such companies operate in conflict and post-conflict situations, since law enforcement in such situations is often ineffective. "Accountability" is understood to mean "being answerable", i.e. having to account for one's conduct. In a legal sense, companies and/or employees are accountable insofar as they can be held legally responsible (by criminal or civil sanctions) for violating the law, regulations or contract. In addition, companies and their employees may also be accountable in a broader political or societal sense, insofar as they are "answerable" particularly to public authorities and/or to victims and others affected by their conduct.

Insofar as private security and/or military services are in fact being used, how can the issues of control and accountability be addressed, and how might respect for, in particular, human rights and international humanitarian law be promoted? Unfortunately, there probably is no single, simple "catch-all" solution to address the multi-faceted issues raised by the transnational provision of private military and security services in conflict and other unstable situations. Recent expert conferences and meetings have generally concluded that complementary policies and mechanisms by different actors are needed.<sup>2</sup> Ideally, the different layers of control and regulation should complement if not interlock with each other and rely on coherent standards.<sup>3</sup>

Contracts are a first and most direct way for any client to require the private contractor and their employees to respect certain standards and avoid undesired external effects.<sup>4</sup> Another way to address certain issues is for the

1 See e.g., Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, 2003.

2 See e.g., Swiss initiative, Expert Workshop of 16–17 January 2006 in Montreux, *Summary of the Chair*, 11 September 2006, p. 5, available at: <http://www.eda.admin.ch/psc> (last visited 18 December 2006). See also Benjamin Perrin, "Promoting Compliance of Private Security & Military Companies with International Humanitarian Law", *International Review of the Red Cross*, Vol. 88, No. 863, September 2006.

3 On the need for a "regulatory ecology" with regard to private military companies, see Kathleen M. Jennings, *Armed Services: Regulating the Private Military Industry*, Fafo-Report 532, 2006, at 11 et seq., available at: <http://www.fafo.no/> (last visited 14 December 2006).

4 See e.g., Laura A. Dickinson, "Contract as a tool for regulating private military companies", in Simon Chesterman/Chia Lehnardt (eds.), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies*, Oxford University Press (forthcoming 2007). See also W. Hays Parks, *The*

industry to self-regulate, for instance, by adopting company or industry-wide standards such as public codes of conduct and having trade associations effectively enforcing agreed standards.<sup>5</sup>

States do clearly have a role to play, be it individually or on a regional or international level. International law establishes direct as well as due diligence obligations of States. States hiring private security and military companies (“contracting states”) for operations abroad must respect their international legal obligations and cannot elude them by outsourcing activities. For example, they have an obligation to ensure respect of international humanitarian law. In addition, states are responsible for violations of international law and particularly human rights and international humanitarian law committed by private contractors they hire that can be attributed to them.<sup>6</sup> States on whose territory such companies operate (“territorial states”) as well as states from whose territory their services are “exported” (“exporting states”) must, for instance, punish grave breaches of the Geneva Conventions. Moreover, there may be circumstances in which states must take appropriate measures or exercise due diligence to prevent, punish, investigate or redress the harm caused by the acts of private companies or their staff that impair human rights.<sup>7</sup> Contracting standards and procedures as well as national regulation laying down conditions companies must satisfy in order to be allowed to operate by the territorial and exporting states may offer ways to ensure control over private security and military companies, increase

*Perspective of Contracting and “Headquarters” States*, background document prepared for the Expert Workshop of the Swiss initiative of 16–17 January 2006, p. 5–6, available at: <http://www.eda.admin.ch/psc> (last visited 14 December 2006).

- 5 The British Association of Private Security Companies (BAPSC) has adopted a charter, available at: <http://www.bapsc.org.uk> (last visited 18 December 2006), as well as membership criteria. The International Peace Operations Association (IPOA) has elaborated a code of conduct, which currently is in its 11<sup>th</sup> version, available at: <http://ipoaonline.org> (last visited 18 December 2006). The Private Security Company Association of Iraq (PSCAI) has included a mini code of conduct in section 9 of its recently adopted Charter, even if it may be too short and generally formulated to give much guidance, available at: [http://www.psc.ai.org/Docs/PSCAI\\_Charter\\_Final.pdf](http://www.psc.ai.org/Docs/PSCAI_Charter_Final.pdf) (last visited 9 December 2006). The intention to create a European association of private security companies (being active also beyond Europe) was announced at a roundtable discussion in Brussels on 7 December 2006, see Security & Defence Agenda, *The private security phenomenon: policy implications and issues* available at: <http://www.forum-europe.com/publication/ScD-PrivateSecurity/Dec2006.pdf> (last visited 30 January 2007). In contrast to the relatively new formation of associations of security companies transnationally operating private associations in domestic (and not so much conflict) settings have existed for many years. The Confederation of European Security Services has also elaborated a code of conduct for domestic security contractors, see CoESS/Uni-Europe, Code of conduct and ethics for the private security sector, July 2003, available at: [http://www.coess.org/documents/code\\_of\\_conduct.pdf](http://www.coess.org/documents/code_of_conduct.pdf) (last visited 18 December 2006). See also Andrew Bearpark/Sabrina Schulz, “The Regulation of the Private Security Industry and the Future of the Market”, in Chesterman/Lehnhardt (eds.), above note 4.
- 6 On the question in what cases private contractors’ conduct can be attributed to a state hiring it, see University Centre for International Humanitarian Law, *Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions*, 2005, available at: [http://www.uchl.org/communication/private\\_military\\_contractors\\_report.pdf](http://www.uchl.org/communication/private_military_contractors_report.pdf) (last visited 14 December 2006); Chia Lehnhardt, “Private military companies and state responsibility”, in Chesterman/Lehnhardt (eds.), above note 4.
- 7 See Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 8.

their accountability, and help promote respect for international human rights law and international humanitarian law by them and their employees.<sup>8</sup>

This contribution considers some of the contracting and regulatory options available to states, primarily with respect to the transnational provision of private security and military services, with a focus on the delivery of such services in conflict situations and fragile states. The article, in particular, contemplates possible elements for contracting standards for states hiring such companies and possible elements of regulatory frameworks in territorial and exporting states. Elements considered draw in part on existing contracting practice and existing or planned regulation frameworks relating to the transnational sale of private security and military services and, where international precedents are scarce, also on domestic settings. It is hoped that the present considerations may contribute to and stimulate further comparative analysis of existing regulatory frameworks and the elaboration of practical approaches.

## Contracting states

Contract provisions are a simple tool for regulating contractor behavior with direct impact. The contract specifies the terms of conduct and employment to which the contractor, in order to be competitive and win the bid, must agree and demonstrate capability of compliance. Considered contract awarding procedures, terms and compliance monitoring may therefore contribute to choosing the best services and to promoting the application of the standards desired and accountability by private security and military companies, including with regard to international human rights law and international humanitarian law.<sup>9</sup>

This chapter considers practical issues that may be contemplated with regard to contracting and deliberates possible contract elements and benchmarks against which to measure applicants and their services. Some best practices have already been compiled. The manual for organizations awarding contracts for

8 On the obligations of states in relation to such companies under international human rights law, see Andrew Clapham, *International Review of the Red Cross*; Francoise Hampson, *The Implications of Human Rights Law*, background document prepared for the Expert Workshop of the Swiss initiative of 13–14 November 2006 (on file with author); Cordula Droegge, *Private Military and Security Companies and Human Rights: A Rough Sketch of the Legal Framework*, background document prepared for the Expert Workshop of the Swiss initiative of 16–17 January 2006, available at: <http://www.eda.admin.ch/psc> (last visited 14 December 2006); Alexis Kontos, “Private security guards: privatized force and State responsibility under international human rights law”, *Non-State Actors and International Law*, Vol. 4, No. 3, 2004, p. 199. On the obligations of states in relation to such companies under international humanitarian law, see Emanuela-Chiara Gillard, “Business Goes to War: Private Military/Security Companies and International Humanitarian Law”, *International Review of the Red Cross*, Vol. 88, No. 863, September 2006; Lindsey Cameron, “Private Military Companies: Their Status under International Humanitarian Law and its Impact on their Regulation”, *International Review of the Red Cross*, Vol. 88, No. 863, September 2006. On regulating the industry, see e.g., Caroline Holmqvist, *Private Security Companies: the Case for Regulation*, SIPRI Policy Paper, No.9, January 2005; Kathleen Jennings, above note 3; Fred Schreier/Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Geneva Centre for the Democratic Control of Armed Forces, March 2005, p.120.

9 See e.g., Laura A. Dickinson, above note 4. See also W. Hays Parks, above note 4.

private guarding services elaborated by the European Confederation of Security Services (CoESS) and Uni-Europa (trade unions) in 1999,<sup>10</sup> for instance, offers useful recommendations, even if it focuses on guarding services in domestic and peaceful settings. In contrast, the Sarajevo Client Guidelines for the Procurement of Private Security Companies proposes best practices specifically for post-conflict situations in the south eastern European region.<sup>11</sup>

### Information to be submitted by the bidding company

The search for the best private contractor for security or military services should not only focus on the price but also take into account other elements, such as the quality of the service, due diligence, ethics, training of the employees, etc. To facilitate the selection, private security and military companies applying for a contract should be requested to provide relevant information and documents, possibly by a standard procurement questionnaire.<sup>12</sup> Information and documents to be requested could include:<sup>13</sup>

- proof of possession of relevant licenses and authorizations where required by law, which may include:
  - registration or licensing of the company or membership of a relevant industry association in the territorial state, where required by that state's legislation;
  - registration or licensing of the employees in the territorial state or possibly also in an employee's state of nationality, where required by these states' legislation;
- information on the ownership and, if applicable subsidiary corporation relations, as well as on the financial situation of the company, including statements of overall turnover and profits over the last few years, audited accounts and proof of adequate liability insurance;
- information on the qualifications of the management and the operatives, including on the latter's selection and vetting process, training offered, skills and experience, turnover rate and number;
- information on the company's principal services provided in the last few years, generally and in the country concerned, as well as on major contracts awarded for the provision of services similar to those applied for;

10 CoESS and Uni-Europa, *Selecting best value: A manual for organisations awarding contracts for private guarding services*, 10 June 1999, available at: [http://www.coess.org/documents/public\\_tendering.pdf](http://www.coess.org/documents/public_tendering.pdf) (last visited 9 December 2006). The CoESS has produced several further documents that may be of interest, all available at <http://www.coess.org> (last visited 9 December 2006).

11 South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (SEESAC), *The Sarajevo Client Guidelines for the Procurement of Private Security Companies*, available at: <http://www.seesac.org/reports/Procurement%20guidelines.pdf> (last visited 9 December 2006).

12 An interesting example is the Pre Qualification Questionnaire (PQQ) for the procurement of private security services elaborated by UK's Foreign and Commonwealth Office (on file with author).

13 See also CoESS/Uni-Europa, above note 10; SEESAC, above note 11.

- information on quality management mechanisms or certification as well as applicable codes of conduct and other rulebooks of the company;
- professional or trade association membership.

Of course, the mere submission of the information listed above is not sufficient. The applicant company must live up to the claims it makes.

## Selection criteria

Criteria for selecting a company could include elements such as the possession of all required authorizations, adequate procedures and standards concerning selection, vetting and training of the employees, rulebooks and standard operating procedures, internal oversight, and compliance and sanctions mechanisms. Membership in an association and adherence to its code of conduct,<sup>14</sup> as well as vetting or accreditation by an independent organization or even a respected trade association could also be an indicator of quality.<sup>15</sup> Disqualifying criteria may include implication in serious crimes by the management or the company's employees, prior grave professional misconduct, the submission of misleading information, or an unsound or non-transparent financial situation and ownership. The CoESS manual on awarding private guarding contracts and the Sarajevo Client Guidelines for the Procurement of Private Security Companies contains systematic schemes facilitating the assessment of tenders according to elements classed into four categories: personnel standards, contract management/operations, contract infrastructure and company standards.<sup>16</sup>

## Specifying obligations by contract

Once the company has been selected, the contract is a simple and direct tool to specify obligations of the company and its employees. The contract can provide that the company and its employees must comply with the legislation of the state in which they operate as well as all applicable international law, including human rights and, insofar applicable, international humanitarian law.<sup>17</sup> The contractual terms could even provide that private contractors must abide by relevant human rights and humanitarian law rules applicable to governmental actors. Such a provision, in its conception not uncommon to domestic settings, would avoid the uncertainty as to whether a specific private contractor is a governmental actor and therefore legally bound to obey the same rules, and it would, in any event, allow

14 The UK government has stated that adherence to such a code could indeed become a factor in approving the export of private military services, see UK Foreign Affairs Committee, *Response of the Secretary of State for Foreign and Commonwealth Affairs (with regarding to the Green Paper)*, Session 2001–2002, October 2002.

15 Laura A. Dickinson, above note 4.

16 CoESS/Uni-Europa, above note 10, pp. 7–8 and 12–16 and 23–24; SEESAC, above note 11, pp. 5–6.

17 A 2005 US Department of Defense (DoD) instruction provides that contractors “shall abide by applicable laws, regulations, DOD policy, and international agreements,” US DoD Instruction, No. 3020.41, 3 October 2005, §6.1.

for contract enforcement.<sup>18</sup> In terms of standards to be respected by the companies and their employees, reference could also be made to non-binding standards, such as the Voluntary Principles on Security and Human Rights,<sup>19</sup> the UN Code of Conduct for Law Enforcement Officials,<sup>20</sup> the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990,<sup>21</sup> and best practices developed by companies, civil society or governments, including instruments such as the Sarajevo Code of Conduct for Private Security Companies.<sup>22</sup>

The contract could also contain obligations to ensure that all employees are identifiable, at least by way of identity cards, to prohibit any subcontracting or make it dependent on prior approval, to abide by anti-corruption and transparency norms, to avoid activities that would result in a conflict of interests, and a reference to the obligation of confidentiality. Given that the selection of the operatives on the ground is crucial, the contract could explicitly provide for the company to vet all its employees and not to hire or arm anyone with a criminal record or past involvement in human rights or international humanitarian law abuses. The company could be required to provide a list of all employees for further background checks. Persons found to be not in conformity with these criteria would have to be discharged from their tasks immediately.

## Training

A key element to ensure respect for human rights, international humanitarian law and adequate conduct on the ground is adequate training of the employees. The company should therefore be required by contract to ensure that each employee carrying out the services concerned has received sufficient training, both generally and in a context- and task-specific manner adapted to each assignment. Training should generally be provided in the standard operating procedures in the situations to be expected; in conduct vis-à-vis persons showing violent behavior, including self-defense and defense of others; in the relevant standards of national and international law, including human rights and, where relevant, international humanitarian law; particularly in a transnational context in cultural sensitivity (appropriate conduct vis-à-vis persons of a different cultural, religious or other background); in rules concerning bribes and conflicts of interest; and possibly also in first aid and health risks. Furthermore, the contract should require that any employees carrying a weapon be adequately trained in its use, know the respective operational rules, and that all weapons be duly registered.

18 Laura A. Dickinson, above note 4.

19 Available at: <http://www.state.gov/g/drl/rls/2931.htm> (last visited 9 December 2006).

20 Adopted by UN General Assembly Resolution 34/169 of 17 December 1979.

21 Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 27 August – 7 September 1990, available at: [http://www.unhcr.ch/html/menu3/b/h\\_comp43.htm](http://www.unhcr.ch/html/menu3/b/h_comp43.htm) (last visited 9 December 2006).

22 UNDP SEESAC, *The “Sarajevo Process Code of Conduct”*, 2006, available at: <http://www.seesac.org/reports/Code%20of%20conduct.pdf> (last visited 9 December 2006).

A 2005 US Department of Defense instruction on Contractor Personnel Authorized to Accompany the U.S. Armed Forces provides that prior to deployment all contractors must “validate or complete any required training (e.g., Geneva Conventions; law of armed conflict; general orders; standards of conduct; force protection; personnel recovery; medical; operational security; anti-terrorism; nuclear, biological and chemical protective gear; country brief and cultural awareness; and other training as appropriate).<sup>23</sup>

## Monitoring

Appropriate monitoring and oversight, both internally by the company and by the contracting authority and/or others, are crucial to promoting accountability. The company can be required by contract to monitor and sanction misbehavior itself, for instance through an internal compliance mechanism that envisages “whistleblowers” within the company. Furthermore, the contract should spell out reporting obligations of the company, including periodical reports on contract performance to the contracting authorities; reports following particular incidents, such as the use of violence, changes in the employee pool or a possible, suspected or alleged violation of the law; reports upon request of the contracting authority; and reports to the local authorities in case of a violation of the applicable law.

To effectively monitor contract performance as well as compliance with applicable codes and rules, government oversight would need to include trained and experienced governmental contract monitors. Potential performance indicators could include no-show rate; misuse of force; violations of agreed standards or procedures, company or industry codes of conducts or best practices, or the law; other violations of the contract terms; and complaints.<sup>24</sup>

A particular challenge is that the company operates far away from the contracting authority, often in conflict zones. Therefore, information from third parties, such as the territorial government, other clients, or also civil society, organizations and the media, may be valuable but would likely be occasional at best. Clients might consider externalizing some audit or inspection and monitoring functions to an independent commission, company, organization or team with experience in the areas of international and particularly human rights law, business practices, and security and/or the military. Given that the local population may neither know nor have the means to file a complaint with authorities or courts in the contracting state, a challenge is to give them a voice and allow them to access courts or alternative grievance procedures established by the client, the contractor or a professional association.<sup>25</sup>

Transparency and external oversight over the regulator’s practice can be advanced by regular reports to parliament with lists of current contracts between governmental departments and private military and security companies. Also,

23 US DoD Instruction, No. 3020.41, 3 October 2005, §6.2.7.1.

24 See SEESAC, above note 11, p. 8.

25 On the feasibility of creating third-party beneficiary rights, see Laura A Dickinson, above note 4.

centrally holding information on contracts between governmental departments and private military companies<sup>26</sup> may help establish coherent standards within the same government. Information, for example, on misconduct (blacklisting) might also be exchanged, particularly with the state on whose territory the contractor operates and possibly with other clients.

### Sanctions and criminal jurisdiction

For breaches of contract, the contract can provide for penalties, including fines, termination of the contract and exclusion from entering or raising the benchmarks for entering future bidding processes. States should ensure that there is a mechanism for reporting, investigating and prosecuting any misconduct. They must ensure that their courts have the jurisdiction to prosecute crimes under international law, such as war crimes, crimes against humanity and torture, particularly if the security or military services are to be carried out in conflict situations or weak states that may not offer an effective criminal justice forum.<sup>27</sup> Employees responsible for crimes under international law, such as grave breaches of the Geneva Conventions, must be brought to justice or extradited for that purpose insofar as they are found on the hiring state's territory. In addition, hiring states should consider whether they would have jurisdiction over foreign employees of the security or military company they have hired, insofar as these employees commit crimes abroad and remain abroad.<sup>28</sup> One way to help prevent criminal behavior may be by establishing the criminal responsibility of company managers for crimes under international law (such as war crimes, crimes against humanity or the crime of torture) committed by their employees and resulting from the managers' negligence. The hiring state might also consider providing jurisdiction over complaints regarding a company's civil liability or even the criminal responsibility of its employees or directors.

The circumstances under which managers and directors of private military and security companies may bear individual criminal responsibility for international crimes committed by their employees merits further analysis and research. Article 28(b) of the 1998 Rome Statute on the International Criminal Court indeed suggests that superiors, such as company directors or managers, may become criminally

26 This has also been recommended by the UK's Foreign Affairs Committee, *Private Military Companies: Ninth Report of Session 2002–02* (on the Green Paper), Session 2001 – 2002, recommendation (a).

27 In Iraq, the Coalition Provisional Authority (CPA) has even granted immunity from the Iraqi legal process to contractors for acts performed by them pursuant to the terms of a contract or a sub-contract thereto with states providing personnel, etc., to the CPA, the multinational forces or with other specific international links, CPA Order No. 17 (revised). Granting such immunity makes it necessary, in order to avoid impunity, to ensure the availability of an effective alternative law enforcement and jurisdictional mechanism, in particular in the contracting or possibly also the exporting state.

28 Many states subject the exercise by their own courts of universal jurisdiction over crimes under international law to the presence of the accused on their territory. If such a state hires a company for services abroad, and, where these employees are nationals of another state and commit crimes under international law, the hiring state potentially could incur state responsibility for crimes attributable to it, while its own courts would be unable to initiate proceedings against the perpetrators.

responsible for crimes committed by their subordinates where they fail to take reasonable measures to prevent or repress these acts. However, several cumulative conditions (that need interpretation) must be met for this. Most importantly, the subordinates must be under the superior's "effective authority and control"; the crimes must concern activities within the superior's "effective responsibility and control"; he or she must know or consciously disregard information; he or she must fail to "exercise control properly" and not take "all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution"; and, finally, this must result in at least a higher risk of such crimes.<sup>29</sup>

## Territorial states

States on whose territory private security and military companies operate may adopt regulations, *inter alia*, in order to control the use of force and protect their population from undesired consequences that may potentially arise from the operation of private security and military companies. Such a set of authoritative rules provided by the government and overseen by an agency contributes to the setting of standards.

### Existing regulations in territorial states

Most European states have adopted regulations of one type or another that determine preconditions for private security companies to operate on their territory.<sup>30</sup> The regulatory frameworks, however, differ significantly. Some states have adopted specific private security laws, such as France or the United Kingdom.<sup>31</sup> Others have different regulations for different parts of the federal system, such as in Switzerland where there are endeavors to elaborate common standards and harmonize the regulations.<sup>32</sup> In still others, the regulatory framework is based on general commercial law.<sup>33</sup>

29 See e.g., Kai Ambos, "Superior Responsibility", in Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2002, p. 823.

30 For an overview of existing regulations, see CoESS and UNI-Europa, *Panoramic overview of private security industry in the 25 Member States of the European Union*, 2004, available at: <http://www.coess.org/studies.htm> (last visited 14 December 2006); Tina Weber, *A comparative overview of legislation governing the private security industry in the European Union*, ECOTEC Research and Consulting, Birmingham, 2002; SEESAC, *SALW and private security companies in South Eastern Europe: A Cause or Effect of Insecurity?*, Belgrade, 2005, available at: <http://www.seesac.org> (last visited 14 December 2006); European Committee on Crime Problems, *Regulating Private Security in Europe: Status and Prospects (Report by the Geneva Centre for the Democratic Control of Armed Forces, forthcoming in 2007)*.

31 See e.g., France, *Loi réglementant les activités privées de sécurité du 12 juillet 1983*, modifié le 10 mars 2004; United Kingdom, *Private Security Industry Act of 2001*, available at: <http://www.the-sia.org.uk> (last visited 14 December 2006).

32 See e.g., *Concordat du 18 octobre 1996 sur les entreprises de sécurité de la Conférence Latine des chefs des Départements de Justice et Police*, available at: <http://www.eda.admin.ch/psc> (last visited 14 December 2006).

33 See European Committee on Crime Problems, above note 30.

However, many states on whose territory armed conflicts take place or have recently taken place lack such regulations. Exceptions include the requirement of licenses under Section 19 of Sierra Leone's National Security and Central Intelligence Act of 4 July 2002,<sup>34</sup> the Coalition Provisional Authority's (CPA) Memorandum No. 17 of 26 June 2004 on Registration Requirements for Private Security Companies desiring to carry out private security services in Iraq and at this moment continuing to be applied,<sup>35</sup> and the Kurdistan Regional Government's guidelines on Private Security Company Requirements for Iraqi Kurdistan dated 7 December 2005,<sup>36</sup> which must be read together, most particularly, with the CPA Memorandum No. 17 and CPA Orders Nos. 3 (Revised) (Amended), 17 (Revised), and 100. Moreover, the governments of Iraq and Afghanistan are currently drafting national regulations on the matter.

Developing a model regulatory framework on licensing private security (and possibly even military) services for countries in conflict or transition that lack regulation could be considered as a way to assist the relevant governments to develop regulation. Such a model might also be useful to occupying powers or with regard to UN-administered territories.

### Options and possible elements of regulation in territorial states

States wishing to increase their control and oversight over companies carrying out armed security or military services on their territory may take two principal approaches to specific regulation. They may either prohibit private contractors from carrying out certain military or armed security activities, and/or determine preconditions such companies and operatives must meet in order to be allowed to carry out such activities. For the latter option, a licensing regime may be considered, in particular where the government seeks to promote good standards and improve the control over and accountability of private security and military contractors operating in its territory. We will consider four different options that can be combined in different ways:

- a ban on private contractors carrying out certain security or military services in the state's territory or jurisdiction;
- the company must obtain an operating license to be allowed to undertake defined (armed) security or military services (company licensing);
- the company must obtain approval for individual contracts relating to the provision of defined (armed) security or military services (contract licensing or notification); and/or
- each individual operative must obtain an operating license to be allowed to carry out defined (armed) security or military services.

34 Available online at <http://www.sierra-leone.org/Laws/2002-10.pdf> (last visited 14 December 2006).

35 Available online at <http://www.cpa-iraq.org/regulations> (last visited 14 December 2006).

36 An English version is available online at [http://www.psc.ai.org/Docs/Foreign\\_Security\\_Company\\_Guidelines.pdf](http://www.psc.ai.org/Docs/Foreign_Security_Company_Guidelines.pdf) (last visited 14 December 2006).

## Banning certain activities

Private contractors could be prohibited from carrying out certain military, policing and other armed security activities. Section 9(1) of CPA Memorandum No. 17, for instance, precludes private security companies and their employees from conducting any law enforcement activities. A different approach could be to prohibit mercenary activities, even if such a prohibition would hardly be an effective means to address many of the issues raised by private military and security services.<sup>37</sup>

## Licensing regimes

### *Company licensing*

The first option of “company licensing” is a typical mechanism to control commercial activity by which a specific company is authorized to engage only in a defined commercial activity in a state’s jurisdiction with the approval of the governmental authorities. Such a license could be granted for a limited timeframe. Again, the security and military activities concerned would need to be clearly defined.<sup>38</sup> A crucial element will be the establishment of workable procedures and the provision of the necessary resources, authorities and training to the administrative entity examining licensing requests. Other issues to consider may include whether the licensing requirements should be identical for local and foreign companies. In the case of foreign companies whose state of nationality requires an operating license for the sale of such services abroad, the domestic operating license could be linked to proof of a valid export license.

<sup>37</sup> Mercenarism is very restrictively defined by both the UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989 and the African Union’s Convention for the Elimination of Mercenarism in Africa. The required cumulative elements in the definitional first article of both conventions include the individual’s motivation “to take part in the hostilities essentially by the desire for private gain” and the individual being “specially recruited ... in order to fight in an armed conflict.” Hence, it would be very difficult to prosecute successfully anyone for the crime of mercenarism, which is why observers have raised doubts about the prohibition’s effectiveness. Moreover, outlawing mercenary activities would not provide answers to issues raised by the use of armed force by the vast majority of employees of private military companies that would not seem to fall under that definition. See UK Foreign and Commonwealth Office (FCO), *Private Military Companies: Options for Regulation* (the so-called “Green Paper”), p. 23; Peter W. Singer, “War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law”, *Columbia Journal of Transnational Law*, Vol. 42, No. 2, 2004; Juan-Carlos Zarate, “The Emergence of a New Dog of War: Private International Security Companies and the New World Disorder”, in *Stanford Journal International Law*, Vol. 34 (1998), pp. 93 and 121; International Alert, *The Mercenary Issue at the UN Commission on Human Rights: the Need for a New Approach*, 2001, pp. 28–29.

<sup>38</sup> Section 19(9) of Sierra Leone’s National Security and Central intelligence Act defines “private security company” as a “company providing security services, including armed escort services, to persons, homes, businesses or institutions, whether public or private.” For a definition of “manned guarding” with regard to domestic private security contractors, see e.g., the UK’s Private Security Act 2001, Schedule 2, section 2.

Criteria such as the following could be required to grant an operating license or could be written into the contract, similar to the contracting elements considered above:

- existence as a legal person, including, where applicable, proof of registration and/or a general business license;<sup>39</sup>
- provision by the company of sufficient information to evaluate its reputation and financial situation, to identify its managers, stakeholders and home state, nature of services it intends to offer, etc;<sup>40</sup>
- qualification of company managers and employees, including passing employee background checks by the company itself, the authorities, or both,<sup>41</sup> and adequate training;
- good company management and ethics requirements, including for instance appropriate codes of conduct and rulebooks and internal compliance as well as internal disciplinary and sanctions mechanisms. An obligation to investigate allegations of misconduct and breaches of law and to report them under certain circumstances to the authorities should be written into the license. Membership of recognized associations and adherence to industry codes of conduct<sup>42</sup> may be a plus;
- a sound financial situation, as well as proof of adequate insurance cover, and/or the submission of a bond that is forfeited if the contract terms or the law are violated;<sup>43</sup>

39 Section 2(1) of CPA Memorandum No. 17, for instance, requires that private security companies first need a “Business Licence” (issued by the Ministry of Trade) granting a general right to carry out business in Iraq and, second, an “Operating Licence” issued by the Ministry of Interior under the Memorandum. Prior to being granted both licenses, the same section envisages the alternative option of a “Temporary Operating License”. Paragraph 4(b) of the same section requires “proof of registration of the company, and if the PSC is registered in a state other than Iraq proof of registration of the company in its home state.”

40 Section 2(4) of CPA Memorandum No. 17 requires, *inter alia*, the following information: “(b) the full names of all employees, company officers and directors ...; (c) details of the work PSC will be carrying out in Iraq, including any relevant documentation (e.g. a copy of any contracts for services or statement of intent to hire the PSC, including the details of number of employees and customers).” Section 19(3) of the 2002 National Security and Central Intelligence Act of Sierra Leone requires similar information for a licensing application, including information on “(b) financial resources ..., (c) the particulars of the applicant and other promoters, directors, and other officers of the company, and (d) other information as [the licensing authority] may require.” Section 3 of the Kurdish Regional Government Private Security Company Requirements additionally requires specification of the companies or individuals that the security company is contracted to protect, and the areas that the company will physically operate within, as well as lists of all expatriate personnel’s names and countries of origin, of local personnel, and of all company vehicles.

41 Section 2(5) of CPA Memorandum No. 17 foresees that officers and employees must pass vetting by the Ministry of Interior. Possible criteria for such vetting are described with regard to the option of a licensing regime for individual operatives further below.

42 For a code of conduct of the European domestic private security industry, see CoESS/Uni-Europa above note 5, *Code of conduct and ethics for the private security sector*, July 2003, available at: [http://www.coess.org/documents/code\\_of\\_conduct.pdf](http://www.coess.org/documents/code_of_conduct.pdf) (last visited 14 December 2006).

43 Section 3 of CPA Memorandum No. 17 requires a minimum refundable bond of \$25,000 or more, depending on the number of company employees, as well as evidence of sufficient public liability insurance. The bond is forfeited if the company fails to provide information every six months or upon request, or if employees or the company breach Iraqi or other applicable law. Section 3 of the Kurdish

- identification of employees, as a minimum by means of an identity card to be shown upon demand, in order to increase accountability and potentially allow for lodging complaints;
- periodic reporting on contract performance as well as incident reporting. The company might periodically be subjected to a limited evaluation or obligation to submit reports, for example any time a significant change (e.g. with regard to company structure, type of services, employee recruitment changes etc.) or incident occurs;<sup>44</sup>
- obligation to conduct operations in accordance with specified rules, including codes of conduct and operational rules on the use of force;<sup>45</sup>
- the authority should re-affirm in the license the obligation of the company and its staff to respect national law, including criminal, corporate, labor, immigration and tax law, as well as applicable international standards, including human rights and, where relevant, international humanitarian law;<sup>46</sup>

### *Contract licensing or notification*

Given the sensitivity of armed security or even military services, in addition to issuing company licenses for the type of services envisaged, consideration might be given to subjecting each contract or transaction of a certain kind or amount to prior approval by governmental authorities. It would, however, need to be seen whether such a “transaction by transaction” control is realistic and how many additional administrative resources it would require. The period of time necessary for the authorities to process a license request should not become excessive.

Alternatively, an obligation of simple notification could be envisaged, whereas the authorities would have the right to intervene should the contract not comply with requirements.

Possible considerations for the approval of a specific contract or “transaction” might, for instance, include the likelihood of the services being used to facilitate violations of international law and standards, in particular human rights, as well as national laws, the envisaged positive or negative impact of

Regional Government Private Security Company Requirements requires a company insurance certificate and (apparently only under certain circumstances) an original bond certificate drawn on an Iraqi bank.

44 Section 7 and 3(2) of CPA Memorandum No. 17 require information to the authorities every six months on financial and employment records, contract status and weapons data. Failure to provide such information may result in the forfeiture of the bond.

45 Section 9(4) of CPA Memorandum No. 17 specifies that operations must be conducted in accordance with rules on the use of force annexed and a code of conduct for private security companies operating in Iraq, both annexed to the memorandum. The rules on the use of force for instance require treating civilians with dignity and respect, maintaining a current weapons training record and not joining coalition or multi-national forces in combat operations except in self-defense or in defense of persons as specified in the contracts. Section 8 of the Kurdish Regional Government Private Security Company Requirements lays out a number of conduct obligations of the licensed company.

46 Section 9 of the CPA Memorandum No. 17 specifies that private security companies must comply with all applicable criminal, administrative, commercial and civil laws and regulations.

the activities on the public interest (e.g., regional security and stability, sustainable development and institution-building, disarmament, demobilization and reintegration of combatants, and humanitarian issues such as de-mining) and the risk of the service being used against governmental or other actors.<sup>47</sup> Such criteria might also to some degree be inspired by instruments relating to the export or trade of arms, such as the EU's Code of Conduct on Arms Exports Control or the draft framework convention on international arms transfers of 25 May 2004 worked out under the auspices of a group of Nobel Peace Laureates<sup>48</sup> as well as, of course, other national regulations on the domestic private security industry.<sup>49</sup>

### *Licensing of individual operatives*

In addition to company (and possibly contract) licensing, territorial states may consider requiring each individual carrying out certain security and/or military services to first obtain a personalized operating license. This would allow some control and oversight over those who carry out the respective activity on the ground and may assist in excluding undesirable individuals. All licensed individuals should receive an identification card.

Criteria to issue such a license could include passing a background check (including the absence of criminal history), a certain age limit and adequate training.<sup>50</sup>

### *Requirements relating to weapons*

Requirements with regard to the possession, carrying and use of weapons by a private security company could be considered for any of the described licensing regimes, unless general regulations apply satisfactorily. Most states have enacted regulations on the conditions for individuals to possess and use weapons. With regard to private security companies, controls relating to weapons could include limitations on the types of weapons that private contractors may use; a requirement that the company (or its operatives) duly register all weapons with

47 Section 19(5) of Sierra Leone's National Security and Central Intelligence Act of 2002 lists "the public interest" as a (very general) criterion to be taken into account when examining a company's application for a license. In section 19(7), the same act specifies that when the application is refused, a written statement shall state the reasons for that refusal, which is subject to appeal.

48 Available at: [http://www.iansa.org/documents/2004/att\\_0504.pdf](http://www.iansa.org/documents/2004/att_0504.pdf) (last visited 12 December 2006).

49 See above notes 28–30.

50 Section 2(5) of CPA Memorandum No. 17 for instance provides that the company as well as their officers and employees "will be vetted by the [Ministry of Interior] to ensure that any criminal or hostile elements are identified and to prevent attempts by illegal organisations (e.g. criminal organisations, illegal militias) to legitimise their activities." Vetting criteria in Section 2(6) include a minimum age of 20, mental and physical fitness, willingness to respect the law and all human rights and freedoms of all citizens of the country, a background check that confirms compliance with the "De-Baathification of Iraqi Society" policy, no prior criminal convictions, no history of involvement in terrorist activity, and minimum operations and weapons training. For non-Iraqi employees, however, section 2(7) provides for the possibility of a waiver of the vetting criteria if a copy of a comparable certification from a foreign governmental authority can be produced.

the relevant governmental authority and possibly provide a list of these weapons to the licensing authority;<sup>51</sup> provisions relating to the import of weapons; the need for a mandatory weapons authorization card; as well as requirements to ensure specific weapons training and operating procedures to limit as much as possible the potential risk to third persons.<sup>52</sup>

### *Monitoring and sanctions*

Again, monitoring will be crucial in ensuring accountability and compliance with standards and license conditions. A body vested with inspection and/or auditing competences may be crucial for effective monitoring of compliance with the contract and the law.<sup>53</sup> To promote transparency, lists of current licenses could be made available to the parliament and possibly to the public. Also, in addition to access to courts, particularly for affected individuals, territorial states might consider establishing or promoting alternative grievance procedures. Reference can be made to what was said with regard to monitoring by contracting states.

### *Establishing criminal and civil jurisdiction*

Besides possibly regulating the provision of private security and military services on its territory, territorial states should ensure that they can effectively bring to justice individual employees alleged to have committed serious violations of human rights and international humanitarian law. In addition, they may also consider establishing criminal responsibility of company directors for violations by employees that result from the directors' negligence, in particular for serious violations of human rights and international humanitarian law.<sup>54</sup> Non-criminal liability and also criminal liability of the company for torts arising out of crimes by their employees or directors may also be considered.<sup>55</sup>

51 For licensing applications, Section 2(4) of CPA Memorandum No. 17 requires information, *inter alia*, on “d) details and serial numbers of all weapons that may be used by the PSC.” Section 19(3) of the 2002 National Security and Central Intelligence Act of Sierra Leone requires information on “any arms and ammunition, whether or not licensed under the Arms and Ammunition Act, 1955, intended to be used for the business or operations of the company.”

52 CPA Order Number 3 (Revised) (Amended) as well as Section 6 of CPA Memorandum No. 17 establish standards, for instance, with regard to licensing, the possession and use of weapons by private security companies, the obligation of employees to possess and carry with them a weapons card, and a ban on using privately owned weapons for private security duties. See also section 19(3) of the 2002 National Security and Central Intelligence Act of Sierra Leone.

53 Section 8 of CPA Memorandum No. 17 foresees the establishment of an independent oversight committee responsible for carrying out general inspection and audits of private security companies concerning the implementation of the memorandum. Also, all private security companies are liable to periodic audits verifying the vetting standards and carried out by an independent auditing firm engaged by the Ministry of Interior.

54 On the criminal responsibility of superiors, see above note 27.

55 For instance, the United Kingdom's Private Security Industry Act 2001 (which, however, does not envisage the sale of private security services abroad) establishes in its section 23 that “[w]here an offence under any provision of this Act is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a) a director,

## Exporting states

Currently, only very few states have adopted regulations specifically concerning the export of private armed security or military services. The United States' main set of regulations governing the licensing of the export of defense services is the International Transfer of Arms Regulations (ITAR), which implements the US Arms Export Control Act.<sup>56</sup> The US exporting regime has been qualified as being increasingly structured to facilitate trade to allies, partners and areas of foreign policy priority, with a more profound acceptance of using private military companies to deliver services formerly provided by state institutions than elsewhere, creating a "good faith" atmosphere between regulators and industry.<sup>57</sup> The South African Regulation of Foreign Military Assistance Act has taken a very different, rather restrictive approach, albeit it has been observed to be under-enforced, *inter alia*, because of a lack of resources for monitoring compliance extraterritorially, a lack of confidence in the viability of prosecutions and possibly also because of the rather antagonistic approach.<sup>58</sup> Other states are considering regulating the export of private security and military services, including the United Kingdom<sup>59</sup> and Switzerland.<sup>60</sup>

As mentioned above, all states, including exporting states, have a general duty to ensure respect for international humanitarian law and for human rights law. Regulating the export of services that may result in the use of force may contribute to promoting respect for international law by controlling who exports what services and where they are exported to, and by establishing standards that would hopefully marginalize disreputable companies and individuals. Additional reasons for a state to consider regulating the export of military or security services may include the possibility that the activities of companies or nationals from that state negatively reflect on its reputation. Also, their actions may not conform to

manager, secretary or other similar officer of the body corporate, or b) any person who was purporting to act in any such activity, he (as well as the body corporate) shall be guilty of that offence and liable to be proceeded against and punished accordingly." Section 9 of the CPA Memorandum No. 17 specifies that a licensed company shall be responsible for the actions of its employees.

56 See Marina Caparini, "Domestic regulation: licensing regimes for the export of military goods and services", in Chesterman/Lehnhardt (eds.), above note 4.

57 See Caparini, *ibid*.

58 See Caparini, *ibid*; Raenette Taljaard, "Implementing South Africa's Regulation of Foreign Military Assistance Act", in Alan Bryden/Marina Caparini (eds.), *Private Actors and Security Governance*, Geneva Centre for the Democratic Control of Armed Forces, 2006, p. 167.

59 See UK FCO, *Green Paper*, above note 37; UK Foreign Affairs Committee, *Ninth Report*, above note 26; UK Foreign Affairs Committee, *Response*, above note 14; Christopher Kinsey, "Regulation and Control of Private Military Companies: The Legislative Dimension", *Contemporary Security Policy*, Vol. 26, April 2005, p. 84; Elke Krahmman, "Private Military Services in the UK and Germany: Between Partnership and Regulation", *European Security*, Vol. 14, No. 2, June 2005, p. 277.

60 The Swiss government has mandated its Federal Department of Justice and Police to review the advisability of requiring providers of military or security services based in Switzerland with operations in crisis and conflict zones to obtain approval, or of subjecting them to a licensing system, Report by the Swiss Federal Council on Private Security and Military Companies of 2 December 2005 (unofficial English translation), available at: <http://www.eda.admin.ch/psc> (last visited 9 December 2006), section 6.3, para. 4.

the state's foreign policy objectives or go against other interests or even its own forces.<sup>61</sup> Challenges include not overburdening the industry as well as the public authorities with impractical administrative procedures that result in delays, and making regulation and its monitoring effective, given that the actual activities will take place abroad.

### Options and possible elements for regulation by exporting states

States wishing to regulate the “export” of private military and security services to conflict or post-conflict situations have four regulatory options:

- ban on exporting certain military services;
- general licensing of companies;
- licensing of individual contracts; and/or
- licensing of individual operatives.

Many arms export control regulations, including the US Arms Export Control Act, provide for a double licensing approach. To be granted an application, it would first be necessary for the company to obtain a general license. Secondly, the specific contract must be licensed. Exporting private military or security services without a license would be subject to sanctions. Such export licensing regimes can also be combined with a ban on exporting specified military services.

### *Extending arms export controls to military and security services*

One approach for regulating the export of military and security services is to extend existing arms export control instruments and mechanisms to include the export of such services. In the same vein, a recent report of the European Parliament's Committee on Foreign Affairs proposes that the European Parliament adopt a resolution containing the following paragraph calling for the EU to consider extending the EU's Code of Conduct on Arms Export to cover certain private and military security services:

“[The European Parliament] Notes that the United States has extended its legislation on the control of military exports to cover private security companies, and therefore calls for the EU to consider similar steps to extend the 1998 EU Code of Conduct so that it covers private security services; as a first step the EU could add to the Common Military List the following activities and services requiring a license for export: armed personnel and site protection, armed transport security, military weapons and equipment training, strategic and tactical training, security sector reform, military and security consultancy, military logistics, counter-intelligence services and operational support.”<sup>62</sup>

61 See also UK FCO, *Green Paper*, above note 37, pp. 20–21.

62 Committee on Foreign Affairs of the European Parliament, Report on the Council's Seventh and Eighth Annual Reports according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports (2006/2068(INI)), A6-0000-2006 (final), 28.11.2006. Options for the EU to act, such as the

Such an extension of the non-binding EU Code of Conduct, which nonetheless has had a real impact on the regulation of EU members,<sup>63</sup> would provide a chance to promote common standards and approaches on the issue.

However, the export of services is not quite the same as the export of physical goods, and thus may raise different issues, even if arms export regulations often also regulate the provision of a range of services connected to arms exports, such as maintenance, operation or training in the use of the exported arms. The export of arms can be relatively easily controlled when the physical objects cross borders, which also serves as the evident trigger of the regulation's application. Services are less evident and easy to control since they are delivered in a destination state, far from the jurisdiction and central authorities of the licensing state, and over time the nature of each service may change.

### Banning the export of certain military services

A sweeping ban on exporting any military services would be very broad, and it would raise definitional difficulties. The UK's Green Paper took the view that such a general ban would excessively restrict individual liberty, could deprive weak but legitimate governments of needed support and would deprive defense exporters of legitimate business, since services are often a necessary part of export sales of military goods.<sup>64</sup>

Several states prohibit the recruitment in their territory of foreign armed forces, or prohibit their own nationals from joining or fighting for foreign armed forces, sometimes against the background of neutrality. These prohibitions vary, sometimes applying to any foreign governmental armed forces,<sup>65</sup> or only to armed forces engaged in warfare against the own state<sup>66</sup> or a friendly state,<sup>67</sup> or of a state that potentially could become an adversary. These prohibitions are usually based on the nationality of the individuals involved but could possibly be adapted to apply to companies based in or exporting from that state. The mentioned prohibitions stem, however, generally from a different era. Not only is their applicability

creation of a European framework, a set of unified standards and extending the EU's Code of Conduct on Arms Export, were discussed by participants including EU representatives at Roundtable on 7 December 2006, see Security Defence Agenda, above note 5. On the options available to the EU, see Elke Krahmann, "Regulating Military and Security Services in the European Union", in Bryden/Caparini (eds.), above note 58, p. 189; *idem*, "Regulating Private Military Companies: What Role for the EU?" in *Contemporary Security Policy*, Vol. 26 (2005), p. 1. The UK Foreign Affairs Committee had recommended working towards the inclusion of services provided by private military companies in the existing EU Code of Conduct for Arms Exports, Foreign Affairs Committee, *Ninth Report*, above note 26, recommendation (d).

63 Krahmann, above note 62, p. 116.

64 See UK FCO, *Green Paper*, above note 37, No. 71.

65 See e.g., General Civil Penal Code of Norway of 1902, article 133.

66 See Swiss Military Penal Code, Arts. 90 and 94.

67 See Canadian Foreign Enlistment Act, Revised Statutes of Canada 1985, c. F-28, Art. 3-5.

to the contemporary phenomenon of private military companies not entirely clear, but also they have essentially become redundant.<sup>68</sup>

States parties to the UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989 or the African Union's Convention for the Elimination of Mercenarism in Africa of 1977 are required to prohibit activities related to mercenarism, and particularly the recruitment of mercenaries on their territory.<sup>69</sup> There have been only very few prosecutions, however, and as mentioned, it is doubtful whether prohibitions against the recruitment of mercenaries would be very effective,<sup>70</sup> even if it is inherently difficult to measure any potential deterrent effect.

An alternative to prohibiting mercenarism, which might address some of the underlying concerns, could be a ban on military services to any non-governmental forces, a ban on participation in any overthrow of a government, or a ban on contracts involving active participation in hostilities or combat.<sup>71</sup> Also, the prohibition of certain military services could be limited in time and/or with regard to certain countries or parties to a conflict.

While these prohibitions are a very direct way for national legislators to try to prohibit objectionable activities abroad by their citizens (or companies of that state), they do not set standards for the export of other military or security services, nor do they establish oversight for such activities.

## Licensing of companies

Instead of or in addition to a non-flexible ban of the export of certain activities, companies could be required to apply for a general license permitting the company to export a defined range of security or military activities to all or some countries or clients. The company license then may specify the type of services, destinations and/or potential range of clients for which the license has been granted. The Green Paper argues that a general license on its own may not be effective for protecting the public interest (since not scrutinizing individual exports) and may lend credibility to companies about whose operations the government may know little or whose character might change. But the Green Paper considers that a general company license might be useful and credible in conjunction, for instance, with licensing individual service contracts.<sup>72</sup>

Such a double licensing approach is applied in the United States. US companies seeking to export defense services first need to register, and only thereafter can apply to obtain a license for a specific sale. The same double licensing requirement exists under many national arms export controls. Under the

68 See International Alert, *Regulating private military companies: options for the UK Government*, 2001, p. 28 f.

69 See e.g., South Africa, Regulation of Foreign Military Assistance Act, 1998.

70 See the remarks on prohibiting mercenarism by territorial states, above note 37.

71 UK Committee on Foreign Affairs, *Ninth Report*, above note 26, recommendations (e), (j), (k) and (l).

72 See UK FCO, *Green Paper*, above note 37, pp. 25–26.

Swiss Federal Law on War Material of 13 December 1996, for instance, a company license is issued insofar as the company offers the necessary guarantees of regular business conduct and insofar as the foreseen activity is not contrary to Swiss interests. The company license is valid only for the war material mentioned in the application and can be limited in time, subjected to conditions and revoked if the basis for granting the license no longer exists.

Criteria to take into account when evaluating an application for a company operating license may include those considered above with regard to the approval of company operating licenses by territorial states.<sup>73</sup> The US Directorate of Defense Trade Controls strongly advises registered exporters and manufacturers to have in place a compliance and monitoring mechanism and lists some recommended elements of such a compliance program in a manual.<sup>74</sup>

### Licensing of individual export contracts

In addition to or also instead of company licensing, state authorities could require a company to obtain a license for contracting to provide certain military and security activities abroad. Such a license requirement would have the advantage of permitting the authorities to take into account current circumstances, including the recent evolution of the situation in the destination state or region and the nature of the potential clients when determining whether to grant the license. Also, specific conditions and standards can be attached to the license for the export of certain military or security services to certain states, regions or clients. For example, a specific condition for an export license for military training may go as far as requiring the alteration of the training curricula.<sup>75</sup> The overall objective is, again, to prevent exports of military and security services that could have undesirable consequences.

The definition of the military and security services covered by the licensing regime will need to be clearly defined.<sup>76</sup> The 2005 draft South African legislation defines security services as one or more of the following services or activities:

- “(a) Protection or safeguarding of an individual, personnel or property in any manner;
- (b) giving advice on the protection or safeguarding of individuals or property;
- (c) giving advice on the use of security equipment;
- (d) providing a reactive response service in connection with the safeguarding of persons or property in any manner;
- (e) providing security training or instruction to a security service provider ...;

<sup>73</sup> See above, pp. 648–650.

<sup>74</sup> See <http://pmdtcc.state.gov/compliance.htm> and [http://pmdtcc.state.gov/docs/Compliance\\_Programs.pdf](http://pmdtcc.state.gov/docs/Compliance_Programs.pdf) (both last visited 30 January 2007).

<sup>75</sup> Caparini, above note 56.

<sup>76</sup> A list of possible military and security services is, for instance, contained in Schreier/Caparini, above note 8, p.120.

- (f) installing, servicing or repairing security equipment;
- (g) monitoring signals or transmissions from security equipment;
- (h) making a person or service of a person available, directly or indirectly, for the rendering of any service referred to in paragraphs (a) to (g); or
- (i) managing, controlling or supervising the rendering of any of the services referred to in paragraphs (a) to (h)”.<sup>77</sup>

With regard to security services, one option could be to cover only armed security services. The US International Traffic in Arms Regulations (ITAR) provides an example of a definition of “defense services” that essentially covers services connected to arms export and military training.<sup>78</sup> The extent to which this definition and thereby ITAR’s export control licensing regime also applies to typical security services, such as the protection of individuals or objects, is not very clear.

### *Criteria for granting licenses for individual exports*

Certain procedures and criteria applied in granting licenses for the export of goods could also be used in the licensing of the export of services. The UK Green Paper indeed suggested that criteria for the export of services would be established along the same lines as those for exports of arms.<sup>79</sup> The non-binding EU Code of Conduct on Arms Exports, for instance, includes, *inter alia*, the following criteria:

- respect for the international obligations of the exporting state, particularly UN or EU sanctions, agreements on non-proliferation;
- respect for human rights of the country of final destination, including an assessment of the risk that the proposed export might be used for international repression, exercising “special caution and vigilance in issuing licenses, on a case-by-case basis and taking account of the nature of the equipment to countries where serious violations of human rights have been established ...”;
- an evaluation of the risk of provoking or prolonging armed conflicts or aggravating existing tensions or conflicts in the country of final destination;

<sup>77</sup> Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Bill, 24 October 2005, section 1(1).

<sup>78</sup> That Regulation defines a “defense service” requiring an export license as: “(1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarisation, destruction, processing or use of defense articles [including, for instance, firearms and ammunition]; (2) The furnishing to foreign persons of any technical data [such as classified information relating to defense articles and defense services, information required for the production, operation, repair or maintenance of defense articles, or software directly related to defense services] whether in the United States or abroad; or (3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational or information publications and media of all kinds, training aid, orientation, training exercise and military advice.” International Traffic in Arms Regulations, 22 CFR 120–130, 1 April 2001, §120(9).

<sup>79</sup> UK FCO, *Green Paper*, above note 37, No. 73.

- for the sake of preserving regional peace, security and stability, evaluation of the risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim;
- evaluation of the behavior of the recipient country with regard to the international community, particularly concerning its attitude to terrorism, the nature of its alliances and respect for international law;
- the potential effect of the proposed export on the defense and security interests of the licensing state and those of friends, allies and other EU members.

The draft framework convention on international arms transfers of 25 May 2004<sup>80</sup> suggests the following in its draft article 3:

“A Contracting Party shall not authorize international transfers of arms in circumstances in which it has knowledge or ought reasonably to have knowledge that transfers of arms of the kind under consideration are likely to be:

- a. used in breach of the United Nations Charter or corresponding rules of customary international law, in particular those on the prohibition on the threat or use of force in international relations;
- b. used in the commission of serious violations of human rights;
- c. used in the commission of serious violations of international humanitarian law applicable in international or non-international armed conflict;
- d. used in the commission of genocide or crimes against humanity;
- e. diverted and used in the commission of any of the acts referred to in the preceding sub-paragraphs of this Article.”

In addition, draft article 4 provides that:

“In considering whether any international transfer of arms may be authorized in accordance with Article 1 of this Convention, Contracting Parties shall take into account whether transfers of arms of the kind under consideration are likely to:

- a. be used for or to facilitate the commission of violent crimes;
- b. adversely affect regional security;
- c. adversely affect sustainable development; or
- d. be diverted and used in a manner contrary to the preceding sub-paragraphs and in such circumstances there shall be a presumption against authorization.”

The risk assessment conducted under the US ITAR licensing regime for the commercial export of defense services similarly takes into account national security, arms proliferation concerns and foreign policy considerations, such as regional stability, human rights and multilateral controls.<sup>81</sup> The Directorate of

80 Available at: [http://www.iansa.org/documents/2004/att\\_0504.pdf](http://www.iansa.org/documents/2004/att_0504.pdf) (last visited 12 December 2006).

81 Nancy Meyer, Directorate of Defense Trade Controls, Powerpoint presentation, February–March 2006, available at: [http://www.industry.gov.au/assets/documents/itrinternet/ITAR\\_overview\(DoS\)20060316094050.pdf](http://www.industry.gov.au/assets/documents/itrinternet/ITAR_overview(DoS)20060316094050.pdf) (last visited 14 December 2006). The Swiss Decree on War Material of 25 February 1998 establishes similar criteria for authorizing individual exports in its Article 5 and provides that if the arms

Defense Trade Controls also applies a pre-license check of the proposed foreign end-users, assessing their reliability and likeliness to comply with end-use restrictions, maintaining to that end a watch list of suspicious organizations and individuals.

### *Administrative implementation and monitoring*

A governmental agency with adequate resources would need to administer the granting and management of export licensing for services and monitor and promote compliance with the relevant legal rules and licensing conditions by the companies. To avoid an excessive burden for minor or unproblematic contracts, a “fast track” procedure could be envisaged for less problematic services (e.g., “non-lethal” as opposed to potentially “lethal”),<sup>82</sup> regions or clients such as certain governments and international organizations. The US Directorate of Defense Trade Controls,<sup>83</sup> for instance, automatically denies licenses to embargoed countries while generally expediting the licensing process for key NATO allies and friendly countries.<sup>84</sup>

Monitoring adherence to the licensing conditions is a challenge, particularly because the activities take place far away from the agency in another state’s jurisdiction.<sup>85</sup> The United States has mandated its embassy personnel to take on enforcement tasks, make pre-license checks and monitor end use of licensed exports under the so-called “Blue Lantern Program”. This program particularly targets defense articles and services most susceptible to diversion or misuse, but it is unclear to what extent military training contracts or other services are monitored.<sup>86</sup> The US Directorate of Defense Trade Controls can conduct investigations, undertake criminal prosecutions and civil action in case of suspected ITAR violations, and penalties for violations include suspending or revoking license approvals, fines, imprisonment, a ban on contracting with the government for up to three years or enhanced scrutiny in the future.<sup>87</sup> Concerns have been voiced, however, about the transparency of the whole ITAR export regime. Public information about the export of private military services is scarce. Service export is not clearly differentiated from the export of defense goods, and there appears to be a “revolving door” effect with

are not exported to a foreign government or a company working on its behalf, the company must demonstrate that it possesses the required authorization of the final destination state or that it does not need such an authorization.

82 Deborah D. Avant, *The Market for Force: The Consequences of Privatizing Security*, 2005, p. 150.

83 See <http://pmdtc.state.gov/> (last visited 30 January 2007).

84 See Caparini, above note 56.

85 Measures comparable to contract oversight may be taken, see above, pp. 644–645.

86 Arms Exports Control Act, Section 40A; “End-Use Monitoring of Defense Articles and Defense Services: Commercial Exports FY 2005”, available at: [http://www.pmdtc.org/docs/End\\_Use\\_FY2005.pdf](http://www.pmdtc.org/docs/End_Use_FY2005.pdf) (last visited 14 December 2006); Caparini, above note 56.

87 Caparini, above note 56.

individuals changing between government and company employments. Moreover, Congressional oversight is limited.<sup>88</sup>

To promote transparency of the industry and political oversight, annual reports to parliament could help, as is the case with arms export controls in many countries.<sup>89</sup> Also, sharing information about licenses that were refused may contribute to weeding out the black sheep.

### Licensing of individuals providing military or security services abroad

The fact that the employees of a company based in a regulating state are citizens of many different countries poses a challenge to licensing individual operatives. Also, the employees may never be physically present in the territory of the regulating state. Licensing of the company's own nationals contracting for military or security services abroad would raise other issues, including to some extent "legitimizing" conduct, the monitoring of which would be very difficult, if not unrealistic.<sup>90</sup>

### Concluding remarks

The phenomenon of the transnational sale of private security and military services raises many complex issues. However, as this contribution has tried to show, there are some tools that may help promote respect for desired standards by such companies and increase their accountability and control over them. When considering regulation of the transnational phenomenon of private security and military companies, the domestic private security market and its regulation offer particular lessons that until now have received (too) little attention. It has also become apparent that the regulation of the export of such services may draw on frameworks that exist in most states, such as arms export controls. Ideally, a particular state's regulations of the domestic and the export-oriented private security market and possibly also the contracting of such companies will apply coherent and harmonized standards and procedures.<sup>91</sup> The companies based in one state may well be active both within and outside that state.

88 US Government Accountability Office, "State Department Needs to Resolve Data Reliability Problems that Led to Inaccurate Reporting to Congress on Foreign Arms Sales", GAO-05-156R, 28 January 2005, pp. 15–16 (no. 3), available at: <http://www.globalsecurity.org/military/library/report/gao/d05156r.pdf> (last visited 14 December 2006); Caparini, above note 56; Avant, above note 84, pp. 150–151.

89 See e.g., Art. 32 of the Swiss Federal Law on War Material of 13 December 1996.

90 This view was expressed by certain participants at the Swiss initiative's Expert Workshop of 13–14 November 2006 in Montreux.

91 See Christian Schaller, "Private Sicherheits- und Militärfirmen in bewaffneten Konflikten: Völkerrechtliche Einsatzbedingungen und Kontrollmöglichkeiten", SWP-Studie 2005/S24, September 2005, available at: [http://www.swp-berlin.org/common/get\\_document.php?id=1387](http://www.swp-berlin.org/common/get_document.php?id=1387) (last visited 8 December 2006).

Still, since the transnational provision of private security and military services to a considerable extent is beyond the control of one single state, there is a need for international dialogue on how to approach the issues. A common understanding of the issues and on how to approach them could contribute to coherent, complementary and even interlocking layers of regulation and control, which apply the same or at least consistent (minimum) standards.

Given the lack of specific intergovernmental exchange on the issue of private military and security companies, Switzerland, in cooperation with the International Committee of the Red Cross (ICRC), has initiated an intergovernmental dialogue on how to ensure and promote respect for international humanitarian and human rights law by such companies operating in conflict and post-conflict areas.<sup>92</sup> This process aims:

- “1. to contribute to the intergovernmental discussion on the issues raised by the use of private military and security companies;
2. to reaffirm and clarify the existing obligations of states and other actors under international law, in particular under international humanitarian law and human rights law;
3. to study and develop options and regulatory models and other appropriate measures at the national and possibly regional or international level; and
4. to develop, on the basis of existing obligations, recommendations and guidelines for states to assist them in meeting their responsibility to ensure respect for international humanitarian and human rights law, including by national regulation.”<sup>93</sup>

Participants at the two meetings of governmental and other experts in January and November 2006, a first step of the initiative, shared the view that states have to respect international law when using private military and security companies and cannot circumvent their international legal obligations by resorting to their services. Also, they agreed that states may incur responsibility for violations of international humanitarian law and human rights committed by private military or security companies if their conduct is attributable to them according to the international rules on state responsibility.<sup>94</sup>

At the November 2006 meeting, participants discussed relevant international law and elements of (non-binding) good practices to assist states in promoting respect for international humanitarian law and human rights in their relations with private military and security companies. The organizers of the initiative intend to pursue and deepen this discussion. Ultimately, the initiative aims to reduce any adverse humanitarian effects that may arise from the operation of private military and security companies. A possible venue for discussing the issue, including relevant international law, is the International Conference of

92 See <http://www.eda.admin.ch/psc> (last visited 14 December 2006).

93 Swiss initiative, Outline, 22 November 2006, available at <http://www.eda.admin.ch/psc> (last visited 14 December 2006).

94 Swiss initiative, Expert Workshop of 13–14 November 2006 in Montreux, Brief Summary, <http://www.eda.admin.ch/psc> (last visited 14 December 2006).

the Red Cross and Red Crescent Movement scheduled for the end of November 2007.<sup>95</sup>

Given the current quest by a number of states to regulate private military and security companies, it is hoped that the Swiss initiative may stimulate international debate on best practices and contribute to coherent and complementary practices by the industry as well as other non-governmental clients.

95 Ibid.

# Corporate civil liability for violations of international humanitarian law

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## **Abstract**

*The fact that international humanitarian law violations are in the vast majority of cases prosecuted in criminal courts does not mean that a civil liability for these violations does not exist. This article seeks to explore the concept of civil liability of corporations involved in violations of international humanitarian law by providing an overview of the different legal issues raised by this concept and its implementation in both common law and continental law systems.*

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In recent years there have been much discussion and media reporting about international humanitarian law violations by states and the question of individual criminal liability for such violations. The issue of corporate liability is likewise now attracting broad media attention. Civil liability of companies<sup>1</sup> and violations of international humanitarian law are therefore familiar concepts not only for legal specialists but also for the public. However, they are rarely addressed together. And yet companies are increasingly operating in places which would have been inconceivable only a few years ago, namely in areas of armed conflict. Although companies working in conflict areas or in support of armed forces do not constitute an entirely new phenomenon, the conflict in Iraq, where foreign companies providing security and other support services appeared on the scene

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almost at the same time as the US army, is an extreme example of the role private entities can play during hostilities.

Companies can play many different roles in an armed conflict and may be called upon to take part in it in various ways. In the early stages they can be a source of revenue for the belligerents, and this can cause the fighting to go on longer than it might have done otherwise. In Colombia, for example, oil companies were obliged to pay a special contribution towards restoring law and order, which took the form of a special tax of \$1.25 a barrel. In 1996 this tax brought the Colombian government a total revenue of \$250 million.<sup>2</sup> In Angola, during the last ten years of the conflict, it could be claimed that the parties were able to go on fighting only because of the revenues derived by the government side from the oil companies working the offshore oil deposits, and those derived from De Beers by the then rebel force UNITA, which controlled the diamond mines.<sup>3</sup>

Another way in which companies can take indirect part in an armed conflict is by financing security forces specially mandated to protect the company and its facilities. This type of financing can be arranged either by the signing of contracts between the company and the Ministry of Defence, for example, or tacitly, through the company's free provision of services to the military units in charge of its security.<sup>4</sup> In such a case, are companies liable if their equipment is used by the army to commit violations of international humanitarian law? That is one of the questions this paper sets out to answer.

Finally, a company can be considered to take part in a conflict when it engages private security firms or is itself a private military company that has signed a contract with the government to supply military services. If a company can be deemed to have committed a breach of international humanitarian law, what does that mean in practice? What liability does the company have in such a case?

Serious violations of international humanitarian law are often associated with criminal liability. It should not be forgotten, however, that a number of countries do not recognize the criminal liability of legal persons and, moreover, civil liability offers certain advantages. If civil actions are brought against companies and the courts award large sums of money in damages and interest against them, this could make them more accountable and induce them to change

1 In this article, the terms “companies”, “firms”, “corporations” and “multinationals” are used interchangeably. We do not wish to enter into the legal definitions thereof; they are used to mean any legal person exercising a commercial activity. The term “corporate” is also used here with this general connotation.

2 “Colombia: Human rights concerns raised by the security arrangements of transnational oil companies”, Human Rights Watch, <<http://www.hrw.org/advocacy/corporations/colombia/Oilpat.htm>> (consulted on 28 May 2006).

3 BBC, “Fuelling the war: diamonds and oil”, 28 January 1999, <[http://news.bbc.co.uk/1/hi/special\\_report/1999/01/99/angola/264228.stm](http://news.bbc.co.uk/1/hi/special_report/1999/01/99/angola/264228.stm)> (consulted on 28 May 2006).

4 For example, in Colombia a consortium of oil companies concluded a contract with the Colombian army for \$2 million a year to be paid in cash or in kind in the form *inter alia* of equipment, troop transports and helicopter flying hours. Human Rights Watch, above note 2.

their corporate culture; shareholders, too, would become more aware of their responsibilities on seeing their profits thus dwindle and fearing the loss of their investments. There is also the practical aspect of civil action, which enables victims or their representatives to set in motion a judicial inquiry. This is particularly important in legal systems without a mechanism for victims to initiate criminal proceedings. A civil action furthermore enables victims to obtain material compensation for their sufferings, whereas some legal systems do not allow for this possibility in criminal proceedings. Finally, the standard for a decision in a civil case is the preponderance of evidence, whereas in a criminal trial, the existence of reasonable doubt is sufficient to prevent a guilty verdict. A civil suit therefore provides an easier route for victims to obtain the moral compensation afforded by recognition of liability by a court.

To examine the question of corporate civil liability, three aspects must be considered: the legal bases of corporate civil liability, in particular, the extent to which international law can create obligations for companies and whether there is a general obligation to make reparation for violations of international humanitarian law; the establishment of liability for a violation of international humanitarian law; and the enforcement of that liability before the national courts, that is, the determination of the law applicable and domestic courts' jurisdiction for corporate violations of international humanitarian law.

## The legal bases of corporate civil liability for violations of international humanitarian law

In any legal system the failure to respect a commitment, contract or treaty creates a liability on the part of the defaulting party; generally, there arises a duty to provide compensation for any resulting damage. Several contemporary authors consider that responsibility can be viewed today as a general principle of law.<sup>5</sup> Both the Permanent Court of International Justice and its successor, the International Court of Justice, confirmed very early on that the consequence of an unlawful harmful act was the duty to provide compensation.<sup>6</sup> This general principle has recently been codified in the International Law Commission's Draft Articles on

5 "Today one can regard responsibility as a general principle of international law, a concomitant of substantive rules and the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties", I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford University Press, Oxford, p. 420. See also Q. D. Nguyen, P. Dallier and A. Pellet, *Droit international public*, Paris, LGDJ, p. 762: "Tout ordre juridique suppose que les sujets engagent leur responsabilité lorsque leurs comportements portent atteinte aux droits et intérêts. Cette idée est équitable et irréfutable."

6 *Case concerning the Factory at Chorzów*, Permanent Court of International Justice, 1927: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form", *Corfu Channel Case*, [1949] ICJ Rep., p. 23: "these grave omissions involve her [Albania's] international responsibility. The Special Agreement asks the Court to say whether, on this ground, there is "any duty" for Albania "to pay compensation" to the United Kingdom. ... The Court answered in the affirmative."

Responsibility of States for Internationally Wrongful Acts (hereinafter the ILC Draft),<sup>7</sup> subsequently adopted by the General Assembly of the United Nations.<sup>8</sup>

### The specific case of international humanitarian law

Well before it was codified by the ILC, the principle that there is an obligation to make reparation was expressly formulated in the specific context of international humanitarian law, in Article 3 of the 1907 Hague Convention IV.<sup>9</sup>

On examining the reports of the Hague Peace Conference, it can be seen that the delegates' intention was not to create a principle but rather to extend the existing precept of private law that a principal is responsible for acts of his agents in regard to breaches of the laws and customs of war.<sup>10</sup> The first part of that article is no more than a reiteration of the general principle of state responsibility. Its provisions were later confirmed by Article 91 of 1977 Additional Protocol I, which is essentially a repetition of the said Hague Convention's Article 3.<sup>11</sup> The 1949 Geneva Conventions, which place the emphasis in terms of prosecution and punishment on the criminal liability of individuals, nevertheless contain an article referring to state responsibility.<sup>12</sup>

Pursuant to the general principle of state responsibility and the various relevant provisions of international humanitarian law, there is therefore an obligation on the part of a state to make reparation for an internationally wrongful act committed by it or resulting from the conduct of its agents.

### Corporate obligations under international law

The question here is whether, under international law, non-state entities can be held responsible for violations of international humanitarian law and, if so,

7 Article 1 of the ILC Draft stipulates that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”

8 Adopted in 2001, annexed to General Assembly Resolution 56/83, A/RES/56/83.

9 Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

10 The report of the Second Committee which studied this article reveals that Germany's proposal (future Article 3) was to extend to international law, for all violations of the Hague Regulations, the private law principle to the effect that a principal is responsible for his subordinates or his agents. This principle appears to have been accepted, since, according to the report, Germany's proposal went unopposed. F. Kalshoven, “State responsibility for warlike acts of the armed forces”, *International and Comparative Law Quarterly*, Vol. 40, 1991, p. 832.

11 It should be noted that Article 91 extends the scope of this principle to other breaches of international humanitarian law and to the “wars of self determination” mentioned in Article 1(4) of the Protocol.

12 “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.” Article 51, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Article 52, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; Article 131, Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949; Article 148, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949. The authors' intention in including this provision was not to repeat Article 3 of the Hague Convention but to specify that compliance with the obligation to prosecute the perpetrators of serious breaches did not relieve states of their obligations under Article 3 of the Hague Convention.

whether there is a concomitant duty to make reparation. We therefore need to consider the extent to which international law creates obligations for non-state entities.<sup>13</sup>

In the nineteenth century, international law was addressed exclusively to states: according to the traditional view, only states and their agents could be liable under international law. However, the proliferation of non-state actors on the international scene, two examples being armed groups and multinational companies, which wield ever-greater economic and social power, has prompted international law to take an interest in this type of entity.<sup>14</sup> Individuals certainly had particular obligations under international law well before the Second World War, but since then instances of new rights and duties being created for individuals by international law have increased exponentially. The great expansion of international human rights law in the two post-war decades is a clear indication that the aim of international law is not only to regulate relations between states but also those between states and individuals.

An examination of the Universal Declaration of Human Rights would seem to indicate that international law can confer duties on non-state actors. The use of the expression “every individual and every organ of society”<sup>15</sup> in its preamble is interpreted by some<sup>16</sup> as evidence that the authors intended the provisions of the Declaration to be applicable to all non-state actors and hence also to companies.<sup>17</sup> Similarly, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which are binding treaties, contain in the first paragraph of their common Article 5<sup>18</sup> wording that clearly places “groups” under the obligation not to “engage in any activity or perform

13 Legal persons and hence companies, firms, etc. are non-state entities. Non-state entities can also include armed groups. Other non-state actors are armed individuals. An important part of the debate on the place of non-state actors in the international legal system focuses on the question of their legal personality, i.e. whether or not they are subjects of international law. I shall not address this question here as it does not have much bearing on the question of obligations under international law.

14 P. Muchlinski, “Human rights and multinationals: is there a problem?”, *International Affairs*, Vol. 77, 2001, p. 31.

15 “... Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”

16 Louis Henkin argues that the expression “every organ of society” used in the Preamble to the Universal Declaration of Human Rights includes legal persons, and hence companies, and that the Universal Declaration therefore applies to them. Cited in *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*, International Council on Human Rights Policy, Versoix, 2002, p. 58.

17 It should be noted that, although the Universal Declaration of Human Right is not as such a legally binding instrument, it is the most important soft law instrument in that it has an uncontested moral value as the very foundation of modern international law on human rights.

18 “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.”

any act aimed at the destruction of any of the rights and freedoms” recognized in the Covenants. Referring to the right to adequate food, the Committee on Economic, Social and Cultural Rights stipulated that all members of society, including the private sector, had responsibilities with respect to that right.<sup>19</sup> If the Committee’s interpretation is accepted, non-state entities have responsibilities under the Covenant even though they are not party to it.

The evolution of international criminal law and international humanitarian law since the Second World War has likewise demonstrated that international law applies not only to states but also to non-state entities and, in particular, to individuals.<sup>20</sup> This trend has continued over the past ten years with the creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda<sup>21</sup> by the UN Security Council and the adoption of the Rome Statute establishing the International Criminal Court (ICC). In the context of non-international armed conflicts, international humanitarian law imposes obligations not only on individuals but also on other non-state actors, in particular armed groups. Article 3 common to the four Geneva Conventions and the provisions of Additional Protocol II apply directly and automatically to all parties to such a conflict, provided that the conditions for their application are met.

The idea that international law applies to non-state actors, and hence to companies, and that they have duties and responsibilities under that law consequently does not pose any conceptual problem. Moreover, there are a number of other conventions that explicitly create obligations for companies in specific areas.<sup>22</sup> The first is the International Convention on the Suppression and Punishment of the Crime of Apartheid, Article 1 of which refers to “organizations, institutions and individuals committing the crime of apartheid”.<sup>23</sup> The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal contains a provision to the effect that the Parties shall prohibit “all persons” from transporting or disposing of hazardous waste unless authorized or allowed to do so.<sup>24</sup> Another convention, this time of a maritime nature, imposes civil liability on shipowners for oil pollution damage.<sup>25</sup> Finally, provision is made for the liability of legal persons in Article 10 of the more recent United Nations Convention against Transnational Organized Crime,<sup>26</sup> adopted by the General

19 Committee on Economic, Social and Cultural Rights General Comment 12: The right to adequate food, 12/05/1999, E/C.12/1999/5.

20 E.g. the International Military Tribunals for Germany (Nuremberg) and the Far East (Tokyo) and the adoption of the four 1949 Geneva Conventions, which include an article on criminal prosecution of those who commit grave breaches of the Conventions.

21 The International Criminal Tribunal for the former Yugoslavia was set up pursuant to Security Council Resolutions 808 and 827 (S/RES/808 and S/RES/827) and the International Criminal Tribunal for Rwanda pursuant to Resolution 955 (S/RES/955).

22 B. Stephen, “The amorality of profit: transnational corporations and human rights”, *Berkeley Journal of International Law*, Vol. 20, 2002, p. 69.

23 Article 1, para. 2: “The States Parties to the present Convention declare criminal those organizations institutions and individuals committing the crime of apartheid.”

24 Article 2: “Person means any natural or legal person.”

25 International Convention on Civil Liability for Oil Pollution Damage (CLC), 29 November 1969.

26 A/RES/55/25.

Assembly in 2000. All these treaties bear out the proposition that the international legal system can define what constitutes a crime or a civil wrong on the part of a company.<sup>27</sup>

In addition there are a number of “soft law” instruments that deal exclusively with the responsibility of transnational corporations in respect of human rights. I shall refer here to three of these. The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy<sup>28</sup> is unusual in that it is not an expression of the will of states alone, for it was adopted by consensus by the Governing Body of the International Labour Organization, which includes representatives of the member states’ employers and workers and thus also of the private sector. The Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises, drawn up in 1976 and revised in 2000, emphasizes the duty of enterprises to respect the human rights of those affected by their activities.<sup>29</sup> Finally, the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights,<sup>30</sup> adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights at its 55th session in 2003, are particularly pertinent since they stipulate that companies “shall not engage in nor benefit from” violations of international humanitarian law.<sup>31</sup>

### Corporate obligation to make reparation under international law

Legal persons can therefore have obligations under international law, or at least there is a strong tendency to that effect. However, virtually none of the above instruments provides for a mechanism for the enforcement of any liability that may arise or lays down any obligation for non-state entities to make reparation; they leave it to the states party to the treaties to choose how to apply the rules. Thus while it is possible to conclude that companies do have a duty under international law to make reparation for damage resulting from breaches of their international obligations, it is more difficult to assert that this duty is implemented by a mechanism established by international law. Nonetheless, a number of recent international texts which refer explicitly to the duty to make reparation do seem to support such a claim. One example is the Norms on the

27 A. Clapham, “The question of jurisdiction under criminal law over legal persons: lessons from the Rome Conference on an International Criminal Court”, in Menno T. Kamminga and Saman Zia-Zarifi, *Liability of Multinational Corporations under International Law*, Kluwer Law International, The Hague, 2000, p. 178. See also B. Stephen, above note 22, p. 70.

28 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Board of the International Labour Organization at its 204th Session (Geneva, November 1977). See in particular Article 8.

29 OECD Guidelines for Multinational Enterprises, para.1. See also *Policy Brief: The OECD Guidelines for Multinational Enterprises: A Key Corporate Responsibility Instrument*, OCDE, September 2003, available at <<http://www.oecd.org/dataoecd/52/38/2958609.pdf>> (consulted 7 February 2006).

30 E/CN.4/Sub.2/2003/12/Rev.2.

31 *Ibid.*, para. 3.

Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, stipulating that “transnational corporations ... shall provide ... reparation to those ... that have been adversely affected by failures [by the corporations] to comply” with the norms in question.<sup>32</sup> Two other instruments also appear to confirm the hypothesis that, under international law, non-state entities are bound to make reparation for damage resulting from a breach of international law.

The first is the Basic Principles and Guidelines on the Right to a Remedy and Reparation,<sup>33</sup> the aim of which is to define the mechanisms that allow victims of gross violations of international human rights law and serious violations of international humanitarian law to obtain reparation. According to these basic principles, states are obliged to provide victims with “effective access to justice”, irrespective of who may ultimately be responsible for the violation,<sup>34</sup> and to enforce “judgments for reparation against individuals or entities liable for the harm suffered”.<sup>35</sup> These entities may include companies.

Finally, Article 75 of the Rome Statute of the ICC seems to confirm the tendency towards recognition of an obligation under international law for non-state entities to make reparation. Article 75 states that “[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims”. According to the Rules of Procedure and Evidence, the Court may award reparations taking into account the scope and extent of any damage, loss or injury; awards for reparations must be made directly against a convicted person.<sup>36</sup> Although such awards for reparations are made in the context of criminal proceedings, it follows from the above that they require the same elements as an award for compensation in a civil suit. The person against whom an award for damages is made must have committed a wrongful act and that act must have given rise to the damage. The debate that took place during negotiation of the Rome Statute illustrates the delegations’ differing points of view concerning the nature of the duty to make reparation. Some delegations perceived reparations as a way for victims to bring a civil claim via the Court against the person responsible for the crimes, while others saw reparations as an additional sanction pronounced by the Court. The former interpretation carried the day, that is, reparations are awarded on an individual basis except where the Court deems the award of reparations on a collective basis or a combination of the two to be more appropriate.<sup>37</sup>

32 Ibid., para. 18: “Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken.”

33 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147.

34 Ibid., Principles 1 and 3.

35 Ibid., Principle 17.

36 Articles 97 and 98 of the Rules of Procedure and Evidence.

37 P. Lewis and H. Friman, “Reparations to victims”, in R. S. Lee, *The International Criminal Court*, Transnational Publishers, Ardsley, 2001, p. 483.

Prior to the Rome Statute of the ICC there was no international legal mechanism that enabled victims to make claims for reparation against the person directly responsible for a violation.<sup>38</sup> Although as imposed by international law this duty to make reparation applies only to individuals convicted of a crime, there is nothing to indicate that such a duty could not be imposed on a legal person. France had tabled a proposal to the effect that the Court should have jurisdiction over legal persons, but withdrew it after long negotiations because of the conceptual debate as to whether legal persons can incur criminal liability.<sup>39</sup> If that proposal had been accepted, and if the Court had been given jurisdiction over legal persons, the obligation to make reparation under Article 75 would have applied to them *ipso facto*. This provision cannot be overlooked since it is part of an instrument that has both definite legal force and an implementation mechanism; moreover, the Rome Statute can be considered as expressing the states' *opinio juris* in a number of areas,<sup>40</sup> given the large number of signatures and ratifications it has received.<sup>41</sup>

From the above it may be concluded that international law can establish, by treaty, rules that govern companies' activity, inasmuch as they impose certain obligations on them. In all treaties that address the question of corporate liability, responsibility for taking legislative measures to enforce companies' criminal or civil liability lies with the states. Despite the absence of international enforcement mechanisms, there appears to be a tendency on the part of international law to consider that non-state entities that breach obligations deriving from international human rights law or international humanitarian law are indeed under an obligation to make reparation.

### Imputability of a violation of international humanitarian law to a company

As we have seen, a company can have obligations under international humanitarian law. However, before it can be found liable, a violation of that law must be attributable to it. This is one of the three fundamental elements required for civil liability, namely a wrong, damage and the causal relationship between the two. A violation of international humanitarian law which constitutes a wrong can be the result of the company's own actions or, in some cases, of the actions of others.

#### *Liability for its own actions*

At first sight it is difficult to imagine how a company – which is an abstract, non-physical entity – could commit a violation of international humanitarian law

38 Ibid., pp. 474–5.

39 For greater detail on the course of those negotiations and the French proposal, see A. Clapham, "The question of jurisdiction under criminal law over legal persons", in Kamminga and Zia-Zarif, above note 27.

40 *Prosecutor v. Anto Furundzija*, IT-95-17/1-T, Trial Chamber II, 10 December 1998, para. 227.

41 As at 28 May 2006, 139 states had signed the Rome Statute and 100 states had ratified it.

directly, that is by its own acts. In the majority of cases violations of international humanitarian law are attributable either to a party to the conflict<sup>42</sup> or jointly to an individual and a party to the conflict.<sup>43</sup> A company can also be held responsible for acts committed by its employees, but this question will be examined later.

So what type of acts are directly attributable to a company? The best place to look for an answer to this question is in the judgments of the US Nuremberg Military Tribunals (NMT) set up in after the Second World War. Allied Control Council Law No. 10 empowered any of the occupying authorities to try all persons suspected of crimes, including war crimes, in their respective occupation zones.<sup>44</sup> The tribunals could not therefore punish corporations as such for any crimes they might have committed. However, in order to be able to condemn their senior managers, the Tribunal had to examine the companies' actions. Three cases<sup>45</sup> concerning German industrialists were heard by a US military tribunal under Allied Control Council Law No. 10, two of which are of particular interest here as they constitute precedents for holding companies responsible for a violation of international humanitarian law.

In the first of these cases twelve top managers of the German industrial conglomerate Krupp were accused of, *inter alia*, war crimes for spoliation and plunder of public and private property in occupied territory and of war crimes and crimes against humanity for employing prisoners of war, foreign civilians and concentration camp inmates in arms factories in inhumane conditions. On several occasions the tribunal had to examine the acts of the company itself in order to be able to establish the criminal liability of the individuals who had been running it. The tribunal first examined the question of the company's acquisition of properties in France, Alsace and the Netherlands. In the judgment the tribunal several times refers to actions by the company in contrast to the individual conduct of an employee or a top manager.<sup>46</sup>

In connection with the acquisition of a French company, the tribunal even appears to have attributed a particular intent to Krupp as legal person: "the correspondence between the Krupp firm and the Paris office shows the avidity of the firm to acquire the Austin factory and the Paris property".<sup>47</sup>

42 It is difficult to imagine how failure to respect the fundamental guarantees set out in Article 75 of Protocol I, or other obligations that are the sole responsibility of the High Contracting Parties, could be ascribed to a company.

43 E.g. all acts that can be committed by combatants, in particular grave breaches of the law that give rise to individual criminal liability for their perpetrators and entail the state's responsibility.

44 Allied Control Council, Law No 10, 20 December 1945.

45 *Trial of Friedrich Flick and Five Others*, US Military Tribunal, Nuremberg, 20 April–22 December 1947, *Law Reports of the Trials of War Criminals*, Vol. IX, pp. 1–68; *The I.G. Farben Trial, Trial of Carl Krauch and Twenty-two Others*, US Military Tribunal, Nuremberg, 14 August 1947–29 July 1948, *Law Reports of the Trials of War Criminals*, Vol. X, pp. 1–68; *The Krupp Trial, Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*, US Military Tribunal, Nuremberg, 14 August 1947–29 July 1948, *Law Reports of the Trials of War Criminals*, Vol. X, pp. 69–181.

46 A. Ramasastry, "Corporate complicity: from Nuremberg to Rangoon – an examination of forced labor cases and their impact on the liability of multinational corporations", *Berkeley Journal of International Law*, Vol. 20, 2002, p. 109.

47 *Trials of War Criminals before the Nuremberg Military Tribunals*, Vol. IX, United States Government Printing Office, Washington, 1950, p. 1351.

The tribunal's conclusion on the acquisition of that company shows its view that the Krupp firm had the capacity to act as such and thus to take part in a crime:

We conclude from the credible evidence before us that the confiscation of the Austin plant based upon German-inspired anti-Jewish laws and its subsequent detention by the Krupp firm constitute a violation of Article 48 of the Hague Regulations which requires that the laws in force in an occupied country be respected; that it was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected; that the Krupp firm, through defendants Krupp, Loeser, Houdremeont Mueller, Janssen and Eberhardt, voluntarily and without duress participated in these violations ... and that there was no justification for such action.<sup>48</sup>

Finally, in examining evidence relating to acts of plunder committed in the Netherlands, the tribunal again referred to acts by the company:

We conclude that it has been clearly established by credible evidence that from 1942 onward illegal acts of spoliation and plunder were *committed by, and on behalf of, the Krupp firm* in the Netherlands on a large scale, and that particularly, between about September 1944 and the spring of 1945 certain industries of the Netherlands were exploited and plundered for the German war effort, in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy.<sup>49</sup>

These passages from the judgment certainly suggest that the tribunal recognized that the Krupp firm as such had itself committed the act of plunder.

In connection with the third charge concerning the Krupp group's use in its factories of the labour of prisoners of war, foreign workers and civilian concentration camp inmates, the tribunal referred both to their treatment by the company and its employees and to their use in armaments factories. On the latter point, the accused pleaded in their defence that they were forced to use those workers in the group's factories since, if they had refused, they risked forfeiting the group's factories and property.<sup>50</sup> In order to rebut this defence, the tribunal had to consider the acts of Krupp as a firm. The tribunal noted that "it was not a matter of refusing to accept an allocation. It was up to the enterprises to put in requests. Many armament firms refused. The Krupp firm sought concentration camp labor because of the scarcity of manpower then prevailing in Germany."<sup>51</sup>

The tribunal concluded that the Krupp firm had an "ardent desire" to use forced labour. In arriving at that conclusion, it is plain that the tribunal sought to impute the intention to the legal person of the firm in order to demonstrate that it emanated from the top management. The fact that the tribunal found that the Krupp firm planned and intended to use prisoners of war to work in its

48 Ibid., pp. 1351–2.

49 Ibid., p. 1370 (emphasis added).

50 Ramasastry, above note 46, p. 112.

51 *The Krupp Trial*, above note 47, p. 1412.

armaments factories, in breach of the law and customs of war already in force at the time,<sup>52</sup> shows that a company can be held responsible for a breach of international humanitarian law.<sup>53</sup>

In the *I.G. Farben* case, twenty-three members of the German chemical and pharmaceutical company's board were accused of, *inter alia*, war crimes, the plundering and spoliation of public and private property in occupied territory, and war crimes and crimes against humanity for having used forced labour. The tribunal based a number of its findings on the role of I.G. Farben as a corporate body. While it made no reference to the acts of the company in connection with the charge of using forced labour, confining itself to the direct role of the accused in negotiations and meetings on that matter,<sup>54</sup> it did so extensively when it addressed the charges of plunder:

With reference to the charges in the present indictment concerning Farben's activities in Poland, Norway, Alsace Lorraine and France, we find that the proof established beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 *were committed by Farben*, and that these offences were connected with, and an inextricable part of the German policy for occupied countries as above described.<sup>55</sup>

Moreover, the tribunal held the company responsible for a specific violation of Article 47 of the Hague Regulations, which forbids pillage.<sup>56</sup> This violation was not interpreted by the tribunal as being able to be committed solely by the occupying power. The tribunal considered that a legal person had the capacity to breach the laws and customs of war<sup>57</sup> and *ipso facto* that international humanitarian law was applicable to a company.<sup>58</sup>

It can therefore be deduced from the US military tribunal's judgment that the war crime of pillage could be imputed directly to I.G. Farben as a company, even though the tribunal did not have jurisdiction over legal persons.<sup>59</sup>

These two judgments show that companies can be held responsible for violations of international humanitarian law, particularly war crimes, as exemplified in this case by pillage and use of forced labour.

52 Article 6 of the Regulations respecting the Laws and Customs of War on Land (hereinafter the Hague Regulations).

53 Ramasastry, above note 46, p. 112.

54 *The I.G. Farben Trial, Trial of Carl Krauch and Twenty-two Others*, above note 45, pp. 53–61.

55 *Trials of War Criminals before the Nuremberg Military Tribunals*, Vol. VIII, above note 47, p. 1141 (emphasis added).

56 "Such action *on the part of Farben* constituted a violation of rights of private property, protected by the Laws and Customs of War" (emphasis added), *Trials of War Criminals*, above note 47, p. 1140.

57 "Where private individuals, *including juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. ... Where a private individual *or a juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations" (emphasis added), *ibid.*, p. 1132.

58 Clapham, above note 27, p. 169.

59 *Ibid.*, p.171, and Ramasastry, above note 46, p. 107.

## Secondary liability

A legal person can be held responsible for a violation of international humanitarian law, not only for its own acts but also, in certain cases, for the acts of its employees or of other entities, companies, armed groups or even a state. In order for a company to be held at least partially liable, certain conditions have to be met. I shall analyse here the various cases in which a violation can be ascribed to it.

*Vicarious liability.* It is a principle of private law that a principal is responsible for the acts of his agents. In domestic law systems this is known as the principle of vicarious liability. This type of liability also exists in international law in the form of state responsibility for internationally wrongful acts. The second chapter of the ILC Draft<sup>60</sup> addresses responsibility for acts of organs of a state or persons or entities exercising public functions. However, as regards corporate liability for violations of international humanitarian law committed by others, the fact that the law is implemented at national level means that the attribution of liability will be governed by the civil-law rules of domestic legal systems.<sup>61</sup> Under Quebec law, for example, the relevant principle is to be found in Article 1463 of the Quebec Civil Code: “The principal is liable to reparation for injury caused by the fault of his agents and servants in the performance of their duties; nevertheless, he retains his recourses against them.” This article creates a presumption of liability on the part of the principal, that is, the company in this case, for acts of others; no wrong on the part of the principal is therefore needed to establish such liability.<sup>62</sup> Under common law, the tort system, which deals with non-contractual liability, also recognizes this principle, known as the principle of *respondeat superior*. The standards to be met before the principle can apply are more or less the same as in the civil-law system described below.<sup>63</sup> For liability to arise, three conditions must be cumulatively met, namely a wrongful act on the part of the employee, a relationship of subordination and the existence of damage caused by the agent in the exercise of his functions. At first sight these standards appear relatively clear, but the second and third warrant closer examination. The contractual link is not particularly important in determining the existence of a relationship of subordination. What has to be established is rather the authority of the

60 See note 13 above.

61 See below.

62 J. L. Baudouin, *La responsabilité civile*, 4th edn, Les Éditions Yvon Blais, Cowansville, 1994, p. 342. This principle is codified in almost all civil-law systems; see for example Article 2049 of the Italian Civil Code.

63 “As with natural persons, the corporate employer will be held responsible where an agent’s tortious act is committed within the scope of the agent’s authority and in the course of the agent’s employment.” B. Stephen, “Corporate accountability: International human rights litigation against corporations in US courts”, in Kamminga and Zia-Zarifi, above note 27, p. 219. See also V. Oosterveld and A. C. Flah, “Holding leaders liable for torture by others: command responsibility and respondeat superior as frameworks for derivative civil liability”, in C. Scott, *Torture as Tort*, Hart Publishing, Oxford, 2001, pp. 450–1.

principal over the agent and his work and the method used in the performance of his duties.<sup>64</sup> The principal must have power of supervision, authority and control over the way in which the agent's work is carried out. The relationship of subordination between a company and a sub-contractor can therefore be more difficult to establish. The independence of the sub-contractor to whom certain tasks are entrusted is often incompatible with the degree of control required for the presumption of the principal's liability to apply.<sup>65</sup> Obviously, if it can be proved that the principal retains a degree of control over his sub-contractor's activities that satisfies the above standards, the principal may be held liable.

The notion of the performance of duties also raises some difficulties. The standard considered safest for the purposes of determining whether the act was committed in the performance of the agent's duties is the "purpose of the employee's activity" test. If the wrongful act was performed in the interests of the agent and the principal or solely in the latter's interests, it will be presumed to have been committed in the course of the agent's duties. However, if the act is deemed to have been for the sole benefit of the agent, it will not be so presumed.<sup>66</sup> It has been suggested that, when the employee deliberately disobeys or disregards his employer's orders, the employer will incur no liability. However, that is not necessarily so. The standard that applies is always the purpose of the act, as "disobedience on the part of the agent is not necessarily incompatible with performance of his duties".<sup>67</sup> The same applies to a criminal act, as the perpetration of a criminal act does not presuppose *per se* that the agent is acting outside the scope of his duties.<sup>68</sup> These clarifications are of particular importance when it comes to establishing the civil liability of a company for violations of international humanitarian law, since such violations are often crimes. A company operating in a conflict zone may well instruct its employees to comply with human rights law and international humanitarian law, but the fact of giving such instructions will not alone provide a basis for the company to avoid liability for the act of its agent, where that act is performed for the furtherance of its business and where it has benefited from that act.

*Complicity (aiding and abetting).* Complicity is primarily a criminal law concept with strict rules of application. According to Schabas, three conditions have to be met: (i) a crime must be proved to have been committed by another person; (ii) the accomplice must have performed a material act of assistance to the perpetrator of the crime; and (iii) this act must have been performed with intent and with knowledge of the act of the perpetrator of the crime.<sup>69</sup> As the concept of complicity

64 Baudouin, above note 62, p. 353.

65 *Ibid.*, pp. 361–3.

66 *Ibid.*, pp. 383–6.

67 *Ibid.*, p. 375.

68 *Ibid.*, pp. 373–4.

69 W. A. Schabas, "Enforcing international humanitarian law: Catching the accomplices", *International Review of the Red Cross*, Vol. 83, No. 842, June 2001, pp. 447–8.

does not exist as such in extra-contractual civil liability law, either in tort or civil law, we now need to ask how the concept is expressed in private law.

In a number of situations where companies have been accused of violations of international humanitarian law, the violations in question were in fact committed by government forces and hence the state. In some very particular cases, a contract is concluded between a company and the authorities under the terms of which government forces guard the company's facilities; often a specific military unit is assigned to the task.<sup>70</sup> In most of such cases, these units can be regarded as independent contractors since they are not under orders. The principle of vicarious liability described above is therefore applicable.

However, it can be considered in a general manner that if a company deliberately contributes in some way, active or passive, to the committing of a breach, it could be held liable for that breach by virtue of its own act, provided that a sufficiently strong link of causality can be established between the company's wrongful act and the violation.<sup>71</sup>

US law is somewhat more specific. It defines the types of conduct that give rise to joint and several liability for a tort. Such liability arises where a person "orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own, or (b) conducts an activity with the aid of another and is negligent in employing him, or (c) permits the other to act upon his premises or with his instrumentalities. Knowing or having reason to know that the other is acting or will act tortiously."<sup>72</sup> Moreover, the US courts, applying the Alien Tort Claims Act (ATCA),<sup>73</sup> have devised two further tests that would allow a form of complicity to apply in civil cases.

In cases of complicity between companies and governments, the theory of "joint action" can be applied using the joint action test. In such cases, it must be shown that there was an agreement between the parties with a view to achieving a common design.

*Doe v. Unocal Corp.* is a good example of case-law illustrating the application of this theory.<sup>74</sup> In this case, which was heard at first instance in a US federal district court, the company Unocal was sued by citizens of Myanmar for aiding and abetting the Myanmar military in committing grave breaches of human rights. Several of the breaches referred to (torture, rape, forced displacement, etc.) would be violations of international humanitarian law if they were to take place in the context of an armed conflict, hence the relevance of this judgment here. These breaches were perpetrated in the context of oil and

70 See the remarks on the situation in Colombia in the introduction.

71 *Beyond Voluntarism*, above note 16, p. 126.

72 Restatement (Second) of Torts 877 (1965), cited in C. Shaw, "Uncertain justice: Liability of multinationals under the Alien Tort Claims Act", *Stanford Law Review*, Vol. 54, 2002, p. 1382.

73 The Alien Tort Claims Act (hereinafter ATCA) allows a foreign national to bring a civil suit against a party that has caused damage resulting from a breach of international law. "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

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

gas extraction operations and the building of a pipeline. The government had a mandate, *inter alia*, to provide security and manpower for the project, a joint venture involving Unocal, Total and the government of Myanmar. In its analysis the Court found that for the breach to be imputable to the company under the joint action theory, the plaintiff had to show that the parties participating in the joint action, namely Unocal and the government of Myanmar, had the specific common design of violating the victims' rights. The Court found that the two bodies had only one common design, namely that of running the project profitably.<sup>75</sup> The Court also applied the "proximate cause" test to determine whether a breach committed by a state was imputable to a company. To satisfy this test the plaintiff had to show that the company exercised control over the government's decision to commit a violation.<sup>76</sup> In this case, although the evidence showed that Unocal was aware of the use of forced labour and that the project benefited from it, this was not sufficient to hold the company liable for the breach under the joint action theory. This judgment was appealed and was overturned. However, the appellants challenged not the joint action theory *per se* but only its applicability in this case.

In the second-instance judgment in the case,<sup>77</sup> the Court of Appeals for the Ninth Circuit found that the district court should have applied a complicity theory borrowed from criminal law, namely that of aiding and abetting. In the grounds for its judgment the Court of Appeals said that, according to the conflict of laws theory in international private law, it was preferable to use international law standards to decide legal questions in cases based on a rule of the law of nations.<sup>78</sup> The Court of Appeals provided three arguments in favour of the use of international criminal law standards in a civil case in domestic law: (i) international human rights law has been developed largely in the context of criminal prosecutions rather than civil proceedings; (ii) the distinction between a crime and a tort is of little help in ascertaining the standards of international human rights law because what is a crime in one jurisdiction is often a tort in another;<sup>79</sup> and (iii) the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law.<sup>80</sup> On the basis of this theory and the fact that Unocal had knowledge of the human rights violations before becoming party to the joint venture, the Appeals

75 D. Betz, "Holding multinational corporations responsible for human rights abuses committed by security forces in conflict-ridden nations: an argument against exporting federal jurisdiction for the purpose of regulating corporate behavior abroad", *DePaul Business Law Journal*, No. 14, 2001, p. 176.

76 *Ibid.*, p. 177.

77 *Doe v. Unocal Corp.*, U.S. Court of Appeals for the Ninth Circuit, Judgment of 18 September 2002.

78 T. Garmon, "Domesticating international corporate responsibility: holding private military firms accountable under the Alien Tort Claims Act", *Tulane Journal of International and Comparative Law*, Vol. 11, 2003, pp. 347–8.

79 The Court appears to be mistaken in citing this reason, at least as far as violations of international humanitarian law are concerned, since states are obliged under the Geneva Conventions to classify serious violations as criminal acts. Any difference of classification for these types of conduct is therefore impossible.

80 Garmon, above note 78, p. 348.

Court found that there was sufficient evidence to hold Unocal liable under the ATCA.

This application of the aiding and abetting standard was followed by a district court of New York State in the *Talisman* case,<sup>81</sup> in which a Canadian oil company was sued for collaborating with the Sudanese government in violations of human rights and war crimes committed in the context of the international armed conflict taking place in Sudan. *Talisman* challenged the use of the aiding and abetting standard, arguing that this theory did not apply to a civil claim under the ATCA.<sup>82</sup> The Court ruled that this argument was unfounded:

*Talisman's* contention is incorrect. Its analysis misapprehends the fundamental nature of the ATCA. The ATCA provides a cause of action in tort for breaches of international law. In order to determine whether a cause of action exists under the ATCA, courts must look to international law. Thus, whether or not aiding and abetting and complicity are recognized with respect to charges of genocide, enslavement, war crimes, and the like is a question that must be answered by consulting international law.<sup>83</sup>

The theory of aiding and abetting seems therefore to be applicable in civil claims for violations of international humanitarian law, at least in the United States under the ATCA. It is interesting to note that, in order to determine the degree of participation required if a party is to be regarded as a member of a "joint enterprise", the English and Australian courts have used a concept similar to the theory of aiding and abetting.<sup>84</sup> It will therefore be helpful to define "aiding and abetting".

The *Furundzija* case, heard before the International Criminal Tribunal for the former Yugoslavia, offers the fullest definition of the standards for establishing complicity in the form of aiding and abetting. The assistance given must have a substantial effect on the perpetration of the crime, and the person aiding or abetting must have been aware that the assistance provided is contributing to the perpetration of a crime, even if he did not have a common design with the person who directly committed it:

81 *Presbyterian Church of Sudan v. Talisman Energy*, 244 f. Supp. 2d 289, US District Court for the Southern District of New York, 19 March 2003.

82 *Ibid.*, p. 320.

83 *Ibid.* Arguing that new standards had been set by the Supreme Court decision in the *Alvarez-Machain* case (*Sosa v. Alvarez-Machain et al.*, 542 US Supreme Court, 29 June 2004), *Talisman* sought relief of this decision by contending that the existence of secondary liability in particular aiding and abetting liability was not supported by sufficient evidence and that the concept was not sufficiently defined in international law. The District Court rejected the arguments by upholding the 2003 decision that found that secondary liability existed in international law. Furthermore, the court found that *Talisman's* claim that aiding and abetting was not sufficiently defined in international law, as required by the *Alvarez-Machain* case, was misguided. *Presbyterian Church of Sudan v. Talisman Energy*, 374 f. Supp. 2d 331, US District Court for the Southern District of New York, 13 June 2005.

84 *Beyond Voluntarism*, above note 16, p. 130.

In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the actus reus consists of participation in a joint criminal enterprise and the mens rea required is intent to participate.<sup>85</sup>

Companies can therefore be held liable for violations of international humanitarian law where these violations are the result of their own acts or of acts of others, inasmuch as a sufficiently strong link can be established between an act or omission by the company and the violation, or if the company's conduct amounts to complicity. Having established that companies do have responsibilities in relation to violations of international humanitarian law and that they can be held liable for such violations, we now need to consider what means are available for enforcing this type of corporate liability.

## Enforcing corporate civil liability

As ascertained in the first section, companies have obligations under international law. There also seems to be a tendency to consider that they have a concomitant obligation under international law to make reparation. However, as international law does not provide for any mechanism whereby corporate civil liability can be enforced, we must look to domestic law to see what possibilities, if any, it provides for enforcing corporate liability for violations of international humanitarian law.

### Who is the subject of the right to reparation provided for under international humanitarian law?

This question is crucial to the next stages of the analysis. As claims for reparation are made through civil proceedings, it is essential to determine who can bring a civil action on the basis of international law. The first step in answering this question is to investigate what the states' intention was when they adopted Article 3 of the Hague Convention IV of 1907. An examination of the preparatory proceedings leads to the conclusion that Article 3 was intended, *inter alia*, to confer a right to reparation on individuals.<sup>86</sup> The aim of the article was to set up a

85 *Prosecutor v. Anto Furundzija*, above note 40, para. 249.

86 “[I]t would be unacceptable if a victim could claim damages only from the officer or soldier guilty of the infraction”, cited in Kalshoven, above note 10, p. 834. “If in this case the persons injured as a consequence of a violation of the Regulations could not demand reparation from the Government and were obliged to look to the officer or soldier at fault they would fail in the majority of cases to obtain the indemnification due”, cited in Pierre D’Argent, *Les Réparations de guerre en droit international public: la*

new mechanism, as an alternative to diplomatic protection which was non-existent or ineffective in a context of belligerent occupation, to enable victims of violations of international humanitarian law to obtain reparation. It was therefore necessary to confer the right to reparation on the victims themselves. Various domestic courts have expressed opinions on this question and it is important to take a brief look at their conclusions.

On several occasions since the 1960s, when considering claims for compensation from victims of violations of international humanitarian law that occurred during the Second World War, the Japanese courts have had to examine the question as to who is the subject of the right to reparation. After analysing Article 3 and customary law, the Tokyo District Court, in two recent judgments<sup>87</sup> concerning former prisoners of war and civilian internees, dismissed the actions on the grounds that the individuals did not have a personal right to reparation at the time of the violations.<sup>88</sup> They reached this conclusion on the basis of the standards established in the *Shimoda* case brought by five Japanese plaintiffs to recover damages for injuries sustained from the US atomic bombings.<sup>89</sup> According to that judgment, in order for an individual to claim compensation from states these individuals must be subjects of rights in international law. The test set out in that case to determine if one is subject of rights is the following : individuals must be able to have rights and assume duties for and in their own names. For a person to seek reparations from a state, he must be a subject of a right in international law.<sup>90</sup>

However, the Japanese courts' interpretation seems to be mistaken. Correct application of the standards should lead to a conclusion quite different from theirs, for international humanitarian law *is* directly applicable to individuals and does create obligations, for example in the area of criminal law. Consequently, even according to the test applied by the Japanese courts themselves, individuals should be subjects of the right to reparation.

*responsabilité internationale des États à l'épreuve de la guerre*, Brussels, Bruylant, 2002, p. 508. These two statements, which went unchallenged, demonstrate by their wording and the use of the terms "victims" and "persons injured" that the parties wished to confer the right to reparation on individuals and not on the states.

87 In both cases, each plaintiff claimed compensation of US\$22,000 for damage resulting from ill-treatment inflicted by the Japanese army. The fact that the victims had suffered ill-treatment was not contested. The main question was whether or not the victims had a right of redress. *Arthur Titherington and others v. State of Japan*, Civil Division No. 31, Tokyo District Court, 26 November 1998, and *Sjoerd Lapré v. State of Japan*, Civil Division No. 6, Tokyo District Court, 30 November 1998, cited in Fujita Hisaku, Suzuki Isomi and Nagano Kantoro, *War and the Rights of Individuals: Renaissance of Individual Compensation*, Nippon Hyoron-sha, Tokyo, pp. 104, 118.

88 "Article 3 of the Hague Convention is nothing more than a provision which clarifies a state's international liability to compensate a victim nation for violations of the Hague Regulations .... And in the courts of Japan, individuals suffering injury from conduct of members of armed forces who violate international humanitarian law may not seek compensation from the country of their violator." *Sjoerd Lapré v. State of Japan*, *ibid.*, p. 124.

89 *Shimoda* case, 7 December 1963, *Japanese Annual of International Law*, Vol. 8, 1964.

90 Hisaku Fujita, "Introduction: post-war compensation litigation from the viewpoint of international law", in Hisaku et al., above note 87, p. 19.

The US courts traditionally did not recognize an individual right of redress for a violation of international humanitarian law because the Hague Convention was not deemed to be self-executing.<sup>91</sup> Yet this traditional interpretation seems to be changing. In the *Karadzic* case, the Court of Appeals of the Second Circuit acknowledged the possibility that individuals could be subjects of a right to reparation.<sup>92</sup> This tendency seems to be confirmed by other recent judgments, at least as regards claims for reparation under the ATCA for violations of international humanitarian law.<sup>93</sup>

Finally, the right of victims to sue for reparation for damage resulting from violations of international humanitarian law has been recognized in a recent case in Greece. According to the court of first instance, the claim for reparation did not need to be lodged by the state of which the victims were nationals, since there was no rule of international law that prevented the individuals from lodging such a claim themselves.<sup>94</sup> This judgment was confirmed by the Aereios Pagos (Supreme Court), whose conclusion presents a cogent summary of the state of jurisprudence on the right of victims to sue for reparation:

In our opinion we are at the stage of emergence of a practice of founding jurisdiction of the courts of the forum (most appropriate) to adjudicate compensation claims brought by individuals against a foreign state for breaches of *jus cogens* rules and especially those safeguarding human rights, provided that there exists a link between such breaches and the forum state.<sup>95</sup>

Recent developments in both human rights law and international criminal law also indicate that states acknowledge that individuals are subjects of the right to reparation. The Basic Principles and Guidelines on the Right to a Remedy and Reparation,<sup>96</sup> for example, recognizes that individuals are subjects of the right to reparation for serious violations of international humanitarian law. The right of individuals to claim reparation has also been recognized by one of the most important organs of the United Nations, namely the Security Council, which, in its Resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia, stated that:

91 *Goldstar (Panama) S.A. v. United States*, US Court of Appeals 16 June 1992, *International Law Reports*, 96, 1992, p. 58. See also *Hugo Prinz v. Federal Republic of Germany*, Court of Appeals for the District of Columbia 1 July 1994, *International Legal Materials*, 33, 1994, p. 17: “nothing in the Hague Convention, even implied, grants individuals the right to seek damages for violations of its provisions.”

92 “The law of nations generally does not create private clauses of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations.” *Kadic v. Karadzic*, 70 F. 3d 232, 1995, p. 246.

93 See, for example, *Presbyterian Church of Sudan v. Talisman Energy*, above note 81, in which the Court dismissed Talisman’s claim but recognized individuals’ right to claim reparation.

94 *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997; Court of First Instance of Leivadia, 30 October 1997, *American Journal of International Law*, Vol. 92, 1997, p. 767.

95 *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 11/2000, Aereios Pages, 4 May 2000, *American Journal of International Law*, vol 95, 2001, p. 203.

96 Above note 33. Principle 13 also highlights the importance of giving victims access to the justice system to present claims for reparation.

the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violation of international humanitarian law.

Finally, although it does not address claims against civil liability, Article 75 of the ICC Statute recognizes victims' right to reparation. This is certainly an indication that a large part of the international community considers that individuals are the subject of the right to reparation.

### Is a violation of international humanitarian law a civil wrong or a tort in domestic law?

If they are to establish corporate liability for violations of international humanitarian law, domestic courts must have jurisdiction to pronounce on such violations. That means that violations of international humanitarian law must form part of domestic law;<sup>97</sup> in other words international humanitarian law must be incorporated into domestic law. Domestic law must also recognize that a violation of international humanitarian law constitutes a wrong for the purposes of civil liability.

The requirement that international law be incorporated into domestic law is met in the great majority of states. But does a violation thereof constitute a civil wrong for the purposes of private law?

In civil-law systems, a civil wrong is defined as failure, by violating a prescribed standard of behaviour, to fulfil the general duty imposed on each individual not to cause harm to others. An eminent Quebec author has defined a civil wrong as a violation of conduct deemed acceptable in terms of legislation or case-law such that it gives rise to a duty to repair the harm caused.<sup>98</sup> International humanitarian law is in the vast majority of cases implemented through national legislation; as such, conduct that transgresses the standards of behaviour it defines can constitute a civil wrong. This observation applies *a fortiori* to grave breaches, since they are classified as criminal acts.<sup>99</sup> He goes on to say that a transgression of a specific obligation imposed by law or regulation, particularly if it is intentional, constitutes a civil wrong in principle because there is a violation of a standard of conduct imposed by the legislator.<sup>100</sup> There does not therefore appear to be any

97 Except in the United States, where Federal Courts have jurisdiction to hear cases based on international law under the Alien Tort Claim Act, which we shall examine in greater detail below.

98 “[C]’est donc la violation de la conduite jugée acceptable législativement ou jurisprudentiellement qui emporte l’obligation de réparer le préjudice causé”. Baudouin, above note 62, p. 82. This definition is similar to that given by a number of French legal authors.

99 E.g. in Canada, Article 3 of the Geneva Conventions Act, note 113: “Every person who, whether within or outside Canada, commits a grave breach ... is guilty of an indictable offence....”; and in India, Article 3, Chapter II, of the 1960 Geneva Conventions Act.

100 “[O]bligation spécifique imposée par la loi ou le règlement, surtout si elle est intentionnelle, constitue en principe une faute civile, puisqu’il y a alors violation d’une norme de conduite impérativement fixée par le législateur”. Baudouin, above note 62, pp. 91–2.

conceptual obstacle to the classification of a violation of international humanitarian law as a wrong in civil proceedings under the civil-law system. However, as there is no case-law on this point, it is difficult to predict how a court would react to a claim based on a violation of international humanitarian law.

In common-law systems the question has to be framed in different terms. The definition of a “tort” in common law is much less clear-cut than that of a “wrong” in civil law. Common law has created a number of categories of conduct that can be considered as torts, the most common being negligence and intentional offences against the person or property. Unlike civil law, common law does not define failure to comply with a legislative provision as a general tort *per se*. Breach of an obligation imposed by the law may be adduced as evidence that the defendant has been negligent, but is not actionable in itself. In *R. v. Saskatchewan Wheat Pool*,<sup>101</sup> the Supreme Court of Canada rejected the idea of an automatic tort based solely on damage resulting from breach of a law. However, the Court did stipulate that failure to comply with the law was a factor in determining whether or not the defendant was negligent.<sup>102</sup>

Clearly, for a number of violations of international humanitarian law, particularly grave breaches, a claim could be lodged against the violating party on the basis of recognized torts. Torture, serious assaults on physical integrity, inhuman treatment or intentional infliction of intense suffering are violations that would come under the torts of battery, intentional infliction of physical harm or intentional infliction of emotional distress. Similarly, murder could be actionable in tort as wrongful death. A violation of international humanitarian law could also fall under the tort of negligence if the violating party did not intend to cause damage. To establish negligence, it is necessary to show that the defendant had a duty of care towards the victim and that he or she did not fulfil that duty. Defining the duty of care of a company towards the victims in the context of an armed conflict is more complex, however. According to the Supreme Court of Canada, for there to be a duty of care there first has to be a relationship of proximity between the company and the victim such that it is foreseeable that negligence by the company could have as a consequence the loss or damage suffered by the victim. Second, the company must have been negligent, that is, it must have acted in a way that objectively created an unreasonable risk of loss or damage.<sup>103</sup>

Finally, there seems in theory to be nothing to prevent the development of new torts; the fact that a claim is novel or cannot be classified under an existing named tort does not operate as a bar to a civil claim. Common law allows a court to recognize new causes of action. The creation of new torts depends on judges’ willingness to develop common law in order to take changes in individuals’ rights

101 *R. v. Saskatchewan Wheat Pool*, [1983] Supreme Court of Canada, 1 RCS 205.

102 E. M. Hyland, “International human rights law and the tort of torture: what possibility for Canada?”, in Scott, above note 63, pp. 413–14.

103 See the analysis of the judgments in *Kamloops (City) v. Nielsen*, [1984] Supreme Court of Canada, 2 RCS 2, and *Ryan v. Victoria (City)* [1999] Supreme Court of Canada, 1 RCS 201, in C. Forcese, “Deterring “militarized commerce”: the prospect of liability for “privatized” human rights abuses”, *Ottawa Law Review*, Vol. 31, 1999/2000, pp. 209–10.

and duties into account.<sup>104</sup> It is therefore quite possible that we may one day see a court in a common-law jurisdiction find a company liable for a tort based on international humanitarian law.

It is also important to note that the question of conflict of laws in international private law may arise in this type of case. If a company is sued in the state in which it is domiciled for an act committed in another state, it is necessary to determine which laws are applicable, those of the state where the claim has been brought or those of the state where the alleged wrong took place. There is a general rule of international private law to the effect that the law applicable is the *lex loci delicti*, in other words the law of the place where the wrong was committed.<sup>105</sup>

To sum up, on the basis of legal theory – as there is currently no case-law on these questions – violations of international humanitarian law constitute civil wrongs in accordance with the definitions given by domestic law in civil-law systems and can, in a number of cases, be classified as existing torts in common-law systems. Moreover, there is no reason why, at least in theory, a new tort should not be created for such violations.

### The jurisdiction of the domestic courts

Our analysis has shown that violations of international humanitarian law can be imputed to companies and can serve as the basis for civil claims. The next question to be addressed is before what forum a victim or group of victims can bring an action to claim redress for damage suffered as a result of a wrong committed by a company.

#### *General rules of jurisdiction*

In international private law, the basic principle for establishing what judicial instance has jurisdiction in a given case is that of the *actor sequitur forum rei*, that is, the competent court is that of the defendant's place of domicile.

This general principle allows the courts of a given jurisdiction to hear any case as long as the defendant is domiciled in that jurisdiction, even if the alleged wrong took place in another state. A further, universally recognized principle of

104 Hyland, above note 102, pp. 411–13. In his exploration of the question, the author cites Professor Prosser on the creation of torts: “There is no necessity whatever that a tort must have a name. New and nameless torts are being recognised constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none has existed before ... [T]he law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.”

105 In Quebec civil law, this rule is to be found in Article 3126 of the Quebec Civil Code: “The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred.” For a long time the courts in common-law jurisdictions had tended to take the opposite approach, applying *lex fori*, i.e. the local law of the court. However, in Canada, the Supreme Court's *Tolofson*<sup>105</sup> judgment clearly indicated that the rule to be followed was that of *lex loci delicti*. In England, the Private International Law Act passed in 1995 also established this rule for questions of conflict of laws.

jurisdiction is that of the place where the act that gave rise to the litigation, in this case the violation of international humanitarian law, took place.<sup>106</sup> However, in most cases it is hard to imagine bringing a civil action against a company before the courts of the state in which the violation of international humanitarian law took place as, in the majority of cases, either the judicial system is virtually non-existent or the government is an accomplice to the alleged violations.

Finally, in the majority of common-law states, the courts have jurisdiction over people who are present on their territory, even if they are there only on a temporary basis.<sup>107</sup> One of the conditions to the exercise of this jurisdiction is that the defendant has to be notified of the action while he is on the territory.<sup>108</sup> For companies, presence on the territory has been defined under US law as the simple fact of having a presence in a state or having continuous and systematic business there. If these criteria are met, the US courts have jurisdiction.<sup>109</sup>

There are different types of jurisdiction, particularly extraterritorial jurisdiction. However, these differ from one system to another and I shall not consider them here.<sup>110</sup> The only point they have in common is the need for the litigation to have a real and substantial connection with the jurisdiction where the case is brought.

### *The special case of the Alien Tort Claims Act*

The Alien Tort Claims Act<sup>111</sup> dates from 1789. After a long period of dormancy, it has experienced a renaissance since the case of *Filatiga v. Pena-Irala* in 1980.<sup>112</sup> This unique law creates universal civil jurisdiction for violations of international law. The US federal courts therefore have jurisdiction to hear any civil case based on a violation of international law, irrespective of where the violation took place. The Supreme Court recently handed down a judgment concerning a challenge to the scope of this law in the *Alvarez-Machain* case.<sup>113</sup> In its first opinion on this law,

106 *International Business Machines Corporations (IBM) contre Gypsy International Recognition and Compensation Action (GIRCA)*, Arrêt du Tribunal Fédéral Suisse, 4C.296/2004 du 22 décembre 2004. In this case the Swiss Supreme court upholds the finding by the Geneva appeals court that Geneva courts have jurisdiction to hear the case because there exists the likelihood that preparatory acts of complicity for genocide were committed by IBM at its European Headquarters in Geneva.

107 A. C. McConville, "Taking jurisdiction in transnational human rights tort litigation: Universality jurisdiction's relationship to ex juris service, forum non conveniens and the presumption of territoriality", in Scott, above note 84, p. 161: "This "jurisdiction as of right" extends to defendants who are not residents but are physically present in England, even on a transient basis."

108 See *Kadic v. Karadzic*, above note 92, p. 238. In this case the defendant was notified of the suit in 1993 in the lobby of a New York hotel while Karadzic was in New York for discussions at the UN.

109 J. L. Heil, "African private security companies and the Alien Tort Claims Act: could multinational oil and mining companies be liable?", *Northwestern School of Law Journal of International Law & Business*, Vol. 22, 2002, p. 306.

110 By way of example, Article 3136 of the Québec Civil Code provides that "[E]ven though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required."

111 Alien Tort Claims Act, 28 United States Code section 1350 (1789).

112 *Filatiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

113 Above note 83.

the Supreme Court confirmed that it conferred jurisdiction on the district courts for violations of international law, but specified that such jurisdiction was limited to violations of international law norms that did not have less definite content than the paradigms familiar when the law was passed in 1789. This would appear to include serious violations of international humanitarian law. As regards the parties, the very nature of the law requires that those who seek relief be foreign nationals, but the same requirement does not apply to those who are sued under the act.<sup>114</sup> This universal jurisdiction is not absolute, however, as the court must have jurisdiction *ratione personae* over the defendant. This criterion is easy to meet, as the simple fact of the company's having business in the US means that the US courts have jurisdiction *ratione personae*. Application of the ATCA is facilitated as a result.<sup>115</sup>

Since the *Filartiga v. Pena-Irala* case a large number of lawsuits have been instigated by victims of human rights violations. There have also been a smaller number of cases arising from violations of international humanitarian law.<sup>116</sup> Although in the first case, which concerned acts of torture that took place in Paraguay, the defendant was an individual, many companies have also been sued under the ATCA. In only one case was a company accused of violations of international humanitarian law, namely the *Talisman* case referred to above.<sup>117</sup> In that case the court decided that it did have jurisdiction over *Talisman* *ratione personae* because the company had business in New York through two wholly owned subsidiaries.<sup>118</sup>

### *The forum non conveniens doctrine*

The common-law doctrine to the effect that a judge can decline a case on the grounds that another jurisdiction is more competent to hear it is known as *forum non conveniens*. It is almost always relied on when the litigation has its origin in a jurisdiction other than that of the *forum*, that is, the court's own jurisdiction. This is often likely to be the case in suits concerning violations of international humanitarian law.

Although this is a common-law principle, it was codified in Quebec's civil law when the Civil Code was reformed in 1994.<sup>119</sup> Its first test was the *Cambior*

114 It should be noted that in several ATCA cases the courts have examined the "act of state" theory which holds that the courts of one state cannot judge the conduct of another state by virtue of the principle of the sovereignty of states. Since the focus of this paper is on companies I shall not address this question here.

115 B. Stephen, "Translating *Filartiga*: a comparative and international law analysis of domestic remedies for international human rights violations", *Yale Journal of International Law*, Vol. 27, 2002, pp. 11–12.

116 See, e.g., *Kadic v. Karadzic*, above note 92, and *Doe v. Unocal Corp.*, above notes 74 and 77.

117 Above note 81.

118 *Ibid.*, pp. 329–30. See also the analysis of the Second Circuit in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F 3d 88, Second Circuit, 2000.

119 Article 3135, Quebec Civil Code: "Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide."

case,<sup>120</sup> in which the non-governmental organization (NGO) *Recherches internationales Québec* brought a class action on behalf of 23,000 residents of Guyana who had suffered damage as a result of a disaster in a mine operated by a company of which Cambior was the main shareholder. The judge upheld Cambior's argument based on *forum non conveniens* and decided that the courts of Guyana were in a better position to hear the case. The judge established a test based on eight factors: (i) the residence of the parties and witnesses; (ii) the location of the elements of proof; (iii) the place where the fault occurred; (iv) the existence and substance of pending litigation abroad; (v) the location of the defendants' assets; (vi) the law applicable to the litigation; (vii) the advantages to the plaintiff of suing in the chosen jurisdiction; and (viii) the interests of justice.<sup>121</sup>

The judge decided that since the plaintiffs, the witnesses and the elements of proof were, for the most part, in Guyana and the defendant had assets there, and since the law of Guyana applied in the case and the legal system of Guyana offered the possibility of a fair trial, Guyana was a better forum for the case, although the Quebec courts also had jurisdiction. The last factor (the interests of justice) is particularly pertinent to cases based on international humanitarian law, since countries emerging from a recent armed conflict or still involved in one may often be unable to offer the necessary guarantees. In that event, even if all the other factors pleaded in favour of the forum of the place where the fault occurred, it would not be in the interests of justice for the case to be judged in that forum.<sup>122</sup>

The US courts' examination of the *forum non conveniens* doctrine in proceedings brought under the ATCA is also very interesting. In the *Talisman* case, the company relied on this doctrine, alleging that Sudan and Canada – Talisman was a Canadian company – were alternative fora. The court decided that Sudan was not an appropriate forum for the case because the action was based on violations of human rights and humanitarian law committed by Sudanese government forces. In addition, the court took the view that application of sharia law would have been prejudicial to the plaintiffs, since they were not Muslims and therefore had reduced rights under Islamic law.<sup>123</sup> The court was not convinced that Canada was a suitable forum either, since the relevant torts recognized under Canadian law did not reflect the serious nature of the alleged violations. Moreover, because of the theory of conflict of laws, a Canadian court might have considered itself duty bound to apply Sudanese law, and hence sharia law.<sup>124</sup> However, since the plaintiffs had not challenged Talisman's arguments concerning the Canadian forum, the court did not decide the question and took it as read that Canada was

120 *Recherches internationales Québec v. Cambior*, Superior Court, 1998, JE 98 1905.

121 A. Durocher, "Revue de la jurisprudence en droit de l'environnement en 1998", *Revue juridique Thémis*, Vol. 34, 2000, p. 909.

122 Forcese, above note 103, p. 206.

123 *Presbyterian Church of Sudan v. Talisman Energy*, above note 81, pp. 335–6.

124 *Ibid.*, p. 337. On the issue of the severity of torts the Court stated that "While plaintiffs may be able to obtain the same relief in Canadian courts that they seek in this jurisdiction, it is evident from the affidavits provided that Canadian courts will only be able to treat plaintiffs' allegations as violations of Canadian, rather than international law. Because this treatment fails to recognize the gravity of the plaintiffs' allegations, the Court questions whether Canadian courts would be adequate alternative fora."

an alternative forum. But since there was nothing to indicate that Canada was a better forum than the New York court, the judge decided that his court was the appropriate forum.<sup>125</sup>

The *forum non conveniens* principle may represent an obstacle to jurisdiction of domestic courts for cases whose origin lies in another state. But its application is limited by the factors established by the courts, in particular the interests of justice, as it is often far from certain that the interests of justice will be served by the transfer of a case involving violations of humanitarian law to the forum of the place where the wrongful acts in question occurred.

## Conclusion

The aim of international humanitarian law is to reduce the suffering caused by armed conflict. To that end, it establishes rules that all parties to an armed conflict have to respect. These rules were originally formulated for states, but as a result of developments in the law in this area since the Second World War, they now also address non-state entities. The judgments of the US Nuremberg Military Tribunals and in the *Talisman* case confirm that companies can commit and be sued for violations of international humanitarian law.

In theory, domestic law provides the possibility of enforcing this corporate liability for violations of international humanitarian law, since the causes of action giving the right to judicial redress already exist. However, reality still lags far behind theory, and in practice judges are rarely open to cases based on international humanitarian law. There is not much case-law on this subject, and the US judgment in the *Talisman* case may be an indication of an emerging practice. Corporate civil liability exists but is difficult to enforce; at the moment it is necessary to turn to advances in international criminal law in order to punish those who violate international humanitarian law. The development of international criminal law, like the recognition of universal jurisdiction in criminal cases, took fifty years. Effective enforcement of corporate civil responsibility for violations of international humanitarian law will doubtless take time, but, it is to be hoped, not quite so long.

125 Ibid., pp. 337–41.

# National implementation of international humanitarian law

## Biannual update on national legislation and case law January–June 2006

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### A. Legislation

#### Albania

*Law No. 9515 on implementation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel mines and on their Destruction* was adopted by Parliament on 18 April 2006.

The Law defines the national authorities and other entities responsible for implementing the Ottawa Convention of 3 December 1997. It prohibits the use, development, production, purchase, storage, stockpiling or transfer of anti-personnel landmines, as well as any assistance or encouragement of such acts. The retention, use, storage and transfer of a limited number of anti-personnel landmines is nevertheless permitted for the purpose of training in mine detection, mine clearance and mine destruction techniques. The Law stipulates that non-compliance with its provisions may constitute either a criminal offence under the criminal code (Article 278 of the Criminal Code) or an administrative violation punishable by a fine.

The Law also provides for international inspections and specifies the manner in which these may be carried out in cooperation with the national authorities concerned.

#### Peru

*Law No. 28824 concerning conduct prohibited by the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their*

*Destruction*<sup>1</sup> was adopted on 10 July 2006 and published in the Official Gazette on 22 July 2006. The Law implements Article 9 of the Convention and introduces into the Penal Code a new provision (Article 279-D) stipulating prison sentences for acts prohibited under the Convention.

An exception is nevertheless provided for the authorized retention or transfer – under the auspices of the *Peruvian Centre for Action against Anti-personnel Landmines* (CONTRAMINAS) – of a limited number of anti-personnel mines to be specified by the Ministries of Defence and the Interior, in conjunction with the Ministry of Foreign Affairs, for the purpose of developing mine clearance and mine-destruction techniques and training in the field of mine detection.

## Sri Lanka

The *Geneva Conventions Act*, No. 4 of 2006, was adopted on 26 February 2006 and published in the *Official Gazette* on 3 March 2006. The Act gives effect to the Geneva Conventions of 1949. It contains provisions on the punishment of grave breaches of the four Geneva Conventions and establishes universal jurisdiction over these crimes.

The Act sets out the obligation to serve notice of trial of protected prisoners of war and internees on the protecting power or on the prisoner's representative. It contains provisions on the legal representation of persons brought for trial for a breach of the Act, on appeals by protected prisoners of war and internees, on reduction of sentence and on custody. The Act also establishes the jurisdiction of the High Court of Sri Lanka for the purpose of determining whether persons who have taken part in hostilities should be granted prisoner-of-war status in accordance with Article 5 of the Third Geneva Convention. The Act provides for the prevention and sanction of misuse of the red cross emblem and other distinctive emblems.

## United States

The *Detainee Treatment Act, 2005*,<sup>2</sup> part of the *Department of Defense Appropriations Act, 2006*, was adopted by Congress and signed by the president on 30 December 2005. Section 1002 of the Act makes the US Army *Field Manual* on Intelligence Interrogation binding for all interrogations of persons in the custody or under the effective control of the Department of Defense or detained in a Department of Defense facility, with the exception of persons detained pursuant to a US criminal or immigration law.

1 Ley que sanciona penalmente conductas prohibidas por la convención de Ottawa sobre la prohibición del empleo, almacenamiento, producción y transferencia de minas antipersonales y sobre su destrucción, *El Peruano*, 22 de julio de 2006.

2 Detainee Treatment Act, 2005, as included in the Department of Defense Appropriations Act, 2006 and agreed to by the US House and Senate and signed by President Bush, December 30, 2005 (incorporating the McCain Amendment and the Graham-Levin Amendment on detainees), available at <<http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php>>.

The Act contains a prohibition on cruel, inhumane and degrading treatment or punishment of persons under the custody or control of the US government. It also sets out procedures for reviewing the status of detainees held outside the United States and assigns exclusive jurisdiction to the US Court of Appeals for the District of Columbia Circuit for the purpose of reviewing the detention of an enemy combatant, the decisions of combatant status review tribunals and the decisions of military commissions.

## B. National Committees

### Libya

The *Decree of the General Popular Committee No.253 of 2005 regarding the creation of the National Committee for International Humanitarian Law* was adopted on 18 December 2005.

The Committee is responsible for defining, in co-ordination with the relevant authorities, strategies and programmes for the implementation and dissemination of international humanitarian law (IHL) and for drawing up proposals to adapt national legislation to the requirements of IHL treaties. The Committee has also been assigned to monitor and document violations of IHL, and to propose appropriate remedies.

The Committee is chaired by the secretary of the General Popular Committee for Justice and is composed of 15 members, including representatives of different ministries (General Popular Committees) and of various centres and associations, of the secretary-general of the Libyan Red Crescent, and of nine eminent experts in the field of IHL to be named by the Committee chair.

The Decree states that the Committee's expenses will be covered by annual allocations from the state budget and donations accepted by the chair.

### Romania

The National Committee for IHL was set up by means of a decision of the prime minister taken on 29 March 2006 and published in the *Official Gazette* on 13 April 2006.<sup>3</sup>

The Committee serves as an advisory body composed of representatives of various ministries and of independent experts. It may invite members of parliament and representatives of governmental or non-governmental organizations, of the Romanian Red Cross and of the ICRC to take part in its meetings.

The Committee has the task of proposing measures for the implementation of IHL at the national level. To this end it will examine the conformity of national legislation with IHL, issue recommendations on relevant draft laws and

3 *Official Gazette*, No. 420/2006.

regulations, and promote the dissemination of IHL by means of expert meetings and specialized courses on IHL. The Committee will also be responsible for drawing up a national strategy and for preparing an annual report on the implementation of IHL. The Committee will be chaired, in turn, by the state secretaries of the ministries of Foreign Affairs, the Interior and Justice. The Committee will meet in ordinary session every three months and will hold extraordinary sessions as needed.

## Tunisia

Decree No. 2006-1051 on the creation of a national commission on international humanitarian law<sup>4</sup> was enacted on 20 April 2006 by the Tunisian president acting on the proposal of the Minister of Justice and Human Rights.

The Commission has the task of promoting and disseminating IHL. Its primary responsibilities include preparing recommendations for the adaptation of national legislation and practice to the requirements of IHL, and for drawing up and carrying out an annual strategy in conjunction with relevant national bodies. When called upon to do so, the Commission may also issue legal recommendations on questions related to IHL and its field of application.

The Commission will be chaired by the Minister of Justice and Human Rights or his representative, and is composed of the general commissioner for human rights and representatives of various ministries, the High Committee for Human Rights and Fundamental Freedoms, the Tunisian Union of Solidarity, and the Tunisian Red Crescent, as well as various other experts in the field of IHL.

The Commission will meet at least twice a year and on any other occasion deemed necessary. It may create sub-commissions to study specific matters falling within its mandate. The Decree stipulates that office services for the Commission will be provided by the Ministry of Justice and Human Rights and that its expenses will be covered by that ministry's budget.

## South Africa

South Africa's National Committee on IHL was established in April 2006 by a decision of the executive management committee of the Department of Foreign Affairs. The Committee will be chaired by the Department of Foreign Affairs and composed of two representatives from relevant government entities (such as the ministries of Foreign Affairs, Justice, Defence, Police, Health and Education). The Committee may co-opt members from outside the government (e.g. the ICRC and academic circles).

The Committee is assigned a broad mandate and should act as a focal point, providing leadership on all issues related to the domestic implementation and dissemination of IHL.

<sup>4</sup> Décret n° 2006-1051 du 20 avril 2006, portant création de la commission nationale de droit international humanitaire, publié au *Journal Officiel de la République Tunisienne* n°33 du 25 avril 2006.

## C. Case law

### Bosnia and Herzegovina

On 4 April 2006, the Appellate Division of the Court of Bosnia and Herzegovina passed sentence in a case involving a citizen of Bosnia and Herzegovina convicted of war crimes for having intentionally helped abduct civilians.<sup>5</sup> The Court sentenced him to five years' imprisonment.

Referring to past ICTY decisions<sup>6</sup> and to an agreement between the warring parties, the Court found no grounds for disputing that at the time of the events, in 1993, an international conflict had existed between Bosnian Croats and Bosniaks in the Travnik area.

Regarding the status of the abducted persons, the Court held that, while they had been members of the Croatian Defence Council, the facts clearly showed that they should be considered as civilians, since at the moment of their abduction they were not present in the combat zone, were not wearing uniforms and were not armed.

Referring to the values upheld by IHL, in particular those enshrined in Article 3 common to the four Geneva Conventions, and basing itself on Articles 31 and 173 of the Criminal Code of Bosnia and Herzegovina, the Court concluded that the accused had been accessories to war crimes committed against civilians.

On 7 April 2006, the Court of Bosnia and Herzegovina, Section I (War Crimes), pronounced its first sentence in a case involving a Bosnian Serb who had belonged to the Republika Srpska army at the time of the events. It convicted him of crimes against humanity committed in 1992–93 against Muslim civilians. He was sentenced to 12 years' imprisonment (to which was added time unserved for another sentence, thus bringing his prison time to nearly thirteen and a half years).<sup>7</sup>

The accused was found guilty of illegal detention and other severe deprivation of physical liberty, as well as of various sexual crimes including rape and aiding and abetting in holding women in sexual slavery.

As to the applicable law, the Court denied an objection by the defence, which had argued for the applicability to the case of the Criminal Code of the Socialist Federal Republic of Yugoslavia. The Court decided that the provisions relevant to the case drawn from the Criminal Code of Bosnia and Herzegovina could be considered as "an integral part of the codification of crimes already recognized under international customary law at the time relevant to this case". Since international customary law forms a part of the general principles of international law, the Court concluded that trying the accused under the

5 Court of Bosnia and Herzegovina, *Maktouf*, No. KPŽ 32/05, 4 April 2006.

6 *Prosecutor v. Kordić and Cerkez*, ICTY, case No. IT-95-14/2, Trial Chamber, 26 December 2001 (particularly para. 145 and 146 – added), confirmed by the Appeals Chamber, case No. IT-95-14/2-A, 17 December 2004 (particularly para. 374 – added).

7 Court of Bosnia and Herzegovina, *Samardžić*, No. X-KR-05/49, 7 April 2006.

provisions of the Criminal Code of Bosnia and Herzegovina did not constitute a breach of the principle of *nullum crimen sine lege*. In support of its conclusions, the Court referred to the Report of the UN Secretary-General pursuant to para. 2 of S/RES/808,<sup>8</sup> the Commentaries on the draft Code of Crimes against the Peace and Security of Mankind,<sup>9</sup> and past case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).<sup>10</sup>

## Central African Republic

In its decision of 11 April 2006,<sup>11</sup> the Cour de Cassation (highest criminal court) of the Central African Republic rejected in part the General Prosecutor's appeal against a decision by the Bangui Court of Criminal Appeals dated 16 December 2004. The case concerned crimes committed in the Central African Republic since July 2002.

Confirming the decision of the Court of Criminal Appeals, which had declared the country's domestic courts incompetent to hear the case, and noting that the alleged perpetrators were all located outside the national territory, the Cour de Cassation concluded that the judicial system was clearly incapable of carrying out effective investigations and prosecutions for the crimes in question. The Cour de Cassation added that the crimes came under the jurisdiction of the International Criminal Court, which constituted the most effective opportunity to find and punish the perpetrators of the most serious crimes of concern to the international community as a whole.

## Netherlands

On 14 October 2005, the *rechtbank's-gravenhage* (district court) of The Hague was called upon to examine the case of an Afghan asylum seeker whom the Netherlands authorities suspected of having committed acts of torture and war crimes in Kabul in the period between late 1985 and late 1990,<sup>12</sup> while serving as a general in the Afghan army and later as deputy minister for state security and head

8 Doc. S/25704, Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, available on <<http://daccessdds.un.org/-web.washer/-progress?pages&id=2747172583&url=http://daccessdds.un.org/doc/UNDOC/GEN/N93/248/35/IMG/N9324835.pdf?OpenElement&fileName=N9324835.pdf&foo=3>> (visited on 23 August 2006).

9 Draft Code of Crimes against the Peace and Security of Mankind with commentaries, article 18, pp. 32–5, available at <[http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7\\_4\\_1996.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf)> (visited on 23 August 2006).

10 ICTY, *Tadić*, case N° IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141; ICTY, *Tadić*, case N° IT-94-1, Trial Chamber, Judgement, 7 May 1997, paras. 618–623; ICTR, *Akayesu*, case N° ICTR-96-4-T, 2 September 1998, paras. 563–577.

11 Cour de Cassation, *Etat centrafricain contre Ange Félix PATASSE et autres*, arrêt du 11 avril 2006, répertoire N° 006, année 2006.

12 *Rechtbank's-Gravenhage*, AU4347, 09/751004-04 (dagvaarding I); 09/750006-05 (dagvaarding II), 14 October 2005.

of the military intelligence service. The accused was alleged to have transferred persons to places of detention where he knew torture to be common practice during interrogation, and to have failed to put an end to such practices in his capacity as deputy minister for state security.

The court convicted the accused under the Netherlands Criminal Law in Wartime Act<sup>13</sup> on counts of torture and complicity to commit torture as a violation of the laws and customs of war. The court sentenced him to twelve years' imprisonment.

On 23 December 2005, the *rechtbank's-gravenhage* of The Hague examined the case of a Netherlands citizen alleged to have supplied the Republic of Iraq in the 1980s with one of the main ingredients of mustard gas, which was later used in Iraq's chemical warfare programme against the country's Kurdish population and against Iran.<sup>14</sup>

The court acquitted the suspect on the first count of the indictment, that is complicity to commit genocide, as it had not been legally and convincingly proved that, at the time of delivery of the substances mentioned in the charges, the accused knew that he was making a contribution to attacks aimed at the total or partial destruction of the Kurdish population in Iraq.

Turning to the other charges of complicity in the commission of war crimes in the framework of attacks launched between 11 April 1987 and 2 August 1988, the court first established that an international armed conflict between Iran and Iraq and a non-international armed conflict on the territory of Iraq between Iraqi government troops and armed (Kurdish) resistance had existed during the above-mentioned period.

The court found that the requirement of intent for war crimes had been proved because "a person who supplies chemicals, which he knows will be used for the production of poison gas by a country engaged in a lengthy war that it started, can be safely said to have consciously accepted the risk that the poison gas to be produced would eventually be used on the battlefield".

The court concluded that complicity was established since it had been determined that the deliveries, to which the accused had contributed, had furthered or facilitated the execution of the attacks. It sentenced the accused to fifteen years' imprisonment on the basis of the Netherlands Criminal Law in Wartime Act.<sup>15</sup>

On 7 June 2006, the *rechtbank's-gravenhage* of The Hague ruled in a case involving the activities of a Netherlands national in Liberia. The suspect had been chairman of the Oriental Timber Corporation, a company alleged to have transported and imported arms in the period between 2001 and 2003 on behalf of

13 Wet Oorlogstrafrecht (Wet van 10 Juli 1952, houdende vaststelling van Wet Oorlogstrafrecht alsmede van enige daarmede verband houdende wijzigingen in het Wetboek van Strafrecht, het Wetboek van Militair Strafrecht en de Invoeringswet Militair Straf), *Official Gazette*, p. 408.

14 *Rechtbank's-Gravenhage*, AX6406, 09/751003-04, 23 December 2005.

15 Wet Oorlogstrafrecht (Wet van 10 Juli 1952, houdende vaststelling van Wet Oorlogstrafrecht alsmede van enige daarmede verband houdende wijzigingen in het Wetboek van Strafrecht, het Wetboek van Militair Strafrecht en de Invoeringswet Militair Straf), *Official Gazette*, p. 408.

Charles Taylor and his regime. The suspect being the only link between the Oriental Timber Corporation and Charles Taylor, the court concluded that the suspect had played a substantial role in importing weapons. The case against the accused was based on two series of charges: war crimes and violation of a sanction regime.

Regarding the first of these, by virtue of his delivery of weapons to a warring party the accused was alleged to have participated in and incited others to commit, *inter alia*, indiscriminate attacks against civilians, murder and plunder. The court acquitted him of this charge, finding that the mere delivery of weapons, which may also be used for authorized purposes, was insufficient to prove participation in war crimes.

The court sentenced the accused on the second charge, finding that, by delivering the weapons, he had acted in contravention of the Netherlands 2001 Regulation on Sanctions against Liberia<sup>16</sup> and its annex<sup>17</sup> establishing a prohibition on selling or delivering weapons, ammunition or other military technology to individuals or companies in Liberia. This prohibition was established in accordance with the EU regulation regarding limitative measures regarding Liberia, as adopted in implementation of Security Council resolutions 1343 and 1408.<sup>20</sup> The court ruled that by contravening this prohibition, the accused had undermined both international peace and stability in West Africa. It sentenced him to eight years' imprisonment.

## United States

On 29 June 2006, the Supreme Court of the United States rendered a decision in which it ruled that military commissions established to try detainees held at the Guantanamo Bay naval base in Cuba were illegal and violated the Uniform Code of Military Justice and the Geneva Conventions of 1949.<sup>18</sup>

The case involved a Yemeni national captured by militia forces in Afghanistan in 2001 and transported by US forces to the Guantanamo Bay facility. The US president deemed the petitioner eligible for trial by military commission, as authorized under Military Commission Order No. 1 of 21 March 2002.<sup>19</sup> Detained on charges of conspiracy to commit terrorism, the petitioner filed a writ of habeas corpus, arguing that the military commission lacked authority to try him and that he was being held without due process.

The US district court for the District of Columbia granted relief to the petitioner and stayed the Commission's proceedings on the grounds that the president lacked the authority to establish military commissions, and that the procedures established to try the petitioner violated basic protections

16 Sanctieregeling Liberia 2001, Regeling van de Minister van Buitenlandse Zaken.

17 In-en uitvoerbesluit strategische goederen, annex to the Strategic Goods Import and Export Order.

18 *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, No. 05-184. Argued 28 March 2006 – Decided June 29, 2006. <<http://www.supremecourt.us/opinions/05pdf/05-184.pdf#search=%22Hamdan%20District%20Court%22>>.

19 Military Commission Order No. 1 <<http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>>.

recognized under the Uniform Code of Military Justice and Common Article 3 of the four Geneva Conventions of 1949.

The US court of appeals for the District of Columbia Circuit<sup>20</sup> reversed the decision of the district court. The court of appeals concluded that the military commissions were legal and legitimate forums for the trial of enemy combatants and that the Third Geneva Convention, as a treaty concluded between nations, did not confer individual rights and was therefore not judicially enforceable.

The Supreme Court reversed the court of appeals ruling and remanded the case.

On the issue of jurisdiction, the majority opinion first denied the government's motion to dismiss the writ of *certiorari* brought on the basis of the Detainee Treatment Act of 2005,<sup>21</sup> which, it was argued, precluded Supreme Court review over final decisions of combatant status review tribunals and military commissions.

On the merits of the case relating to the legality of military commissions, the Court acknowledged that the military commission had not been authorized by any congressional act and that neither the congressional resolution entitled "Authorization for Use of Military Force"<sup>22</sup> nor the Detainee Treatment Act could be interpreted as expanding the president's war powers or his mandate to convene military commissions. Instead, the above-mentioned resolution, the Uniform Code of Military Justice and the Detainee Treatment Act at most recognized the president's authority to convene military commissions, but only in circumstances in which this was justified under the Constitution and the law, including the laws of war. In the absence of a specific congressional authorization, the Court stated that it was its task to decide whether the petitioner's military commission was justified or not.

As to the legality of the petitioner's military commission trial in the case in question, the majority opinion was that the laws of war necessarily included both the Uniform Code of Military Justice and the Geneva Conventions of 1949, and that at a minimum Common Article 3 of the Geneva Conventions was applicable to the armed conflict in the context of which the petitioner had been captured. The Supreme Court found that the structure and procedures of the military commission presented substantial departures from, and therefore violated, the rules and protections contained in the Uniform Code and applicable in courts-martial and military commissions (e.g. the right of the defendant and his counsel to access certain evidence used during the trial). In the case of the petitioner's trial, the Court concluded that it had not been demonstrated *why the danger posed by international terrorism, considerable though it was, should require any variance from courts-martial rules*. The Court also ruled that the procedures

20 *Salim Ahmed Hamdan v. Donald H. Rumsfeld, United States Secretary of Defense, et al.*, No.04-5393, July 15, 2005 <<http://pacer.cadc.uscourts.gov/docs/common/opinions/200507/04-5393a.pdf>>.

21 See above note 2.

22 Authorization for Use of Military Force, 18 September 2001, Public Law 107-40 (S. J. RES. 23), 107th CONGRESS.

adopted to try the petitioner did not comply with Common Article 3 of the Geneva Conventions. In particular, the Court recalled that the minimal protection afforded under Article 3 included being tried by “a regularly constituted court”, subject to general requirements “crafted to accommodate a wide variety of legal systems”. The military commission convened by the president to try the petitioner, the Court majority opinion found, did not meet those requirements.<sup>23</sup>

23 Three justices dissented in their respective opinions. The Chief Justice took no part in the consideration or decision of the case since he had sat on the bench which delivered the judgment under review.

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