

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.¹ 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.² 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.³

To a great extent the debates around private military companies fall within wider debates about the privatization of government functions.⁴ 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> (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,⁵ 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.⁶ 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.⁷

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.⁸ 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”.⁹ 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.¹⁰ 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> (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.¹¹ 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.¹²

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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶ 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,¹⁷ the then Organization of African Unity Convention for the Elimination of Mercenarism in Africa¹⁸ (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.¹⁹ 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.²⁰ 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.²¹ 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).²² 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.²³

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.²⁴ 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.²⁵

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”.²⁶ 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.²⁷ 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).²⁸ 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.²⁹

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.³⁰ 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,³¹ 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.³² The UN Convention has been ratified by only 28 states and entered into force in 2001.³³ 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.³⁴

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,³⁵ 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.³⁶ 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> (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.³⁷ 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.³⁸ 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 conflict³⁹ or to membership of a militia or volunteer force that belongs to a party to the conflict and fulfils specific criteria.⁴⁰ 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.”⁴¹ 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.⁴²

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.⁴³ 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.⁴⁴ 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.⁴⁵ 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.⁴⁶

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,⁴⁷ 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.⁴⁸ 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.⁴⁹ 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.⁵⁰ 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.⁵¹ 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.⁵² 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.⁵³ 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.⁵⁴ 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.⁵⁵ 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”.⁵⁶ 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,⁵⁷ 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.⁵⁸ 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.⁵⁹ 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”.⁶⁰ 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.⁶¹ 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.⁶² 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.⁶³ 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.⁶⁴ 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.⁶⁵ 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> (visited 1 October 2006).

engaging with those criminals raises the spectre of direct participation in hostilities.⁶⁶ 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.⁶⁷ There is no set list of military objectives.⁶⁸ 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.⁶⁹ 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).⁷⁰

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.⁷¹ 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.⁷² 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).⁷³ 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.⁷⁴ 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.⁷⁵ 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,⁷⁶ 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.”⁷⁷

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> (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.⁷⁸ 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.⁷⁹ 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.⁸⁰ 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.⁸¹ A further mechanism would write human rights obligations into the licensing or regulatory scheme under which private military companies are incorporated.⁸² 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.⁸³ 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.⁸⁴ 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.⁸⁵ Political scientists tend to argue for national regulation, including licensing and oversight mechanisms;⁸⁶ this appears to be the approach of the government of the United Kingdom and the Swiss government.⁸⁷ 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.⁸⁸ 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.”⁸⁹ 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.⁹⁰ 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”.⁹¹ 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> (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”.⁹² 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.⁹³ Companies should have to go through very strict licensing procedures.⁹⁴ 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.⁹⁵

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> (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.⁹⁶ 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.