

Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law

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The views expressed are those of the author and do not necessarily represent the opinion of the International Committee of the Red Cross.

Introduction

Foreign personnel hired to provide military services have often been present in armed conflicts. During the sixties and the seventies, this situation has been mainly associated with covert, mercenary activity. The provisions on mercenaries included in Article 47 of the First Protocol Additional to the Geneva Convention of 1949 (hereinafter "Protocol I") the "Convention on the Elimination of Mercenarism in Africa"¹, and the "International Convention against the Recruitment, Use, Financing and Training of Mercenaries"² were adopted at a time when this phenomenon was widely observed.

In recent years, however, there has been the emergence of highly professional companies that offer their services openly, sometimes using websites. Some companies such as Executive Outcomes and Sandline have carried out active combat operations in various countries. Executive Outcomes, which drew heavily on members of South African special forces, assisted the Angolan government against the rebel movement, UNITA, and helped the Sierra Leone authorities defeat the Revolutionary United Front and restore the elected President to power³. Sandline, a sister company to Executive Outcomes "admits to having undertaken six international operations since 1993", including in Papua New Guinea and Sierra Leone⁴.

Many more private companies are present in countries confronted to armed conflicts, including Iraq, Colombia and Afghanistan. According to sources, "contractors are or have been training security forces in Iraq, flying gunships in Colombia, training civilian police in Bosnia and Kosovo and protecting Afghanistan President Hamid Karzai"⁵. Their activities comprise security monitoring, logistics, training and intelligence gathering, to name a few. Some companies have developed a high level of expertise, such as the American firms Airscan, which operates private air reconnaissance, and Ronco, which is specialized in clearing mine fields.

The customer base of these private corporations is not restricted to States, and includes multinational firms and international organizations. In a famous statement made in 1998, the UN Secretary-General, Kofi Annan, said he had considered the possibility of engaging a

¹ Adopted on 3 July 1977 by the Organisation of African Unity in Libreville.

² Adopted on 4 December 1989 by Resolution 44/34 of the United Nations General Assembly.

³ Press Release "The Secretary-General reflects on 'intervention' in thirty-fifth annual Ditchley Foundation Lecture, SG/SM/6613, 26 June 1998, pt 8.

⁴ A. Vines, "Mercenaries, Human rights and Legality", in *Mercenaries, An African Security Dilemma*, edited by A.-F. Musah and J. Kayode Fayemi, Pluto Press, London, 2000, p. 169.

⁵ E. Pape and M. Meyer, *Newsweek*, 25 August 2003.

private firm to separate fighters from refugees in the Rwandan refugee camps in Goma. But, he added, "the world may not be ready to privatize peace"⁶.

Things might be changing. On February 12, 2002, Mr. Jack Straw, Secretary of State for Foreign and Commonwealth Affairs, declared that "a strong and reputable private military sector might have a role in enabling the UN to respond more rapidly and more effectively in crises. The cost of employing private military companies for certain functions in UN operations could be much lower than that of national armed forces."⁷ It has already been reported that a private company provided logistic support for the UN force in Sierra Leone (UNAMSIL)⁸.

Whilst mercenary activity has attracted hostility from the United Nations and most national governments, the activities of private companies have led to both support and condemnation. The debate has opposed those who view the activities of private companies as *de facto* related to mercenary activities that should be banned, with those who agree that, whilst there might be a need to reinforce accountability and prohibit a number of activities, consider it inevitable that regular armies will turn more and more to private corporations to fulfill some of their missions, especially abroad⁹.

The phenomenon of private contractors carrying out duties for the armed forces is not new: Article 4 (4) of the Third Geneva Convention explicitly refers to "persons who accompany the armed forces without being members thereof, such as [...] supply contractors, members of labor units or of services responsible for the welfare of the armed forces." Article 4 (4) of the Third Geneva Convention even provides that those persons who have fallen into the power of the enemy shall be prisoner of war "provided that they have received authorisation from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model". What is more recent, however, is the level of outsourcing that is now taking place, and the nature of the activities contracted out to private companies, which are doing tasks previously carried out by the military itself.

Most analysts agree that this has taken unprecedented proportions in Iraq, where private companies appear to fill in some of the work that the occupying powers are unable or unwilling to carry out, relieving the strain that is placed on the military¹⁰. A British private company reportedly trained a private security force to guard government buildings and other important sites initially protected by US soldiers¹¹, while the Iraqi army itself was trained by the US based company Vinnel, a subsidiary of Northrop Grumman¹². According to one author, "Private companies are being asked to provide security for the chief of the Coalition Provisional Authority, L. Paul Bremer III, and other senior officials, to escort supply convoys through hostile territory, and to defend key locations, including 15 regional authority headquarters and even the green zone in downtown Baghdad, the center of American power in Iraq"¹³. A senior official of Control Risk Group, a private company active in Iraq, considers that private contractors have been "making up for the shortfall in military resources"¹⁴. The brutal murder of four staff members of the American firm Blackwater by a crowd in Fallujah

⁶ SG/SM/6613, op. cit., pt. 8.

⁷ The Foreign and Commonwealth Office, *Private Military Companies: Options for Regulations*, HCP 577, London: The Stationary Office Limited, 2002, p. 4.

⁸ *Ibid*, p. 8.

⁹ As far as the US army is concerned, this opinion is expressed by Gen. B. McCaffrey, a Commander of U.S. forces in the first Gulf war. Cf. E. Pape and M. Meyer, op. cit.

¹⁰ D. Barstow, "Security companies: Shadow Soldiers in Iraq", *New York Times*, 19 April 2004.

¹¹ Th. Catan and S. Fidler, "The military can't provide security", *Financial Times*, 30 September 2003.

¹² J. Merchet, *Libération*, 3 November 2003. Cf., also, S. Fidler and Th. Catan, *Financial Times*, 11 August 2003.

¹³ D. Barstow, "Security companies: Shadow Soldiers in Iraq", *New York Times*, 19 April 2004.

¹⁴ R. Fenning, "The Iraqi security business urgently needs rules" *Financial times*, May 27, 2004.

on March 31, 2004, has dramatically focused the attention on the role played by private companies operating in that country.

This paper does not purport to make a judgment on the legitimacy of private contractors, nor to evaluate the advantages and disadvantages for States and other actors to call upon the services of private companies. On the one hand, it analyses the status, under international humanitarian law -also known as the law of armed conflicts-, of personnel of private companies carrying out activities in a country at war. On the other hand, it considers what are the implications for States that contract such companies if their personnel commit violations of international law.

Two preliminary issues will be addressed: firstly, the distinction, that is often found in the literature, between "private security companies" and "private military companies"¹⁵ and, secondly, the question whether the personnel of private companies can be considered as mercenaries under international law.

Private military and private security companies

Private military companies (or "PMCs"), as traditionally understood, provide services to replace or back-up an army or armed group or to enhance effectiveness. This category is further broken down into two sub-categories by some authors: "active PMCs, willing to carry weapons into combat and *passive* PMCs, that focus on training and organizational issues."¹⁶

Private security companies (or "PSCs") provide services aimed at protecting business and property from criminal activity. These types of companies have existed for a very long time and are found everywhere, but their number seems to be on the increase especially in conflict regions, where businesses feel they cannot always adequately rely on State security forces for their protection.

The traditional distinction between PMCs and PSCs is found in various documents¹⁷ and certainly reflects a reality of the market. With regard to international humanitarian law, however, the limit between these concepts is not as clearly delineated as it might appear. As it will be shown, it would be incorrect to assume that only a few PMCs seeking active combat duties are concerned with the applicability of this body of law.

Being frequently active in countries where an armed conflict is ongoing, personnel of PSCs could become embroiled in armed confrontation. For instance, the facility that they are providing security to could be attacked, and it is worth considering what the implications would be, under humanitarian law, if security companies personnel returned fire in such a case. Besides, some of the activities carried out by private companies may, under certain circumstances, be considered as direct participation in the hostilities. This raises a number of questions regarding the fundamental distinction between civilians and combatants, that lies at the core of international humanitarian law.

¹⁵ The term "private military firm", or "PMF" is also found. Cf. J Glüsing and S. Von Ilseman, "Gladiators for hire", *Der Spiegel*, May 3, 2004.

¹⁶ D. Brooks, *Protecting People: the Private Military Companies Potential: Comments and Suggestions for the UK Green Paper on Regulating Private Military Services*, 25 July 2002, p. 3. Available from International Peace operations Association (IPOA) website: www.ipoaonline.org

¹⁷ The Foreign and Commonwealth Office, *Private Military Companies: Options for Regulations*, op. Cit., pt. 3. Cf., also, D. Brooks "Messiahs or Mercenaries? The Future of International Private Military Services", *International Peacekeeping*, Volume 7, Number 4 (Winter 2000) pp. 129-144, J. L. Taulbee, "The Privatisation of Security: Modern Conflict, Globalisation and Weak States", *Civil wars*, Franck Cass, Volume 5, summer 2002, number 2, p. 3.

Are employees of private companies ‘mercenaries’?

Whilst the term "mercenary" can be used in a generic – and often politically loaded - sense, it has a precise meaning from a legal viewpoint. The definition of mercenary is found in three documents: Article 47 of Protocol I, the "*Convention on the Elimination of Mercenarism in Africa*" of 1977, and the "*International Convention against the Recruitment, Use, Financing and Training of Mercenaries*" adopted in 1989 by the United Nations General Assembly.

According to Article 47 of Protocol I, 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.

This definition, which requires that all six conditions be fulfilled, has been judged unworkable by many authors¹⁸ and will very seldom be applicable to personnel of private companies. By way of example, British or American employees of PMCs/PSCs carrying out duties in Iraq during the war that started in 2003, would not have qualified as mercenaries since they were nationals of a party to the conflict, and do not fulfill the conditions of Article 47 [d]. Likewise, in all cases where personnel of private companies are not "specially recruited to fight in an armed conflict", but are permanent employees of a private company, assigned to various duties and locations, it is arguable that the conditions of Article 47 [a] would not be met.

It was also reported that PMC personnel formally integrated the armed forces for which they worked, precluding the applicability of Article 47 [e]. This was for instance the case for Executive Outcomes when they were present in Sierra Leone¹⁹. According to F. Kalshoven, "the effect of the definition is that the exception of Article 47 applies only to the members of a totally independent mercenary army which is not (in terms of Article 43(1)) 'under a command responsible [to a party to the conflict] for the conduct of its subordinates.'²⁰

The issue of "direct participation in the hostilities", provided for in Article 47 [b], is also crucial. It must be noted, for instance, that the services of military advisors and technicians are not considered as mercenary activities. The commentary of Article 47 of Protocol I states that

¹⁸ F.J Hampson, "Mercenaries: diagnosis before proscription", *Netherlands yearbook of international law*, Vol. 22, 1992, p. 30. W.T. Mallison and S.V. Mallison, "The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 Concerning International Conflicts. Law and Contemporary Problems, *Duke University*, 1978, p. 29. R.C Hingorani, *Prisoners of War*, Oceana Publications, inc., Dobbs ferry, New York 1982, p 63.

¹⁹ Cf. J.-C. 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*, Volume 34, Number 1, Winter 1998, p 124.

²⁰ Cf. F. Kalshoven and L. Zegfeld, *Constraints on the Waging of War, An Introduction to International Humanitarian law*, International Committee of the Red Cross, 3rd Edition, Geneva, March 2001, p. 90.

“The increasingly perfected character of modern weapons,[...] requires the presence of [...] specialists [...]. As long as these experts do not take any direct part in the hostilities, they are neither combatants nor mercenaries, but civilians who do not participate in combat”²¹. The issue of direct participation in the hostilities will be addressed more generally below.

Finally, Protocol I only applies to international armed conflicts. No similar provision is to be found in Additional Protocol II that applies in non-international armed conflicts. By contrast, the 1977 OAU Convention and the 1989 UN Convention, are not restricted to situations of armed conflicts and apply therefore to a larger range of situations. However, the UN Convention reproduces the wording of Article 47²², whose limitations have been examined above, and has been ratified by a limited number of States. The OAU Convention has a broader definition but also presents major flaws such as the escape clause of the integration in the armed forces²³, and the necessity to demonstrate the motivation for private gain²⁴, among others. The regional nature of this instrument also limits its impact as it is binding only on African countries that have ratified it.

From a strictly legal point of view, it appears that the answer to the question whether individuals employed by private companies are mercenaries will most of the time be negative, as these persons will usually fall outside the conjunctive definition provided for in international instruments.

Status of personnel of private companies under international humanitarian law

In a country at war, the first question that must be considered to assess the status of personnel of private companies is whether such personnel must be categorized as civilians or combatants. It is a cornerstone of international humanitarian law that, while civilians must be protected to the largest possible extent from the effects of armed conflict and may not be attacked, enemy combatants represent military targets and may be attacked lawfully as long as they are not "*hors de combat*". Only combatants have the right to take part in the hostilities.

The section below analyses under what conditions personnel of private companies may be formally categorized as members of the armed forces of a party to the conflict.

International armed conflicts

In international armed conflicts, members of the armed forces of a party to a conflict are defined in the Regulations annexed to the Fourth Hague Conventions of 18 October 1907 (hereinafter "the Hague Regulations"), Article 4 A (1), (2), (3) and (6) of the Third Geneva Convention and Article 43 of Protocol I.

In addition to situations where they would be integrated in the regular armed forces of a belligerent, personnel of private companies would be categorized as combatants if they formed part of militias belonging to a party to the conflict and fulfilled the conditions provided by Article 1 of the Hague Regulations, and Article 4 A (2) of the Third Geneva Convention:

²¹ Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Y. Sandoz, Ch. Swinarski, B. Zimmermann, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva 1987, § 1806.

²² International Convention against the Recruitment, Use, Financing and Training of Mercenaries, Article 1.

²³ OAU Convention on the Elimination of Mercenarism in Africa" of 1977, Article 1, [e].

²⁴ OAU Convention on the Elimination of Mercenarism in Africa" of 1977, Article 1, [c].

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war

In situations where Protocol I is applicable, personnel of private companies would be considered as combatants, according to Article 43, if they belong to an organized group or unit which is under a command responsible to a party to the conflict for the conduct of its subordinates, and is subject to an internal disciplinary system which enforces compliance with the rules of international law applicable in armed conflicts.

With regard to the issue of internal disciplinary system and compliance with the rules of international law applicable in armed conflicts, it is interesting to note that some private companies pledge in their public communication that they respect international law, especially human rights and humanitarian law. For instance, the International Peace Operation Organization (IPOA), an organization that is promoting the role of private companies, has adopted a code of conduct that states that:

"In all their operations, signatories will strictly adhere to all relevant international laws and protocols in regards to human rights. They will take every practicable measure to minimize loss of life and destruction of property. Signatories involved in armed operations will follow the United Nations International Covenant on Civil and Political rights and the Geneva Conventions in the propagation of that conflict, and will seek a swift, equitable and beneficial conclusion".²⁵

If members of private companies are categorized as combatants, they have the right to participate in the hostilities but, as a consequence, they are not immune from military attack. Their legal status and, therefore, rights and obligations do not differ from other members of armed forces. If they are captured, for instance, they are *a priori* entitled to prisoner of war status.

Non-international armed conflicts

Although the term "combatant" is frequently used in its generic sense, the status of combatant does not exist in non-international armed conflicts. In a civil war, members of organized armed groups are not entitled to prisoner of war status upon capture. Their status is essentially a matter of domestic law, and they can be prosecuted for taking up arms.

As the provisions of humanitarian law applicable in non-international armed conflicts do not provide for a definition of combatant, the distinction and protection afforded by international humanitarian law rests mainly on the distinction between those who take a direct part in hostilities and those who do not. During such time as they conduct sustained and concerted operations under responsible command, a wording provided for in Article 1, paragraph 1, of Additional Protocol II, private contractors would not be entitled to the protection afforded to civilians under international humanitarian law.

The following analysis will focus mainly on situations of international armed conflicts, although specific issues and illustrations relative to non-international armed conflicts will also be raised when appropriate.

²⁵ www.ipoaonline.org/code.htm : Access 26 October 2003

Direct participation of private contractors in the hostilities

In international armed conflicts, according to Article 50 of Protocol I, persons that are not categorized as members of the armed forces of a party to the conflict are civilians. If they are civilians, private contractors are protected against direct attacks “unless and for such time as they take a direct part in the hostilities”.²⁶ It does not matter that private contractors are armed, for instance. The simple fact of carrying a weapon does not imply *per se* that the bearer takes a direct part in the hostilities. The use of a weapon may happen in the context of common criminal activity, with no relationship with an ongoing armed conflict.

Interestingly, many security firms exclude themselves from the definition of mercenary on the basis that, precisely, they do not take a direct part in the hostilities.²⁷ However, under international humanitarian law, direct participation in the hostilities is not restricted to situations where individuals are involved in military deployment or are armed with a view to taking an active part in combat operations. In other words, one should not assume that direct participation is necessarily restricted to a minority of PMCs such as Executive Outcomes or Sandline.

A precise definition of “direct participation in the hostilities” is not readily available in the Geneva Conventions and their additional Protocols of 1977 but the commentary on Additional Protocol I states that “direct participation means 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.”²⁸ This leaves open a number of questions regarding different aspects of the missions now regularly entrusted to private companies in situations of armed conflicts.

Whilst food services, repair work or warehouse administration cannot be analyzed as direct participation in the hostilities, it is arguable that private contractors involved in transportation of weapons and other military commodities, intelligence, strategic planning or procurement of arms, may lose the protection afforded to civilians under international humanitarian law.²⁹ With regard to intelligence activities, this is confirmed by the United States Naval Handbook, that classifies as direct participation in hostilities “Collecting information or working for the enemy’s intelligence network”.³⁰

It must be noted that if they take a direct part in the hostilities, private contractors that are categorized as civilians lose their protection only for the duration of such direct participation. Unlike combatants, whose “organic” membership makes them liable to attack at all times unless they are “*hors de combat*”, civilians enjoy the protection afforded by humanitarian law “unless and for such time as they take a direct part in the hostilities”³¹. Once this participation has ceased, they may not be targeted anymore. A direct attack on them while they are not participating in the hostilities would be unlawful under humanitarian law.

It must be noted that the direct participation in the hostilities of persons that are not members of the armed forces of a party to the conflict also raises the issue of what has recently been

²⁶ This rule is provided for in Article 51 (3) of Protocol I for international armed conflicts, and Article 13 (3) of additional Protocol II for non-international armed conflicts.

²⁷ Cf. D. Shearer, “Private Armies and Military Intervention”, *Adelphi Paper 316*, International Institute for Strategic Studies, Oxford University Press, p. 18.

²⁸ Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, op.cit., § 1944, p. 618.

²⁹ According to J.L. Taulbee, “companies such as Vinnel, Armor holdings, Levadan, Dyncorp, TSI and MPRI provide strategic planning, advice, intelligence, training, active procurement and logistical support to clients who lack their own capabilities in these areas”. J.L. Taulbee, op. cit., p. 4.

³⁰ United States *Naval handbook* (1995), Par. 11.3.

³¹ Article 51 of Protocol I and Article 13. 3 of Additional Protocol II.

referred to as “unlawful combatants”, especially by the U.S. administration in the framework of the “war on terror”. An analysis of the so-called “unlawful combatants” falls beyond the scope of this study³², but it is striking that detainees in Guantanamo were denied both prisoner of war status and the protection of the Fourth Geneva Convention on the basis of what could be a daily bread-and-butter for private contractors in Iraq: direct participation in the hostilities of individuals that are not members of the armed forces of a party to the conflict.

Guarding and other security activities

In situations of armed conflicts, acting as a security guard deserves special attention as this activity can be undertaken by both military companies (PMC) and security companies (PSC) and may, according to circumstances, constitute direct participation in the hostilities or not. On this issue, the analysis requires to examine two questions: whether the facility that the private company is guarding is a military objective or not, and what course of action is taken by personnel of private companies in the event of an attack.

According to Article 52 (2) of Protocol I, whose content is regarded as customary law applicable both in international and non-international armed conflicts, “[a]ttacks shall be limited strictly to military objectives”. The Article further adds that :

“Insofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

In situations where contractors are providing security to civilian objects such as schools, hospitals, civilian houses, etc., the situation appears relatively simple. An attack on such a facility would be illegal under humanitarian law, and personnel providing security to it are entitled to the protection afforded to civilians under humanitarian law. The use of force by private contractors in self-defense or to protect other civilian persons or objects would not amount to direct participation in the hostilities.

The situation would be very different if private personnel provided security to a military facility, a trend that has been developing in recent years³³. In situations of armed conflict, it is arguable that guarding infrastructures such as army bases, barracks or ammunition dumps constitutes *in itself* a direct participation in the hostilities. The U.S. Air force Commander’s Handbook, for instance, provides that is subject to attack “anyone acting as a guard for military activity”³⁴. As long as they are on duty, private contractors would not be entitled to the protection afforded to the civilian population under humanitarian law and are not immune from direct attack. Once off-duty, such personnel of private companies no longer directly participates in the hostilities and may not be attacked.

Between these two cases, lies a whole range of situations, where private contractors provide security to facilities which are not military infrastructures but may nonetheless qualify as legitimate military targets under humanitarian law if they fulfill the conditions of Article 52 (2)

³² On the subject, cf. K. Doermann, “The legal situation of ‘unlawful/unprivileged combatants’”, *International Review of the Red Cross*, No. 849, Vol. 85, March 2003, p. 45.

³³ According to J. Glüsing and S. Von Ilsemann, op cit, “[n]owadays, virtually all U.S. overseas military bases are constructed and, at least in the Balkans, guarded by [private military firms]”. According to Th. Catan and S. Fidler, op cit., the company *ArmourGroup* provides security to the US naval base in Bahrain.

³⁴ *Commander's Handbook on the Law of Armed Conflict*, Air Force Pamphlet, Department of the Air Force, United States, AFP 110-34, 25 July 1980, p. 2-2.

of Additional Protocol I: their location, purpose or use makes an effective contribution to military action, and their destruction, capture or neutralization offers a definite military advantage. Power plants, oil sites³⁵ or airports, may qualify as legitimate targets. What are the implications for representatives of private companies that may be guarding such installations? Are they immune from military attack or do they lose the protection afforded to civilians under humanitarian law?

This situation appears different from the case illustrated above, where private contractors are providing security to a military infrastructure. Indeed, whilst it is arguable that providing security to an army base is *per se* a direct participation in the hostilities, guarding a pipeline or a power plant is not. The fact that an object qualifies as a legitimate military target because of its location, purpose, or use does not imply that those who are guarding it are directly participating in the hostilities. In case of attack, if they refrain from returning fire, private contractors should retain the protection afforded to civilians and may not intentionally be targeted.

However, their incidental death or injury would not necessarily constitute a violation of international humanitarian law: in a situation of armed conflict, private contractors must assume the risks resulting from their presence in the vicinity of an object that may qualify as a military objective. According to the rules on the conduct of hostilities, incidental loss of civilian life or injury to civilians -often referred to as collateral damage- that is not excessive in relation to the military advantage anticipated is not illegal under international humanitarian law³⁶.

One question remains: what would the consequences be if private contractors returned fire during the attack? This is, after all, what one could reasonably expect from professionals hired to provide security and who are carrying weapons. This is clearly a gray area and it must be assessed on a case by case basis. The use of force in self-defense should not be seen as direct participation but many commentators note that the limit between defensive and offensive use of force is flimsy. As noted by an author concerning the Colombian conflict "although ostensibly there to protect and defend, there was a frequent need to turn static defense into hot pursuit, particularly given the hit-and-run tactics used by the NLA. In effect, Defense Systems [Ltd.] was in danger of replacing the Colombian's army role within this region, and illustrating the close line between security and military action."³⁷

Responsibility of States that contract private companies

In light of the allegations -yet to be substantiated at the time of writing- that have emerged concerning acts committed by personnel of private companies in Iraq, including in the prison of Abu Ghraib³⁸, it is worth considering to what extent States may be responsible for violations of international humanitarian law committed by private contractors.

On 26 July 2001, after nearly fifty years of work, the International Law Commission of the United Nations completed its text of the "Draft Articles on Responsibility of States for

³⁵ This was for instance the case in Iraq, where the Coalition Provisional Authority "awarded one of the largest security contracts -to defend oil sites and pipelines in Iraq- to a little known UK-based company called Erinys." Th. Catan and S. Fidler, op.cit.

³⁶ Cf. Article 51 (5) of Protocol I.

³⁷ P. Jackson, "War is Much Too Serious a Thing to be Left to Military Men's: Private Military Companies, Combat and Regulation", *Civil Wars*, Frank Cass, Volume 5, Number 4, 2002, p 34.

³⁸ Cf. M. Sirak, "ICRC calls for contractor accountability in war", *Jane's Defense Weekly*, May 19, 2004.

Internationally Wrongful Acts” (hereinafter, “the Draft Articles”)³⁹. These articles were submitted to the General Assembly of the United Nations at its 53th session and, although an international convention has yet to be adopted, they constitute the most authoritative source to determine whether a violation of international law may be attributed to a State.

States are directly responsible for violations of international humanitarian law that are attributable to them. The fact that States are responsible for violations of international humanitarian law committed by their organs, including their armed forces, is clearly expressed in Article 3 of the Fourth Hague Convention and Article 91 of Protocol I. According to Article 3 of the 1907 Fourth Hague Convention, a belligerent party is responsible “for all acts committed by persons forming part of its armed forces”.

But, as clarified by the International Law Commission, States are not only responsible for the actions of their organs. As will be shown below, States can also be responsible for violations that are committed by persons or entities that are empowered to exercise elements of Governmental authority, or are *de facto* acting on its instructions or under its direction and control. Besides, States must exercise ‘due diligence’ to prevent or punish violations committed by private persons or entities.

State responsibility for acts committed by entities acting on its behalf or under its direction and control

According to Article 5 of the Draft Articles, States are not only responsible for their organs,⁴⁰ but also for acts committed by para-statal entities that they have empowered to exercise elements of governmental authority, provided the person or entity is acting in the capacity which is vested in them.⁴¹

Therefore, the outsourcing of tasks that are typically those of the armed forces may imply responsibility for State that delegates such powers. Whatever the level of individual level of responsibility, the State will retain responsibility if violations of international law are committed by private contractors who are acting in a public capacity, e.g. police an area, by virtue of a delegation of power.

As noted in the commentary on Article 5, “in some countries, private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a prison sentence or to prison regulations”.⁴² From the point of view of its international responsibility, it does not matter whether a State have its own organs in charge of prisons or whether this duty is entrusted to autonomous bodies. The international responsibility of the State would clearly be engaged if private contractors mistreat detainees.

In addition to situations where entities which are *empowered* by internal law to exercise governmental authority, the acts of private companies could also engage the responsibility of States if they are carried out by a person or group of persons who are *de facto* “acting on the

³⁹ Draft Articles on State Responsibility, International Law Commission, U.N. Document A/56/10, 30 October 2001.

⁴⁰ Draft Articles, *ibid.* Article 4.

⁴¹ Draft Articles, *ibid.* Article 5 states: “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 that particular instance.”

⁴² Draft Articles, *ibid.* p. 92.

instructions of, or under the direction and control of, that state in carrying out the conduct.”⁴³
The commentary of Article 8 of the Draft Articles considers that:

“the attribution to the State of an act in fact authorized by it is widely accepted in international jurisprudence. In such cases, it does not matter that the person or persons involved are private individuals, nor whether their conduct involves governmental activity. Most commonly cases of this kind will arise where **States organs supplement their own action by recruiting or instigating private persons or groups who act as “auxiliaries”**, while remaining outside the official structure of the state(emphasis added).”⁴⁴

Therefore, in situations where private companies are authorized, e.g. to arrest and detain individuals, the violations that could be perpetrated during such custody may be attributable to the State. This is certainly not a theoretical example as far as Iraq is concerned. An unclassified document dated March 18 2004 by the Command Joint Task Force-7, the body in operation control of all coalition forces, issued the first draft rules on “the use of force by security contractors in Iraq”. This document provides that civilian persons may be stopped, detained and searched by registered private contractors. The document adds that “[d]etained civilians will be turned over to the Iraqi police or coalition forces as soon as possible”⁴⁵.

If such document were to be officially adopted, it is arguable that acts, including violations of humanitarian law, carried out by personnel of registered private companies that are allowed to detain individuals would be attributable to the coalition. With regard to persons protected by the Fourth Geneva Convention, this rule is confirmed by Article 29, that provides that “the party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred”.

Duty of States to exercise ‘due diligence’ to prevent violations of international law

The example of the previous section focused on situations where personnel of private companies are acting as “surrogate” state organs. In addition, a State can also be held responsible if it omitted to act and did not exercise ‘due diligence’ in preventing or punishing violations committed by private persons or entities that are operating within its jurisdiction and territorial control.

This could include actions carried out abroad by private companies that are operating from its territory. Thus, where a Government might have reasons to believe that a private company established on its territory is involved in the commission of violations of international law abroad, it has the duty to take measures, including criminal proceedings where applicable. In such a case, the obligation for States to exercise due diligence is a corollary of territorial sovereignty, which prevents other States from intervening themselves to enforce their rights beyond their borders.⁴⁶

⁴³ Draft Articles, *ibid.* Article 8 states that: “The conduct of a person or 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 or control of, that State in carrying out the conduct.”

⁴⁴ Draft Article, *ibid.*, p 104.

⁴⁵ Rules for the use of force by coalition contractors in Iraq. Document available from the website of the coalition provisional authority in Iraq at <http://www.rebuilding-iraq.net/security/hunter-choat/RUF%20Card%20I%20Contractors>. Access date 13 June 2004. Cf., also: <http://www.guardian.co.uk/g2/story/0,3604,1200183,00.html>.

⁴⁶ Cf. M. Sassòli, “La guerre contre le terrorisme”, *Annuaire canadien de Droit international*, Tome XXXIX, 2001, UBC Press, Vancouver-Toronto, p 222.

Y. Sandoz introduces a further element and considers that "[a] distinction will therefore be drawn between the case of a company which has its headquarters in a State and in whose affairs the state can play a decisive role by withdrawing its license to operate, and the situation where a company use the territory of a State without the formal agreement of the government. In the latter case, all that can be required of the government is a high degree of vigilance."⁴⁷

Conclusion

Procurement of military services by individuals and private firms has developed in a direction that had probably not been anticipated in previous years. For budgetary reasons, many armies seem to be keen on outsourcing more and more of the activities they were doing themselves so far. Besides, large commercial companies who wish to carry out activities in unstable environments feel the need to turn to private companies to provide them with security.

As a result, the presence of armed personnel working for private companies seems to be on the increase in countries confronted to public unrest or armed conflict. In Iraq, commentators note that the sheer increase of percentage of activities carried out by private companies was the result of security situation after the fall of Baghdad that had not been anticipated by the coalition forces⁴⁸. Their role in the country has led to new questions: if attacked, what support can private companies expect from coalition forces? What weapons will they be permitted to hold?

In many countries, private companies operate in a legal vacuum. At the level of the United Nations, plans to regulate private military companies were considered but no concrete steps seem to have been effectively taken⁴⁹. At the national level, the increase and diversification of activities of private companies, as well as their expanding customer base, has prompted a number of governments to consider adopting legislation to control companies that are operating at home and overseas.

⁴⁷ Y. Sandoz, "Private Security and international Law", in *Peace, Profit or Plunder? The privatisation of Security in War-torn African Societies*, Jakkie Cilliers and Peggy Mason eds, Institute for Security Studies, 1999, p 212.

⁴⁸ A. Dworkin, "Security in Iraq, Armed Guards or Private Soldiers?", in *Crimes of war project*, April 20, 2004. <http://www.crimesofwar.org/onnews/news-security.html>. Access date: 13 June 2004.

⁴⁹ The report of the Secretary-General of the UN at the Millennium Summit, 'We the Peoples: The Role of the United Nations in the 21st Century,' (A/54/2000), pt. 212 stated that : "Consideration should also be given to an international convention regulating the actions of private and corporate security firms, which we see involved in internal wars in growing numbers." There would seem to have been no follow-up on this initiative.

One such example is South Africa, which adopted of the Foreign Military Assistance Act in 1998. The Act expressly prohibits the involvement of South Africans in military activities outside South Africa without the due permission from the government⁵⁰. This regulation, which is said to have forced Executive Outcomes out of the country, has not prevented the involvement of many South Africans to seek employment in private companies present Iraq⁵¹. In the United Kingdom, the Government responded to a request from the Foreign Affairs Committee to study the issue of control of private military companies⁵² and issued on February 2002 a "Green Paper" meant to outline various options for regulation.⁵³ Six possibilities were laid out, ranging from an outright ban on military activity abroad, to a general license scheme and even a self-regulatory system.⁵⁴ In France, during the adoption of a law which makes mercenary activity a criminal offense under French law, members of Parliament noted the "pragmatic approach of the UK Parliament regarding the issue of private military companies" and the "need to engage in consultations on the subject with other European countries."⁵⁵

In this debate, reference to international humanitarian law has been rather infrequent. One reason to explain this may be that the "*jus in bello*", as it is also called, may imply to some a tacit acknowledgement that personnel of private companies may get involved in active combat duties. Mentioning this body of law as part of a regulation framework would appear as an implicit recognition that private contractors may wage war *in lieu* of States.

As this paper has endeavored to show, the assertion that only those private military companies (PMC) seeking active combat mission are concerned with the applicability of humanitarian law does not reflect the reality in a country confronted to an armed conflict. Firstly, when private contractors are present in a country at war, it is necessary to examine their status and the protection they enjoy under humanitarian law. Most frequently, only a *de facto* analysis of their role, activities carried out, and course of action taken allows determining whether personnel of private companies retain the protection afforded to the civilian population under humanitarian law. In order to be protected against direct attack, they must refrain from engaging -permanently or temporarily- in activities that would constitute direct participation in the hostilities. As noted, direct participation in the hostilities is not restricted to active combat operations.

Secondly, in a situation that amounts to an armed conflict, both combatants and civilians have obligations, although these may, of course, differ. Whether they are categorized as civilians or combatants, and whether or not they take a direct part in the hostilities, personnel of private companies have duties under humanitarian law. The duty to respect the sick and

⁵⁰ Regulation of Foreign Military Assistance Act, 1998, No. 15 of 1998: Government Gazette of the Republic of South Africa vol . 395, 20 May 1998.

⁵¹ The United Nations recently reported that South Africa "is already among the top three suppliers of personnel for private military companies, along with the UK and the US." REF ♥♥♥♥♥♥♥♥♥♥

⁵² In February 1999, the Foreign Affairs Committee recommended to the Government, in its report on Sierra Leone (HC116-I) "the publication, within eighteen months, of a Green Paper outlining legislative options for the control of private military companies which operate out of the United Kingdom, its dependencies and British Islands.

⁵³ The Foreign and Commonwealth Office, *op.cit.*

⁵⁴ The six options were : a) a ban on military activity abroad, b) a ban on recruitment for military activity abroad, c) a licensing regime for military services, d) registration and notification, e) a general license system and f) self-regulation: a voluntary code of conduct. Cf. The Foreign and Commonwealth Office, *op.cit.*, pp.22-26.

⁵⁵ "Pour ce qui concerne la France, le projet de loi que nous examinons aujourd'hui constitue incontestablement une avancée, mais il sera nécessaire d'aller plus loin dans la réflexion et, sans doute, d'engager une concertation entre partenaires européens, tant nos législations et nos approches paraissent aujourd'hui disparates." Cf. www.senat.fr/seances/s200302/s20030206/s20030206004.html access date : 27 October 2003.

wounded, for instance, applies to everybody. Irrespective of their status or assignment, private contractors can be held responsible for war crimes and other violations of international humanitarian law they may commit. The fact that they carry weapons and may be *de facto* placed in situations where they can exercise some form of authority are additional reasons to insist on their obligations under humanitarian law.

Thirdly, it is important to recall the obligations and responsibility, under international law, of States that contract such companies or allow them, for instance, to arrest or detain individuals. On the one hand, States must ensure that humanitarian law is known and fully complied with. This principle is clearly reflected in Article 127 of the Third Geneva Convention and Article 144 of the Fourth Geneva Convention that provide that “[a]ny civilian, military, police or other authorities, who in times of war assume responsibilities in respect of protected persons, must possess the text of the Conventions and be specially instructed as to its provisions.” On the other hand, States may be responsible for the acts committed by private contractors who are acting on their behalf, or if they did not exercise due diligence to stop the violations.

Finally, international humanitarian law is especially relevant for those companies that are engaged in training and reorganization of foreign armed forces. This task is now frequently entrusted to private corporations and it is of paramount importance that the correct message with regard to the laws of war is included in the training. The armed forces of countries like Iraq or Afghanistan, that emerge from years of civil war or a bloody dictatorship need to re-learn the basics of a modern, reliable army, and this includes human rights and international humanitarian law.