

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

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Abstract

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



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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

in the law when it comes to their operations.⁸ Such sweeping assertions are inaccurate. In situations of armed conflict there is a body of law that regulates both the activities of PMC/PSC staff⁹ and the responsibilities of the states that hire them, namely international humanitarian law. Moreover, the states in whose territories such companies operate, as well as their states of nationality, also have a significant role to play in ensuring respect by PMCs/PSCs for that law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 Holmqvist, above note 2, p. 5.

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

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

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

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

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

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

Mercenaries?

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

Combatants or civilians?

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

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

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

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

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

20 Additional Protocol I, Article 50(1).

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

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

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

*Members of the armed forces of a state?*²³

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

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

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

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

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

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

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

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

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

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

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

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

28 Schmitt, above note 23, p. 525.

29 Third Geneva Convention, Article 5.

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

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

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

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

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

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

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

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

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

32 *Ibid.*, p. 57.

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

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

to the heart of military operations. As there appears to be consensus among states – both those that have adopted regulations on the topic³⁵ and those that have not – that contractors should not be employed for such activities, only a small minority of PMCs/PSCs are likely to satisfy this requirement.

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

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

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

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

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

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

37 Schmitt, above note 23, p. 529.

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

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

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

For the sake of completeness, it should be noted that the rules of Article 4A(1)–(3) of the Third Geneva Convention for determining membership of the armed forces – and consequently entitlement to combatant status – have been supplemented by Additional Protocol I of 1977.⁴¹ The relevant provisions do not make a significant difference in practice to the position of the staff of PMCs/PSCs just outlined.

Civilians accompanying the armed forces

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

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

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

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

41 Principally Articles 43 and 44 of Additional Protocol I.

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

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

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

What is not so clear is precisely who comes within this exception. The above list of possible services provided is indicative, not exhaustive. Neither the *travaux préparatoires* for this provision nor the *Commentary* shed light on the limits of the activities that may be carried out by this category of persons.⁴⁴ However, the non-combatant status of civilians accompanying the armed forces and the nature of the activities listed by way of example – with the exception of civilian members of military aircraft crews⁴⁵ – would seem to indicate that the drafters intended this category not to include persons carrying out activities that amount to taking a direct part in hostilities.

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

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

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

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

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

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

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

48 *Ibid.*, p. 15.

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

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

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

49 Additional Protocol I, Article 50(1).

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

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

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

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

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

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

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

Civilians

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The responsibilities of employees

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The position of company managers and senior officers

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

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

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

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

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

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

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

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

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

The role of companies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Industry codes of conduct

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

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

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

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

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

The responsibilities of states that hire PMCs/PSCs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

101 Ibid., para. E.2.1.6.

102 Id.

103 Ibid., para. E.2.1.6.2.

104 Ibid., para. E.2.1.6.4.

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

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

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

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

First of all, a pre-condition for respect of the law is knowledge thereof. Employees of PMCs/PSCs hired by states must therefore be properly trained in international humanitarian law.¹⁰⁷ Indeed, this is expressly required by the Geneva Conventions for persons who assume certain responsibilities, most notably in respect of prisoners of war¹⁰⁸ and protected persons under the Fourth Geneva Convention.¹⁰⁹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Superior responsibility

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

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

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

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

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

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

The responsibilities and roles of other states

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

Duty to repress grave breaches

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

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

Undertaking to “ensure respect” for international humanitarian law

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

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

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

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

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

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

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

The role of states in whose territory PMCs/PSCs operate

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

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

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

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

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

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

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

Obviously, the regulatory framework would cover numerous other aspects of the operations of PMCs/PSCs, including the types of activities the private sector may perform¹²⁷ and the types of weapons that may be employed.¹²⁸ It could be based on a “one-off” operating license or require contract-by-contract authorization or notification, plus registration of all employees. Finally, it could also establish a mechanism for supervising the activities of PMCs/PSCs, as well as sanctions for operating without a license or in violation thereof (e.g., withdrawal of operating license, loss of bond, imposition of fines and criminal sanctions). For purposes of transparency, annual reporting to parliament on the implementation of the regulatory framework could also be envisaged.

The role of the state of nationality of PMCs/PSCs

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

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

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

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

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

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

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

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

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

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

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

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

Mercenaries?

A detailed analysis of the position of mercenaries under international law today is beyond the scope of this article. It will therefore be confined to presenting their position under international humanitarian law and the two specific conventions on mercenaries: the 1977 Organization of African Unity Convention for the Elimination of Mercenarism in Africa¹³⁴ and the 1989 United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries.¹³⁵

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

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

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

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

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

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

Mercenaries and international humanitarian law

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

The definition of mercenary

Without reviewing the six conditions in Article 47(2) individually, some aspects of the definition nevertheless warrant highlighting. First, the conditions have to be met cumulatively. In practice this makes it difficult for a person to fall within the definition of mercenary.¹³⁷

Secondly, the requirement in condition (b) that the person concerned does in fact take a direct part in hostilities significantly limits the scope of the definition. Many persons who provide significant support to belligerents and who would commonly be considered mercenaries are likely not to engage in activities that amount to “taking direct part in hostilities” within the meaning of international humanitarian law. Furthermore, the inclusion of this expression adds an element of complexity to the definition. As discussed above, the concept of “direct participation in hostilities” – although central to international humanitarian law since it determines the circumstances in which a civilian may lawfully be attacked – is not defined, and it is notoriously difficult to determine its precise limits.

Last but not least, mention must be made of condition (e), which has justifiably been described as rendering the definition of mercenary, and indeed Article 47 as whole, entirely devoid of any practical or legal significance. Article 47(2)(e) excludes from the definition anyone who is a member of the armed forces of a state party to the conflict. Thus, simply by incorporating mercenaries into its

136 Article 47(2) of Additional Protocol I defines as mercenary as any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party; (d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (e) is not a member of the armed forces of a party to the conflict; and (f) has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces.

137 The threshold was set intentionally high at the Diplomatic Conference on the Re-affirmation and Development of International Law, that negotiated the Additional Protocols of 1977, as “determination of a person’s status as a mercenary was likely to involve life or death consequences” and some states wanted to reduce the risk that the article could be used to deny combatant or prisoner-of-war status to legitimate combatants. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974–1977), Vol. XV, Committee III Report, Fourth Session, 17 March–10 June 1977, CDDH/407/Rev.1, para. 25.

armed forces, a state wishing to use them can avoid them being considered mercenaries even if all the other conditions are met. This course of action, already raised as a possibility during the Diplomatic Conference,¹³⁸ was in fact taken by Papua New Guinea in 1997 with regard to the employees of Sandline International, who were given “special constable” status.¹³⁹

Moreover, from a more purely legal point of view the inclusion of condition (e) makes Article 47 redundant. A person who is not a member of a state’s armed forces – or of a militia or volunteer corps meeting the conditions of Article 4A(2) of the Third Geneva Convention – who takes direct part in hostilities, is an “unprivileged belligerent” or “unlawful combatant” and is not entitled to prisoner-of-war status in any event if captured. Accordingly, although Article 47 appears to be creating a new category of persons who are not entitled to prisoner-of-war status, it is merely reiterating an existing position, causing some commentators to refer to it as “a would-be fierce” provision.¹⁴⁰ Although a provision on mercenaries was included in Additional Protocol I for political reasons, it did not change existing law in any way. The sole contribution of Article 47 to the regulation of mercenaries has been to provide a definition that was subsequently used, with some minor changes, in the specialized conventions.

The effect of Article 47 on status

The effect of Article 47 is to render persons falling within the definition of mercenaries “unprivileged combatants” or “unlawful combatants” with the same rights and obligations as any civilian who takes direct part in hostilities.¹⁴¹

138 See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974–1977), Vol. XV, Committee III Report, Third Session, 21 April–10 June 1976, CDDH/236/Rev.1, para 102.

139 Agreement for the Provision of Military Assistance between the Independent State of Papua New Guinea and Sandline International, 31 January 1997, available at <http://coombs.anu.edu.au/SpecialProj/PNG/htmls/Sandline.html>. Apparently a similar approach was adopted in relation to Executive Outcomes employees in Angola and Sierra Leone in the 1990ies.

140 Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict*, 1980, p. 328. For additional shortcomings of the definition see, *inter alia*, the presentation given by one of the experts at the first meeting of experts convened by the Commission on Human Rights in 2001. Commission on Human Rights, The Right of Peoples to Self-determination and its Application to Peoples under Colonial or Alien Domination or Foreign Occupation, UN Doc E/CN.4/2001/18, 14 February 2001, Annex: Report of the Meeting of Experts on the Traditional and New Forms of Mercenary Activities as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Geneva, 29 January–2 February 2001, para. 24.

141 Although Article 47 was adopted by consensus at the Diplomatic Conference, it was a compromise text, and had been the subject of considerable controversy – of a political rather than legal nature. Some states, notably those emerging from colonial domination or who had been the “victims” of mercenary activities, had wanted a stronger text requiring states to prohibit recruitment, training, assembly and operation of mercenaries and prohibiting their nationals from enlisting as mercenaries – the position subsequently adopted in the specialized conventions. Other states did not wish the Protocol to prohibit being a mercenary and mercenarism, and also considered that even the approach that was ultimately adopted, which focused on status, could in practice limit protection and, accordingly, did not belong in a treaty of a humanitarian nature such as the Additional Protocol – a view echoed by some commentators. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974–1977), Volume VI,

What does this mean in practice? Combatants have a right to participate in hostilities. If captured, they are entitled to be treated as prisoners of war and are protected by the Third Geneva Convention of 1949. Importantly, they may not be tried for merely participating in hostilities.

Mercenaries, on the other hand, are treated in the same way as civilians. They do not have the right to participate in hostilities. Should they do so and be captured, they are not entitled to prisoner-of-war status or, consequently, to the protection of the Third Geneva Convention, and they may be tried under national law for merely having participated in hostilities, even if they did not violate any rules of international humanitarian law.

This does not mean that captured mercenaries have no protection under international humanitarian law. They are protected by the Fourth Geneva Convention, and if they fall within the exceptions in that Convention, they are nonetheless still entitled to the fundamental guarantees found in Article 75 of Additional Protocol I.

The protections enshrined in Article 75 are extremely important from a practical point of view. Not only do they ensure that persons falling within the definition of mercenary are not deprived of all protection under international humanitarian law but, more specifically, include the express requirement that they be afforded minimum due process guarantees. This provision is particularly significant in view of the often summary criminal proceedings that have led to the executions of persons accused of mercenarism in the past.¹⁴²

It should, however, be noted that Article 47 does not *prohibit* states from giving mercenaries prisoner-of-war status.¹⁴³ It merely provides that mercenaries, unlike members of states' armed forces, are not *entitled* to it as a matter of right.

Although actual national practice in this area is scarce, instances have been reported in which a state claimed to have granted prisoner-of-war status to

Plenary Meetings, Summary Records of the Thirty-Fourth to Forty-Sixth Meetings, CDDH/SR.41, pp. 156–204. For discussions of the negotiations see, *inter alia*, *Commentary: Additional Protocols*, above note 58, paras. 1789 et seq; Michael Bothe, Karl Partsch and Waldemar Solf (eds.), *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 1982, pp. 267 et seq; François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 2003, p. 628; Rosas, above note 51, pp. 392 et seq; Henry Van Deventer, “Mercenaries at Geneva”, *American Journal of International Law*, No. 70, 1976 p. 811; and Abdulqawi Yusuf, “Mercenaries in the Law of Armed Conflicts”, in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, 1979, pp. 113 et seq.

142 One example was the trial that took place in Angola in 1976 described in Mike Hoover, “The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War”, *Case Western Journal of International Law*, 1977, pp. 323 et seq. See also Edwin Nwogugu, “Recent Developments in the Law Relating to Mercenaries”, *The Military Law and Law of War Review*, No. XX-1-2, 1981, p. 11 at p. 17; and, more recently, Amnesty International Press Release “Equatorial Guinea: Trial of alleged coup plotters seriously flawed”, AFR/24/017/2004, 30 November 2004.

In recognition of this particular problem, an earlier draft of Article 47 proposed during the negotiations had included an express reference to the fact mercenaries were entitled to the protections of what became Article 75. This provision was ultimately removed as part of the compromise. CDDH/407/Rev.1, above note 137, para. 27.

143 Some states at the negotiations had called for such an approach. See *Commentary: Additional Protocols*, above note 58, para. 1795.

persons it considered as falling within the definition of mercenaries. For example, a 1988 report of the UN Secretary-General on the Iran-Iraq war reports Iran's assertion that it had captured third country nationals during the hostilities whom it alleged were mercenaries but, instead of trying them, had treated them like other prisoners of war.¹⁴⁴

Non-international armed conflicts

Article 47 of Additional Protocol I only applies in international armed conflicts, including occupation. International humanitarian law is silent as to the position of mercenaries in non-international armed conflicts. Moreover, as prisoner-of-war status does not exist in such conflicts, it is meaningless to say that someone is not entitled to it.

In practice this means that, in a non-international armed conflict, a person who would have fallen within the definition of mercenary had he/she participated in an international armed conflict is in the same position as anyone else who takes a direct part in hostilities. He/she is entitled to the protections laid down in common Article 3 to the Geneva Conventions, in Additional Protocol II and in the customary rules of international humanitarian law applicable in non-international armed conflict, but may be tried under national law merely for having taken part in the hostilities.

The obligation of mercenaries to respect international humanitarian law

Although the one express reference to mercenaries in international humanitarian law focuses exclusively on their status, there is no doubt that mercenaries, like anyone else in a situation of armed conflict, must respect that law and may face individual criminal responsibility for any serious violations they may commit.

It is interesting to observe that to date in only one of the trials of persons accused of mercenarism were the defendants also accused of having committed acts that amounted to war crimes. This occurred in the aforementioned trial in Angola in 1976, where they were also charged with the murder of civilians and fellow mercenaries who had refused to fight.¹⁴⁵

The mercenary conventions

The position under international humanitarian law should be contrasted with that adopted by the two conventions dealing specifically with mercenaries: the 1977 Organization of African Unity Convention for the Elimination of Mercenarism in

¹⁴⁴ *Report of Mission dispatched by the Secretary-General on the situation of prisoners of war in the Islamic Republic of Iran and Iraq*, UN Doc S/20149, 24 August 1988, para. 65. This assertion appears to conflict with the ICRC's experience in relation to visits to alleged mercenaries detained by Iran during the same conflict as described in Bugnion, above note 141, p. 629.

¹⁴⁵ See above note 142.

Africa (OAU Convention) and the 1989 United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN Convention). The aim of these instruments is to prohibit recourse to mercenaries and criminalize mercenarism and being a mercenary.

Both instruments adopt definitions of mercenaries very similar to that in Article 47 of Additional Protocol I,¹⁴⁶ and the OAU Convention defines the crime of mercenarism, including persons who enroll in “bands” of mercenaries, and also those who enlist or in any way support such bands.¹⁴⁷ The definition of the crime is extremely broad, as is the range of potential perpetrators: individuals, groups, associations, state representatives and states themselves. The UN Convention takes a similar but narrower approach, making it a crime to take direct part in hostilities as a mercenary¹⁴⁸ or to recruit, finance or train mercenaries.¹⁴⁹ Both instruments require states parties to criminalize these offences under national law and to prosecute or extradite suspected persons.

The mercenary conventions do not mention the type of conflict to which they apply so, unlike Article 47 of Additional Protocol I, they can be presumed to apply in relation to involvement in both international and non-international armed conflicts.¹⁵⁰

The OAU Convention also addresses the question of the *status* of persons falling within the definition. In Article 3 it asserts that mercenaries “shall not enjoy the status of combatants” but then rather surprisingly – considering that during the Diplomatic Conference it was mainly African states that called for a stricter position *denying* the granting of prisoner-of-war status to mercenaries – merely reiterates the rule laid down in Article 47 of Additional Protocol I, namely that mercenaries are not *entitled* to prisoner-of-war status if captured. The UN Convention, on the other hand, is silent on the question of status.

Three further aspects of the conventions deserve comment. First, in both instruments the sections relating to possible criminal proceedings against mercenaries contain a provision on judicial guarantees. Regrettably, however, both articles are weak, as they do not refer to international human rights as a minimum standard to be respected in such proceedings. The OAU Convention only requires mercenaries to be ensured the rights “normally granted to any ordinary person by the state on whose territory he is being tried.”¹⁵¹ The UN Convention includes a reference to international law, but this merely states that “[a]pplicable norms of international law should be taken into account” during the

146 OAU Convention, Article 1 and UN Convention, Article 1.

147 OAU Convention, Article 2.

148 UN Convention, Article 3(1).

149 UN Convention, Article 2.

150 In fact, the UN Convention also applies to persons participating in a concerted act of violence aimed at overthrowing a government or otherwise undermining the constitutional order of a state or undermining its territorial integrity. UN Convention, Article 1(2).

151 OAU Convention, Article 11.

trials.¹⁵² A clear assertion that human rights standards must be respected would obviously have been preferable.¹⁵³

Secondly, the UN Convention – but not the OAU instrument – includes a safeguard clause for international humanitarian law.¹⁵⁴ The primary aim of this provision appears to relate to questions of status, which, it will be recalled, are not mentioned in the UN Convention. However, this provision is important as it addresses the interface between the position and rights of persons having taken direct part in hostilities under international humanitarian law and the mercenary conventions more generally.

The proper articulation of this interplay is important for a number of reasons. To give a concrete example, under international humanitarian law in international armed conflicts there is a presumption of entitlement to prisoner-of-war status. In cases of doubt as to such entitlement, the status of the person concerned must be determined by a competent tribunal.¹⁵⁵ Pending the tribunal's decision, captured persons are entitled to the protection of the Third Geneva Convention. Absent a safeguard clause, the mercenary conventions could be interpreted as removing this presumption and entitlement to a review of status. This is not a purely theoretical concern but one with very immediate and significant consequences for the protection of persons accused of mercenarism. The safeguard clause implicitly preserves these rights.¹⁵⁶

The safeguard clause also, to some extent, remedies the UN Convention's failure to affirm the application of human rights fair trial standards, as it imports into it the safeguards found or referred to in international humanitarian law. Most notable are those in Article 75 of Additional Protocol I for persons tried in connection with international armed conflicts, and the prohibition in common Article 3(d) of the Geneva Conventions on "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" for those tried in relation to involvement in non-international conflicts.

Finally, mention should be made of the reference in the UN Convention to ICRC visits to persons deprived of their liberty on suspicion of crimes under the Convention. Article 10(4) preserves:

152 UN Convention, Article 11.

153 Other UN instruments that adopt a similar, "criminalize, prosecute or extradite" approach contain far more affirmative language with regard to the minimum judicial guarantees to be ensured during criminal proceedings. See, for example, Article 14 of the 1997 International Convention for the Suppression of Terrorist Bombings.

154 Article 16 of the UN Convention provides as follows: [t]he present Convention shall be applied without prejudice to: a. The rules relating to the international responsibility of states; b. The law of armed conflict and international humanitarian law, including the provisions relating to the status of combatant or prisoner of war.

155 Third Geneva Convention, Article 5, and Additional Protocol I, Article 5.

156 See Declaration of the International Committee of the Red Cross on the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, United Nations General Assembly, item 144, 44th session, November 1989.

“the right of any state party having a claim to jurisdiction in accordance with Article 9, paragraph 1(b), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.”

This provision, although subsequently adopted in other UN conventions that criminalize a particular activity and require states to prosecute or extradite suspects,¹⁵⁷ also raises issues concerning the interface between the UN Convention and international humanitarian law.

Pursuant to the Geneva Conventions, the ICRC has a right to visit persons deprived of their liberty in connection with an international armed conflict.¹⁵⁸ Persons held under the UN Convention could obviously fall within this mandate. This right is not dependent on the ICRC being invited to communicate with and visit the person in question by their state of nationality or residence as envisaged in Article 10(4). Thanks to the safeguard clause, however, it is clear that this provision in no way limits or affects this right.¹⁵⁹

Are the positions under international humanitarian law and the specialized conventions incompatible?

A recurring question is whether the different approaches of international humanitarian law and the specialized conventions to the same category of persons can be reconciled or give rise to inconsistencies.

Although the difference may cause some understandable initial confusion, compounded by the fact that the definitions in the specialized conventions are drawn from international humanitarian law, the different approaches taken to mercenaries by these two bodies of law do not in fact give rise to any problems as a matter of law.¹⁶⁰

International humanitarian law and the mercenary conventions have different focuses and aims, but their respective approaches can co-exist and are complementary. One body of law, international humanitarian law, addresses the status of persons falling within the definition of mercenaries as well as their

157 See, e.g., Article 7(5) of the 1997 International Convention for the Suppression of Terrorist Bombings and Article 9(5) of the 1999 International Convention for the Suppression of the Financing of Terrorism.

158 Third Geneva Convention, Article 126, and Fourth Geneva Convention, Article 143.

159 In view of the importance of retaining its independent access to persons deprived of their liberty in relation to an armed conflict, the ICRC made a declaration to the UN General Assembly at the time of the adoption of the UN Convention, recalling its right to visit persons deprived of their liberty, regardless of whether it had been invited by their state of nationality or citizenship. The declaration emphasized that it was vital for the ICRC to retain the freedom to either accept or refuse any such invitation. It also pointed out that in such circumstances the ICRC would not consider itself as acting on behalf of the requesting state but would work independently and solely on the basis of humanitarian considerations. ICRC Declaration, above note 156.

160 This conclusion was confirmed during a meeting held in 1988 between representatives of the ICRC and Prof Tullio Treves, Vice-Chairman Special Committee of the UN General Assembly for the Drafting of a Convention Against the Recruitment, Use, Financing and Training of Mercenaries, ICRC Document 88/1578, 16 December 1988, ICRC Ref 130, 215(00).

specific protections and, implicitly, their obligations: like all actors in situations of armed conflict, mercenaries must respect international humanitarian law. The specialized conventions, for their part, address the legality of the phenomenon more broadly. They regulate state behavior by limiting the circumstances in which states may have recourse to mercenaries – a dimension not covered by international humanitarian law.

With regard to individuals, the specialized conventions have a purpose different to that of international humanitarian law, namely to establish individual criminal responsibility. This is done in a manner that does not give rise to inconsistencies with the question of status as addressed by international humanitarian law. In fact, the two approaches form a complementary and coherent system for prosecuting civilians who take direct part in hostilities and who fulfill the other conditions of the mercenary definitions. International humanitarian law neither provides immunity for such direct participation in hostilities, nor requires states to criminalize it. The bases for doing so are the specialized conventions as implemented in national criminal law. The contribution of international humanitarian law to any proceedings that may take place is to lay down minimum conditions of treatment during detention, including the right to visits by the ICRC, and to require that minimum judicial guarantees be ensured.

Are the staff of PMCs/PMCs mercenaries?

Obviously here, too, there is no single answer. Like everyone else, they may only be considered mercenaries if they meet all the conditions of Article 47 of Additional Protocol I or the relevant specialized convention. The cumulative conditions are notoriously difficult to meet – a point made convincingly by Best’s much-quoted view that “a mercenary who cannot exclude himself from this definition deserves to be shot – and his lawyer with him.”¹⁶¹ The specific characteristics of PMCs/PSCs and of the market for their services make it even more unlikely that any but a small minority of their employees could fall within the definition.

As a preliminary point, it should be noted that the definition of mercenaries, both in Article 47 and in the specialized conventions, focuses on natural and not legal persons. Therefore it is the employees of PMCs/PSCs who must fulfill the conditions and not the companies. While this is not problematic *per se* it can lead to unexpected results, as will be seen.

Key factors in determining the status of PMC/PSC employees will be, first, the identity of their client. As discussed above, the possibility exists that if hired by a state and if certain conditions are met, the staff of PMCs/PSCs may be considered members of the armed forces of that state and consequently, by virtue of condition (e) of Article 47(2), would fall outside the definition.¹⁶² Again, in view

161 Best, above note 140, p. 328.

162 For the sake of simplicity, reference is only made to the provisions of the definition in Article 47 of Additional Protocol I, but the comments are equally applicable to the definitions in the two specialized conventions.

of the policies underlying the reduction of the number of armed forces and outsourcing of military tasks, it is unlikely that this will happen, but not impossible.

Next, assuming that the requirements of motive and actual gains in condition (c) are likely to be satisfied in most cases, conditions (a) and (b), which require the person to be specially recruited in order to fight in an armed conflict and actual direct participation in hostilities, will probably exclude most persons. Available information tends to show that the majority of PMCs/PSCs operating in Iraq and Afghanistan, for example, were not specifically hired to take direct part in hostilities, but rather to provide a vast array of logistic and support services to the armed forces. Indeed, the only domestic regulation adopted to date specifically regulating the use of contractors by the armed forces of a state expressly precludes contractors from carrying out activities that are “inherently governmental” – a term that includes combat operations.¹⁶³

Similarly, although many PMCs/PSCs are providing security services – often armed – to a variety of entities other than states, these activities only rarely amount to direct participation in hostilities. Even in those cases where they do, the use of force is unlikely to have been expressly envisaged at the time of hiring, as required in condition (a), but is more likely to have been a reaction to changing realities on the ground.

One final condition likely to exclude many employees of PMCs/PSCs from the definition is the requirement in condition (d) that the person in question “is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict.” By way of example, this excludes from the definition all US, UK and Iraqi employees of PMCs/PSCs hired by these states or any other actor in Iraq.

Furthermore, this requirement leads to results that appear arbitrary, drawing what can only be baseless distinctions between persons of different nationalities. Continuing to use Iraq as an example, this nationality requirement means that a US national and a Chilean national could be working side by side, employed by the same PMC/PSC on the same contract and carrying out exactly the same activity, but the US national would not be considered a mercenary whereas the Chilean would. There seems to be no reason for criminalizing the behavior of one person but not the other.

Without entering into a discussion of the merits and feasibility of amending the mercenary definition,¹⁶⁴ the nationality requirement is the part of it

163 US Department of Defense Instruction Number 3020.41, above note 35, para. 6.1.5.

164 A review of the work of the Commission on Human Rights on the topic of mercenaries and, in particular, of that of the two Special Rapporteurs on Mercenaries, Mr Enrique Bernales Ballesteros and his successor Dr Shahista Shameen, as well as of the Working Group on Mercenaries, which took over the mandate in 2005, is beyond the scope of the present article. It should be mentioned, however, that a possible amendment of the definition of mercenary in the UN Convention has been the subject of discussion for a number of years, including in a series of three meetings of experts held in 2001, 2002 and 2004. UN Doc E/CN.4/2001/18, 14 February 2001; UN Doc E/CN.4/2003/4, 24 June 2002, and UN Doc E/CN.4/2005/23, 18 January 2005. In her 2005 report to the United Nations General Assembly, the Special Rapporteur, *inter alia*, recommended that the Sixth Committee of the General Assembly or the

that appears most out of touch with present-day realities. While during negotiation of Additional Protocol I such a requirement responded to the concern of states about *foreign* interference in conflicts, today it excludes a large proportion of the persons providing military services and also draws unwarranted distinctions between people carrying out the same activities. To avoid such arbitrary results it has been suggested that, at the very least, this condition should be read as referring to the nationality of the companies rather than that of individual employees.

Conclusion

As stated at the outset, a binding legal framework that regulates the operations of PMC/PSC staff in situations of armed conflict does exist. There is therefore no need to develop new rules at the international level.

This is not to say that the position is straightforward as a matter of law or that there are no challenges in implementing the obligations in practice. In order to determine the status and consequent obligations of the staff of PMCs/PSCs, some of the most complex questions of international humanitarian law have to be tackled, such as who are combatants and what amounts to taking direct part in hostilities. These are questions that have to be answered on a case-by-case basis.

In terms of enforcement of the law, although clear obligations do exist for bringing persons suspected of serious violations of international humanitarian law to justice, prosecutions are rare. This is unfortunate. It promotes impunity, deprives victims of redress, provides no deterrence against future violations and may give the impression that there is no applicable law, thus fuelling the risk of further violations.

Moreover, the present article has only addressed the position under international humanitarian law – the simplest dimension of the legal framework regulating the operations of PMCs/PSCs. But international humanitarian law only applies in times of armed conflict. Whenever companies operate in other contexts, this body of law is not relevant to their activities, which are then regulated by the local criminal law – and possibly human rights law. Also, even when they operate in states experiencing armed conflict, international humanitarian law is pertinent only to acts committed in the context of and associated with the conflict. Many of the activities of companies do not have this connection and are thus only regulated by local law – and, again, possibly human rights law. The extent to which human rights law applies to the activities of PMCs/PSCs is a far more complex legal issue than the position under international humanitarian law and is still in need of detailed analysis.

International Law Commission carry out a review of the definition of mercenaries. UN Doc A/60/263, 17 August 2005, para. 60.

To come back to the legal framework outlined in this article, a number of suggestions can be made to try to address some of the legal complications mentioned, as well as some of the policy concerns.

First, the issues raised by the types of activities that may be performed by PMC/PSC employees and the doubts about their status if they take direct part in hostilities could be resolved if states precluded such persons from carrying out activities likely to amount to direct participation in hostilities *unless* they are incorporated into the armed forces. Such an approach would have numerous advantages. It would clarify any doubts as to the status of the persons concerned upon capture as, regardless of whether they had actually taken direct part in hostilities, they would be entitled to prisoner-of-war status. It would also avert the risk that PMC/PSC employees could be considered mercenaries, as they clearly would not fall within the definition. Finally, it would subject them to the command and control of the military hierarchy and to the military disciplinary system. This would address the concerns expressed by members of the armed forces as to their lack of control over PMC/PSC employees¹⁶⁵ and bring these within the armed forces' sophisticated framework for ensuring respect for international humanitarian law. From the point of view of the employees, although as members of the armed forces they would be exposed to the risk of attack at any time, it would avert the risk of criminal responsibility as "unprivileged belligerents", "unlawful combatants".¹⁶⁶

Secondly, states could consider expanding their courts' jurisdictional bases to increase possible avenues for bringing proceedings for violations committed by PMC/PSC staff. Approaches centered on the liability of the company, as opposed to that of its employees, would be preferable for a number of reasons: individual criminal responsibility already exists, companies have far deeper pockets for the payment of compensation and holding the company accountable is more likely to have an impact on its future practices. Possible avenues could include establishing the criminal and or civil liability of companies for acts that amount to serious violations of international humanitarian law and granting courts extraterritorial jurisdiction in respect of such acts.

Thirdly, states that frequently hire PMCs/PSCs could consider adopting directives setting out their position and policy on certain key issues. These could include the types of activities that may be performed by PMC/PSC staff,

165 This point was vividly made by Major William Epley: [t]he closer the function to the sound of battle, the greater the need to have soldiers perform the function because of the greater need for discipline and control. (William Epley, *Contracting in War: Civilian Combat Support of Fielded Armies*, US Army Center of Military History, 1989, 1–6.)

166 The United Kingdom has adopted a creative approach for dealing with this question. The 1996 Sponsored Reserve Act requires a specified portion of the workforce of a government contractor to be members of a military reserve component. Under this arrangement, in time of need, the British government "sponsors" reservist PMC/PSC employees who are mobilized and deployed as uniformed members of the armed forces, where they operate under the command and control of military commanders. As members of the armed forces they are entitled to take direct part in hostilities and to prisoner-of-war status when captured. See, e.g., Blizzard, above note 73, pp. 10 et seq. and references therein.

requirements as to the vetting and training of staff, a clear allocation of responsibility between the state and the company for such matters and for exercising control and discipline over the employees, rules relating to sub-contracting, and also mechanisms for reporting and investigating allegations of violations of international humanitarian law. Additionally, public procurement regulations could be modified to include requirements, such as staff vetting and training, to be met by PMCs/PSCs in order to promote respect for international humanitarian law. Such measures could substantially help states meet their responsibility to ensure respect for international humanitarian law by the companies they hire.

Finally, states of nationality of PMCs/PSCs that provide services abroad and the states in whose territories the companies operate could consider adopting legislation regulating the provision of such services. This would enable them to promote respect for international humanitarian law and to address a number of other issues. A regulatory framework would permit the state of nationality of companies to exercise some control over the activities of its companies abroad, which is essential in order, *inter alia*, to avoid the risk of companies acting in violation of the state's legal obligations and foreign policy interests. Regulation would also permit the state in whose territory PMCs/PSCs operate to determine the types of activities that may be performed by private actors, to demand compliance with certain minimum standards, including those with regard to the carrying of weapons, and to obtain empirical information as to the numbers of companies and their employees operating in its territory.