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International Humanitarian Law and the Regulation of Private Military Companies

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I. Introduction¹

“Private military companies” (PMCs) are becoming a well-known phenomenon. The fact that the employees of private military companies, taken together, make up the second largest contingent in Iraq – now estimated to number 48 000, second only to the US armed forces² – has sparked enormous debate among policy makers, military leaders, non-government organizations and academics on the role of these actors in situations of armed conflict. Observers and critics have especially expressed concerns regarding the responsibility of private actors for human rights violations and the wisdom of being able to rely only on a commercial contract to compel a person to remain in a war zone and carry out life-threatening tasks. For some, the privatization of large-scale violence may signal the beginning of a massive change in the concept of the essential, necessary components of statehood.³ As for the companies, instead of hiding as shadowy mercenaries, they now hold interna-

tional conferences attended by former dignitaries.⁴ For lawyers, governments, and political scientists, the accountability and regulation of private military companies are the key issues that urgently need to be addressed, implying a tacit acceptance that these companies are here to stay and do not need to be outlawed.⁵

Private military companies exploded onto the international scene in 2004 largely due to two incidents in Iraq, aside from their sheer numbers: first, the brutal execution of four employees of the PMC “Blackwater” in Fallujah, which led to the US response in that city using overwhelming force, and, second, the torture of detainees at Abu Ghraib prison carried out with the involvement of PMC employees.⁶ These two incidents exemplify in

⁴ The US trade association of PMCs held a conference in Jordan 2006 and the UK equivalent held a conference in October 2006 attended by Sir Malcolm Rifkind.

⁵ United Kingdom, Green Paper, *Private Military Companies: Options for Regulation*, London: The Stationery Office, 2002; Swiss Federal Council, *Rapport du Conseil fédéral sur les entreprises de sécurité et les entreprises militaires privées*, 2006, and *contra* UN Special Rapporteur on Mercenaries, Enrique Ballasteros, *Question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, UN Doc. E/CN.4/2004/15 esp. at para. 57 (2003).

⁶ These two examples have been officially recognized by the former Special Rapporteur on the Right of Peoples to Self-Determination and its application to peoples under colonial or alien domination or foreign occupation: *Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, Mrs. Shaista Shameem, in her annual report. See UN Doc. E/CN.4/2005/14 at para. 50 (2004). Both the Fay Report and Taguba Report recommended referral to the US Department of Justice for potential criminal prosecution for these events. See Major General George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 130-34, August 23 2004, online: <http://www4.army.mil/ocpa/reports/ar15-6/index.html> (last visited 20 September 2006). The report enumerates incidents in which private contractors were allegedly involved, including (but not limited to) rape (Incident 22), use of “unauthorized stress positions” (Incident 24) use of dogs to aggress detainees (Incidents 25 and 30), humiliation (Incident 33). See also pp. 131 – 134 for MG Fay’s findings regarding the civilians (private military company employees) he investigated. See also <http://www.dod.mil/pubs/foi/detainees/taguba/> (last

¹ The author wishes to extend warm thanks to Marco Sassòli and Théo Boutruche at the University of Geneva for many fruitful discussions and helpful suggestions during the preparation of this paper.

² This estimate that there are now 48,000 persons employed in private military or private security companies in Iraq is cited in the US GAO study, *Rebuilding Iraq: Actions Still Needed to Improve the Use of Private Security Providers*, testimony of William Solis, Director, Defense Capabilities and Management before the Subcommittee on National Security, Emerging Threats and International Relations, Committee on Government Reform, US Government Accountability Office, 13 June 2006. Online: <http://www.gao.gov/new.items/d06865t.pdf>. A recent report from a UK non-government organization alleges that UK Government wants to “privatise the war” as part of its exit strategy”: see Kim Sengupta, UK: Blair accused of trying to ‘privatise’ war in Iraq, *The Independent*, 30 October 2006.

³ For a thorough discussion of this issue, see Anna Leander, *Eroding State Authority? Private Military Companies and the Legitimate Use of Force* (Rome: Rubbetino, 2006), especially at p. 138; Peter Singer, one of the first political scientists to study PMCs in depth, does not see these forces as changing the state, but as a significant actor in a “transformed” “international environment”. See his *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell: Cornell University Press, 2003) at p. 242.

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

Page 2

horrific terms both the vulnerability and potential power of PMC employees. Both have led to legal proceedings in US Courts⁷ and the latter incident in particular to a flurry of academic writing on the responsibility of private actors for such acts.⁸ Further reports have demonstrated that employees of these companies do more than meet the catering needs of the armed forces – they participate in combat operations with uncertain regularity.⁹

Contrary to what some assert, however, PMCs do not operate in a legal vacuum.¹⁰ In fact, it is erroneous and potentially harmful to state that “these [private military companies] act in a void, virtually free from legal restraints.”¹¹ Nevertheless, for lawyers, the advent of these actors in theatres of armed conflict – especially those who engage in combat or have combat roles¹² – represents a challenge in terms of fitting PMCs into the legal framework that applies in armed conflicts with an eye to encouraging increased regulation of these companies by states. Admittedly, mechanisms for *implementing* existing legal obligations have been a particularly thorny problem.¹³ This paper will therefore outline the framework of international humanitarian law that is central to PMC

issues and illustrate the aspects that can make regulation a somewhat tricky exercise. In particular, it will consider whether the employees of PMCs are combatants, mercenaries, or civilians under international humanitarian law and sketch the consequences of their status when it comes to regulating what PMCs may do in situations of armed conflict. It should be noted that a legal analysis of PMCs is based on their functions and activities rather than on whether they are called private security companies or private military companies. Finally, this paper does not seek to condemn or to condone PMCs – it merely seeks to clearly explain international humanitarian law with a view to PMCs so that regulation can proceed in a manner that is commensurate with the longstanding principles and rules of that law. Rather than simply asserting that new law is needed, this paper strives to assess PMC issues under existing IHL and show its relevance for effective regulation.

II. International Humanitarian Law – Combatants, Civilians, Mercenaries

What is international humanitarian law?

International humanitarian law (IHL) is the body of public international law that applies to and in situations of armed conflict. IHL provides comprehensive rules for the protection of individuals in situations of armed conflict and also regulates the conduct of hostilities. It applies independently of the legality of the resort to the use of force by either party, and it is somewhat unusual in international law in that its rules and obligations apply directly to all individuals who find themselves in a territory on which there is an armed conflict, whether they are state or non-state actors.¹⁴ The employees of private military companies operating in situations of armed conflict are therefore clearly bound by IHL. The key components of IHL applicable to private military companies and their employees (operating in armed conflicts) are the Geneva Conventions of 1949, their Additional Protocols of 1977 and customary international law.¹⁵ Despite increasing convergence in the law, distinctions relevant to PMCs persist between the IHL applicable to

visited 20 September 2006) for the report of Major General Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade [hereafter Taguba Report].

⁷ On Abu Ghraib, see the cases *Ibrahim v. Titan*, Civil Action No. 04-1248 (JR), *Saleh v. Titan* Case No. 04CV1143 R (NLS). On the families suing Blackwater for failing to ensure the security of the employees, see *Richard Norden et al v. Blackwater Security LLC et al*, No. 5:05-CV-48-FL(1) 382 F. Supp. 2d 801. The vulnerability should not be understated: as of November 2006, an estimated 700 civilian contractors have been killed in Iraq.

⁸ See, for example, Mark Bina, “Private Military Contractor Liability and Accountability after Abu Ghraib” 38 *John Marshall Law Review* 1237 (2005); Heather Carney, “Prosecuting the Lawless: Human Rights Abuses and Private Military Firms” 74 *George Washington Law Review* 317 (2006); Laura Dickinson, “Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law” 45 *William and Mary Law Review* 135 (2005); for a pre-Abu Ghraib article, see Craig Forcece, “Deterring ‘Militarized Commerce’: The Prospect of Liability for ‘Privatized’ Human Rights Abuses” 31 *Ottawa Law Review* 171 (1999/2000).

⁹ In addition, technological developments make remote participation in combat by civilians a reality. See Major Ricou Heaton, “Civilians at War: Reexamining the status of civilians accompanying the armed forces” 57 *Air Force Law Review* 155 (2005).

¹⁰ Contrary to what many assert: see, e.g. Peter Singer “War, Profits and the Vacuum of Law: Privatized Military Firms and International Law” 42 *Columbia J Transnational Law* 521 (2004).

¹¹ Carney, *supra* note 8 at p. 323.

¹² This is not limited to offensive combat. See below.

¹³ Department of Defense Instruction No. 5525.11 of 3 March 2005 on “Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States...” attempts to address the gap in criminal jurisdiction; however, the fact remains that despite recommendations by Taguba Report and others, no civilian contractor has yet been prosecuted for the events in Abu Ghraib. Moreover, this applies only to those contracted by the US Department of Defense, which is far from a majority of these actors.

¹⁴ This is confirmed by the fact that non-State actors have and can be found individually criminally responsible for violations of international humanitarian law. See ICTR *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-I, Judgment (Appeals Chamber), 1 June 2001, para. 444. This applies for non-international and international armed conflicts.

¹⁵ See especially *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135 [Geneva Convention III]; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 [Geneva Convention IV]; *Protocol [No. I] Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 3 [hereafter, Protocol I]. In addition, other IHL treaties that would apply include arms control treaties, treaties banning specific weapons, etc.

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

Page 3

international armed conflicts and non-international armed conflicts; paramount among these is the fact that in IHL of international armed conflicts, it is imperative to analyse the status of persons as either civilians or combatants. IHL also defines mercenary status and provides rules for the treatment of mercenaries. In non-international armed conflicts, on the other hand, no combatant status exists, so a distinction must be drawn between those who actively and directly participate in hostilities and those who do not.

Combatant Status

One of the fundamental principles of the IHL of international armed conflicts is that one must distinguish between civilians and combatants, since it is only lawful to target combatants.¹⁶ The principle of distinction is crucial to IHL's ability to protect civilians from the violence of armed conflict. Furthermore, only combatants may lawfully directly participate in hostilities: this is the "combatants' privilege".¹⁷ The fact that combatants may lawfully directly participate in hostilities means that they are immune to prosecution for lawful acts of war – for example, killing enemy soldiers – but not immune from prosecution for commission of violations of IHL. If captured, combatants have the right to be prisoners of war unless they have failed to distinguish themselves from the civilian population while fighting.¹⁸ The flipside to this "privilege" is that combatants may be directly targeted and killed with impunity by opposing enemy combatants.

Examples abound of PMC employees directly participating in hostilities, and lobbying by the companies indicates that some seek a more robust role in combat operations generally;¹⁹ consequently, it is imperative to determine whether they are combatants under international humanitarian law such that they may benefit from "combatants' privilege".

Members of the armed forces of a (state) Party to a conflict are combatants.²⁰ As one author notes, this "confirms that lawful combatants act in a public capacity."²¹ International humanitarian law does not set out the steps that states must take in order to incorporate individuals into their armed forces; that is a matter of internal

law.²² However, it does set out certain minimum requirements for those forces: they must be organized under a command responsible to a Party to the conflict and subject to an internal disciplinary system.²³ Incorporation of a PMC employee into the armed forces of a Party to a conflict therefore depends on the will and internal legal regime of the state in question. It would be entirely possible for states to incorporate PMCs into their armed forces if they choose to do so; if they did, PMC employees would have combatant status. However, the will of an individual to be a member of a state's armed forces, without more, is not sufficient for that individual to be a part of the armed forces.²⁴ The fact that some official form of incorporation is necessary is evidenced by the fact that a specific provision in the article of Additional Protocol I defining combatants stipulates that states that incorporate their own police forces or other paramilitary forces into their armed forces must inform the opposing side.²⁵ This also suggests that international humanitarian law anticipates that even though it is a matter of domestic law as to how members of armed forces are recruited and registered within a state, it should be understandable to opposing forces precisely who constitutes those forces.

The example from Iraq has shown that States hiring PMCs rather tend to emphasize that those individuals are civilians. The US Department of Defense Instruction on "Contractor Personnel Authorized to Accompany the U.S. Armed Forces" of 2005 defines the status of contractors as "civilians accompanying the force", confirming an earlier Joint Chiefs of Staff publication on the issue.²⁶ In

¹⁶ Article 48 Protocol I.

¹⁷ See Article 43(2) Protocol I.

¹⁸ In fact, Article 4A of Geneva Convention III defines who has a right to be a prisoner of war, not who has a right to be a combatant, although it is understood that they are one and the same.

¹⁹ War on Want, *Corporate Mercenaries: The threat of private military and security companies*, October 2006.

²⁰ See Article 4A(1) of Geneva Convention III on Prisoners of War and Article 43(1) of Protocol I.

²¹ Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, HPCR Occasional Paper Series, 2005, p. 25.

²² The ICRC Commentary to Article 50 Protocol I states that "armed forces...constitutes a category of persons which is now clearly defined in international law and determined in an indisputable manner by the laws and regulations of States". See Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva/Dordrecht: ICRC and Martinus Nijhoff, 1987) at p. 611, para. 1914 [hereafter: ICRC Commentary]. See also Knut Ipsen "Combatants and Non-Combatants" in Dieter Fleck, *Handbook of Humanitarian Law in Armed Conflicts* (Oxford, Oxford University Press, 1995) at p. 67.

²³ Article 43(1) Protocol I; it is difficult to say to what extent Article 43 alters the existing regime of Article 4A of Geneva Convention III. Nevertheless, combatants must also distinguish themselves from civilians in order to have the right to status as a prisoner of war, although IHL does not specifically prescribe uniforms. See Toni Pfanner, "Military uniforms and the law of war" 86 *International Review of the Red Cross* 93 (2004).

²⁴ Marco Sassòli, "Combatants" in *Encyclopedia of Public International Law* (forthcoming).

²⁵ Article 43(3) Protocol I. One author does not believe this to be a constitutive requirement.

²⁶ US Department of Defense Instruction 3020.41, 3 October 2005, para. 6.1.1, "International Law and Contractor Legal Status", and Joint Chiefs of Staff, Joint Publication 4.0, Doctrine for Logistic Support of Joint Operations, Chapter V, 12a (6 April 2000). It should be noted, however, that the latter document goes on to say that civilians accompanying the force "are neither

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

Page 4

addition to this official position, the regulations passed by the Coalition Provisional Authority in Iraq obliged PMCs to comply with human rights law, which would be sorely inadequate if the US, as an occupying power, knew or believed that they were part of its armed forces.²⁷ There are also reports of PMC employees killed in action who received a military burial and were later stripped of those honours on the grounds that they were not members of the US armed forces. Furthermore, writing by US military officers on the subject treats PMC employees as civilians, not combatants.²⁸ Finally, it is consistent with doctrine that a mere commercial contract is not sufficient to incorporate a person and therefore a PMC into the armed forces of a Party.²⁹ Thus, the PMCs contracted by the US armed forces in Iraq are not members of its armed forces. A similar exercise would necessarily have to be conducted for each state's contractors, but it is generally reasonable to presume that PMCs are not incorporated into a state's armed forces.

A person may also have combatant status if he or she belongs to a militia or volunteer force that (1) belongs to

combatants or noncombatants", a conclusion which is untenable under IHL and which does not reappear in the later document. The POW status of such civilians is consonant with Article 4A(4) of Geneva Convention III.

²⁷ Order 17 passed by the Coalition Provisional Authority in Iraq, CPA/ORD/27 June 2004/17 (Revised), available online: <http://www.cpa-iraq.org>. It is worthy of note that Article 51 of Geneva Convention IV prohibits an occupying power from forcibly recruiting protected persons into its armed forces, and even prohibits "pressure or propaganda which aims at securing voluntary enlistment". One could query whether the US or UK would be in breach of that provision considering the thousands of Iraqis that have been hired by private military companies in a climate of disastrous unemployment to perform tasks such as guarding oil pipelines if one were to consider that private military companies were incorporated into the armed forces of the then occupying powers.

Note: One must be careful not to confuse the rules on attribution for the purpose of holding a State responsible for the acts of private contractors it hires with the rules on government agents that legally have combatant status. Even though it may be possible to attribute the acts of an employee of a private military company to a State, that relationship to a State, although perhaps sufficient for purposes of State responsibility, is not sufficient to make an individual part of a State's armed forces. See the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, UN GAOR 55th Sess. Supp. No. 10, A/56/10 (2001), especially Draft Articles 5 and 8.

²⁸ See Major Michael Guillory, "Civilianizing the Force: Is the United States Crossing the Rubicon?" 51 *Air Force Law Review* 111 (2001), Lieutenant Colonel Mark David Maxwell, US Army, "The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?" *Military Review* 17 – 25 (2004), Major Lisa Turner, USAF, *Civilians at the Tip of the Spear: Civilian Issues Commanders Encounter During Deployments*, Maxwell Airforce Base, Alabama, 2001. See also Heaton, *supra* note 9.

²⁹ Ipsen, *supra* note 22 at p. 69.

a party to a conflict and (2) fulfils specific criteria.³⁰ In addition to the requirement of "belonging to a Party to the conflict", the four conditions that must be collectively fulfilled by the group (in order for its individual members to benefit from combatant and POW status) are:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.³¹

The determination as to whether each PMC (firm, not individual) meets these five requirements would have to be made on a case-by-case basis – not an inconsequential issue considering that there are scores of PMCs operating in Iraq presently.³¹ While anecdotes abound regarding the paramilitary nature of PMCs and photographs occasionally depict individuals in distinctly military-like uniforms, experts conclude that "civilian contractors" of the sort currently in Iraq would only rarely fulfil all of the latter four requirements. In particular, many lack uniforms and are not subject to a responsible command.³²

With regard to the criteria of "belonging to a Party to a conflict", one may be tempted to imagine that all those hired by the United States or the United Kingdom (or Iraq, for that matter) meet this requirement by virtue of the contract between the government and the company, but the fact that the official position of those states is that

³⁰ Article 4A(2) of Geneva Convention III.

³¹ Reports from the UK indicate as many as 181 British PMCs are currently in Iraq. A number of Senators in the United States have requested the Comptroller General of the United States to investigate the use of Private Military Firms in Iraq by the DoD and the CPA: Letter to Comptroller Walker from Senators C. Dodd, R. Feingold, J. Reed, P. Leahy and J. Corzine of 29 April 2004 (available online:

<http://dodd.senate.gov/index.php?q=node/3270&pr=press/Releases/04/0429.htm>, last visited 1 October 2006). In addition, Ike Skelton, a Ranking Democrat in the Committee on Armed Services of the US House of Representatives has written to Donald Rumsfeld, Secretary of Defense, to request "a breakdown of information regarding private military and security personnel in Iraq. Specifically...which firms are operating in Iraq, how many personnel each firm has there, which specific functions they are performing, how much they are being paid...what the chain of command is for these personnel, what rules of engagement govern them, and how disciplinary or criminal accusations are handled if any such claims are levied against them." See also Letter from the Honorable Ike Skelton to Secretary of Defense Donald Rumsfeld, 2 April 2004. As yet, there seems to be no clear figure.

³² Michael Schmitt, "War, International Law, and sovereignty: re-evaluating the rules of the game in a new century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees" 5 *Chicago Journal International Law* 511 (2005) at pp. 527ff. See also Kenneth Watkin, *supra* note 21 at p. 67.

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

Page 5

they are civilians makes this an untenable argument. Moreover, when one considers the complex chains of subcontracts with reconstruction companies and aid agencies hiring their own PMCs to protect their worksites and aid convoys, the relationship becomes much less clear.³³

A consideration of the purpose of recognizing this class of combatants in law further indicates that it is inappropriate to rely on that provision to define PMC employees as combatants. The historical purpose of the provision was to allow for the partisans in the Second World War to have prisoner-of-war status.³⁴ The partisans of WWII are much more easily assimilated to the remnants of defeated armed forces or groups seeking to liberate an occupied territory than to PMCs. Indeed, the “resistance” role of these militias was a factor in granting them prisoner-of-war status.³⁵ Granting combatant status to security guards hired by an occupying power appears to subvert the aims of the drafters of the Convention when recognizing this category of combatants, which was to make room for resistance movements and provide them with incentive to comply with international humanitarian law. The very definition of mercenaries thirty years later that seeks to remove combatant status from precisely such private forces (see below) provides further support that the original purpose of this provision remained paramount through the 1970s. Of course, there is no obligation to restrict the interpretation of this provision to its historical purpose, but advertence to that historical purpose provides some indication of the inadequacy and inappropriateness of using that provision in the context of modern private military companies.

Status determination is not always straightforward, even for some regular armed forces; however, the proliferation of a significant number of PMCs with an ambiguous status exacerbates the problem. In particular, the plethora of companies means that it will be extremely difficult for an enemy to comply with IHL in terms of knowing who may be directly targeted, considering that likely only very few PMCs will have combatant status but they may closely resemble the many other PMCs operating in the conflict zone. It would be a crime for an enemy to target civilian PMC employees directly, but the inability to distinguish the civilian PMCs from combatant PMCs may discourage any attempt to comply with IHL and contribute to an erosion of the principle of distinction.

³³ See also Michael Schmitt on belonging to a party to the conflict, *ibid.* at p. 525.

³⁴ Jean Pictet, *The Geneva Conventions of 1949: Commentary, III Geneva Convention* (Geneva: ICRC, 1952) at pp. 52 ff.

³⁵ *Ibid.* pp. 53 – 59. When one considers the loosening of requirements in Article 43 to enable certain guerrilla fighters to have combatant status, it is evident that the incentive to do so remains essentially the same – to enable those engaging in anti-colonial wars – that is, fight against a more powerful oppressor, to be protected as combatants under humanitarian law if they respected the threshold requirements.

In summary, it is very unlikely that many PMC employees would have combatant status under IHL. Some authors, envisioning a bevy of beneficial uses of PMCs (such as in peace operations where States hesitate to send their own troops) seem to presume that it would not be a big step for States to incorporate PMCs into their armed forces and thereby ensure their combatant status.³⁶ However, reality belies this presumption – one of the reasons States have recourse to PMCs in certain contexts is precisely to get around national laws that would prevent them from sending their own armed forces: the use of PMCs by the US in Colombia to battle the FARC due to a law prohibiting official US intervention is a frequently cited example.³⁷ It is thus essential to take privatization as a serious signal that States would be at the very least quite reluctant to incorporate PMCs into their armed forces. Consequently, it is imperative to determine the status of PMC employees under IHL if they are not combatants. A straightforward application of IHL leads to the conclusion that if they are not combatants, they are civilians.

Civilian status

Under IHL, one must be either a combatant or a civilian. This is confirmed by Article 50 of Additional Protocol I, which defines a civilian as “any person who does not belong to one of the categories of persons” defining combatants. Furthermore, the Commentary to the Geneva Conventions of 1949 states:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.³⁸

Therefore, if PMC employees are not combatants, they must be civilians.³⁹ Within the broad category of civilians, there is a narrower category of “protected persons”

³⁶ James K. Wither, “European Security and Private Military Companies: The Prospects for Privatized ‘Battlegroups’”, *The Quarterly Journal* 107–126 (Summer 2005), especially at p. 122.

³⁷ Peter Singer, *Corporate Warriors*, *supra* note 3 at pp. 206 – 207.

³⁸ Jean Pictet, *The Geneva Conventions of 1949: Commentary, IV Geneva Convention* (Geneva: ICRC, 1952) at p. 51.

³⁹ Article 50 Protocol I defines civilians as “any person who does not belong to one of the categories of persons referred to in Article 4A(1); (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol”, all of which provisions define who are combatants (or prisoners of war).

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

Page 6

(based largely on nationality) who benefit from more detailed rules regarding their treatment in the hands of the enemy. Nevertheless, all civilians, including those who are not “protected persons”, are protected against attack as long as they do not actively or directly participate in hostilities.⁴⁰

It is important to note here that in some circumstances, some members of PMCs providing services to the armed forces of a party to a conflict would have Prisoner-of-War status if they fell into enemy hands, even though they are civilians. This treatment is prescribed for “persons who accompany the armed forces without actually being members thereof, such as ... supply contractors, members of labour units or of services responsible for the welfare of the armed forces”.⁴¹ In order for such persons to have POW status, however, they must have authorization from the armed forces which they accompany (and usually an identity card indicating that authorization) and they must refrain from directly participating in hostilities.

There may be some situations in which this either-or qualification seems unsatisfactory, as perhaps is the case with heavily armed and uniformed PMC groups. Indeed, in law, hard cases often push at the boundaries of existing legal definitions and lead to strange results. Nevertheless, under the current state of the law, anomalies do not call into question the overall framework for classifying persons under IHL.

Mercenaries

Private military companies are often referred to as “mercenaries”, so a brief explanation of mercenaries under IHL and other international treaties is in order. In common parlance, a mercenary is a person who “serves merely for wages” and/or a soldier who is hired into a foreign service.⁴² The concept of “soldiers of fortune” may be unpalatable politically, such that the term “mercenary” used in reference to PMCs may influence the debate on whether to regulate or prohibit these actors. However, the term “mercenary” also has a legal meaning: “mercenaries” are defined in Additional Protocol I of 1977 and also in two different international treaties that criminalize mercenarism.

The definition of a mercenary under IHL is: “any person who:

- a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- b) Does, in fact, take a direct part in the hostilities:

- c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- e) Is not a member of the armed forces of a Party to the conflict; and
- f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.”⁴³

These six criteria must be fulfilled *cumulatively* in order for a person to meet the legal definition of being a mercenary. For this reason, commentators argue that this definition is “unworkable”⁴⁴ and that anyone who manages to get caught by it “should be shot and their lawyer beside them”.⁴⁵ The consequence of being held to be a mercenary is established in the first paragraph of Article 47: “A mercenary shall not have the right to be a combatant or a prisoner of war.” However, Protocol I specifies that even if someone has been unlawfully participating in hostilities and does not have the right to prisoner-of-war status, that person nonetheless benefits from the protection of Article 75 of the Protocol (fundamental guarantees).⁴⁶

The two treaties seeking to criminalize mercenaries essentially re-iterate the definition quoted above.⁴⁷ Those

⁴³ Article 47(2) of Protocol I.

⁴⁴ See in particular Françoise Hampson, “Mercenaries: Diagnosis before Prescription” 3 *Netherlands Yearbook of International Law* (1991) at pp. 14 – 16. See also George Aldrich, “Guerrilla Combatants and Prisoner-of-War Status”, 31 *American University International Law Review* 871 (1982), at p. 881 for a concise but accurate overview of the technicalities of Article 47.

⁴⁵ Private correspondence from a person within the PMC industry to Peter Singer, cited in *Corporate Warriors*, *supra* note 3, p. 238.

⁴⁶ The extension of this protection to those who do not enjoy combatant status is specified in Article 45 Protocol I. Under international humanitarian law, it is the detaining power that would make the determination whether a person is a mercenary by establishing a “competent tribunal” when prisoner-of-war status is called into question. Article 5(2) Geneva Convention III obliges a detaining power to constitute “a competent tribunal” to determine the status of an individual who claims POW status in case of any doubt. Article 45 of Protocol I imposes the same requirement.

⁴⁷ *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, 4 December 1989, UNGA Res A/RES/44/34, entered into force 20 October 2001 [hereafter, the UN Convention]; *Convention for the Elimination of Mercenarism in Africa*, Organisation of African Unity, Libreville, 3 July 1977, CM/817 (XXXIX), Annex II, Rev. 3 (entered into force 22 April 1985) [hereafter, the AU Convention]. The AU Convention definition repeats Article 47 of Protocol I verbatim; the UN

⁴⁰ See Article 13 of Geneva Convention IV, Article 50 Protocol I.

⁴¹ Article 4A(4) of Geneva Convention III.

⁴² The *Shorter Oxford English Dictionary* (5th edn, Oxford: Oxford University Press, 2002) defines a mercenary as “A professional soldier serving a foreign power”. The American connotations of the word include an absence of ethics.

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

Page 7

conventions (which have not been ratified by many States⁴⁸) then establish the elements of related crimes: individuals who meet the definition of being a mercenary and who directly participate in hostilities commit an offence,⁴⁹ and even those who attempt direct participation also commit an offence under the UN Convention. In addition, Article 2 of the UN Convention stipulates that "[a]ny person who recruits, uses, finances or trains mercenaries ... commits an offence for the purposes of the Convention," thus adding a number of ways to participate in the crime without actually being present and fighting in a theatre of hostilities.⁵⁰

Using examples from private military companies operating in Iraq in 2003 and early 2004 (*i.e.* while the conflict could still unquestionably be classified as international), one can conclude that some individuals working for these companies may get caught by Article 47 of Protocol I and by the mercenary conventions. For example, a South African employee of a PMC guarding L. Paul Bremer, earning 1500 USD per day and firing at resistance fighters who attack Bremer could conceivably meet all of the criteria of the definition. It is up to the party that detains him to make this determination.⁵¹ However, the thousands of Iraqi, US and UK nationals who work for PMCs in Iraq would escape the definition of being a mercenary due to paragraph d) of the definition cited above (being a national of a party to the conflict).

Under IHL, it is not a crime or a violation of the Geneva Conventions *per se* to be a mercenary. There is no distinct IHL crime of "mercenarism".⁵² Under the mercenary conventions or a state's domestic law, mercenarism may be a separate crime attracting prosecution, but it is not a crime under IHL itself. However, if detained, mer-

Convention leaves out Article 47(2)(b) but then adds it as an element of the offence.

⁴⁸ The UN Convention has been ratified by only 28 States and entered into force in 2001. Ratifications as of 7 September 2006. The African Union Convention entered into force in 1985. None of the States that have significant numbers of private military companies operating from or on their territory are State parties. The lists of States that have ratified the UN Convention and the AU Convention are available at www.icrc.org

⁴⁹ Article 3 of the UN Convention and Article 1(3) of the AU Convention.

⁵⁰ Each Convention has an additional definition of "mercenary" specifically aimed at situations where the goal is to overthrow a government, and, in the case of the African Union Convention, there are special provisions relating to the involvement of State representatives in such cases. Article 5 of the AU Convention.

⁵¹ Article 5 Geneva Convention III provides that if a person's status is in doubt, that person must be treated as a prisoner of war until his "status has been determined by a competent tribunal". For a fuller discussion of PMCs with regard to mercenarism under international law, see Lindsey Cameron, "Private military companies: Their status under international humanitarian law and its impact on their regulation" 88 *International Review of the Red Cross* 1 – 26 (2006).

⁵² *Rome Statute of the International Criminal Court*, 2187 U.N.T.S. 90, entered into force 1 July 2002.

cenaries have no right to prisoner-of-war status, which puts them in essentially the same position as civilians who directly participate in hostilities.

The narrowness of the definition clearly makes the concept of mercenarism an inadequate tool for the regulation of PMCs. That being said, it is imperative to bear in mind that whether or not PMCs meet the legal definition of mercenaries by no means disposes of the issue of whether their participation in combat situations in armed conflicts is lawful. Many commentators make the mistake of apparently believing that as long as it can be demonstrated that PMCs do not meet the definition of "mercenaries" under the mercenary conventions or IHL, states may simply proceed with regulatory schemes,⁵³ but the fact that PMC employees do not have combatant status (because they are not members of the armed forces or members of armed groups belonging to a party to a conflict) means that they may not participate directly in hostilities, even if they are not mercenaries. As will be shown, the consequences for directly participating in hostilities are virtually identical if one is a mercenary or a civilian. Since the vast majority of PMC employees are civilians (and not mercenaries or combatants), it is essential to explore the repercussions of PMCs having civilian status under IHL.

III. Consequences of Civilian Status of PMCS under IHL: a Challenge for Regulation

There is no problem under IHL with PMC employees having civilian status as long as they do not directly participate in hostilities. But if PMC employees, as civilians, directly participate in hostilities, they lose the protection from attacks normally accorded to civilians during the time that they participate. Enemy combatants may legally target and kill them during their participation in the same way that they may target and kill other combatants. Moreover, they may also be prosecuted and punished for the mere fact of having participated in hostilities.⁵⁴ If they kill enemy combatants, the black letter law of IHL even allows them to be sentenced to death following a trial.⁵⁵ One could argue that such a vulnerable position is the price PMC employees must pay for their apparently high salaries and choice to participate in conflict situations in

⁵³ See, for example, Carney, *supra* note 8, Juan Carlos Zarate, "The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder" 34 *Stanford Journal of International Law* 75 (1998), James Colman, "Constraining Modern Mercenarism" 55 *Hastings Law Journal* 1493 (2004).

⁵⁴ Article 51(3) Protocol I indicates this loss of protection. Marco Sassoli argues that it is implicit in IHL that it is prohibited, but not a war crime.

⁵⁵ Article 68 of Geneva Convention IV allows the death penalty to be pronounced under specific circumstances against protected persons if those persons are guilty of "serious acts of sabotage against the military installations of the Occupying Power".

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

Page 8

this way. But that is admittedly not a very humanitarian view, and it does not address the problems associated with increased participation in hostilities by civilians.

Therefore, one may seek to regulate these companies in order to limit their potential to negatively affect the principle of distinction and to reduce the risks to the employees themselves. However, several aspects of IHL make this endeavour particularly difficult. This section will illustrate the three main quirks of IHL affecting regulation of PMCs aimed at reducing their participation in hostilities. First, IHL does not distinguish between “defensive” and “offensive” attacks for the purpose of determining whether a person is directly participating in hostilities, such that regulations that constrain PMCs to “defensive” roles or operations will not get around this problem. Second, the nature of what constitutes a military objective is not static under IHL, making it impossible to resolve this problem merely by prohibiting PMC employees from being employed as guards of “military objectives”. Finally, there is not yet a clear, established definition of precisely which acts constitute “direct participation in hostilities”, thus making it difficult to propose a simple list of things that PMCs cannot do in order to prevent their participation.⁵⁶ Each will now be explained in more detail, with suggestions on how these issues may be addressed by regulations.

Direct participation in hostilities

First, the fact that IHL does not distinguish between attacks made in offense and defense is clearly stated in Additional Protocol I. Article 49(1) provides, “[a]ttacks’ means acts of violence against the adversary, whether in offence or in defence.” This means that former US Secretary of Defense Donald Rumsfeld’s protestation that PMCs are used only in defensive roles, while perhaps important to make PMCs more palatable politically, is totally irrelevant for IHL in terms of the legality of actions of PMC employees.⁵⁷ The problems posed by the lack of distinction between offensive and defensive attacks are best illustrated by the use of private military companies as security guards. Private security guards are commonly seen outside of armed conflicts patrolling shopping malls, public buildings, and banks. However, the use of such

private security guards cannot be easily transposed to a situation of international armed conflict without creating the possibility that they will be led to participate directly in hostilities. A private security guard who fires back in defense, if the attacking party is a party to the conflict, is directly participating in hostilities, even if he otherwise had no intention of carrying out an offensive military action against that party.

This is not to say, however, that a Party to a conflict could not hire a PMC to guard against *criminal* activity: if the attack on the security guard is carried out by common criminals for general criminal reasons, then the private military company employee need not fear that engaging with those criminals raises the spectre of direct participation in hostilities.⁵⁸ This is because criminals are generally not parties to a conflict and because their actions lack a *nexus* with the armed conflict. It should be noted, however, that this distinction may be extremely difficult to grasp since occupying powers and states may enact laws outlawing and criminalizing resistance fighters. If a PMC employee engages with individuals from an outlawed resistance group, the fact that they are also criminals under the occupying power’s laws does not mean that the PMC employee fighting against them is participating in a police operation rather than directly participating in hostilities. Consider also the example of the 17,000 Iraqi individuals hired by a PMC in Iraq to guard oil pipelines: how do they know whether attacks on the pipeline they are guarding are the work of criminals simply trying to loot petrol, or enemy forces attempting to diminish the other side’s access to oil (and therefore a military operation)? When the PMC employees fire back in defence, does that make it lawful for the other group to target them individually? It is both the nature of the operation combined with the status of the individual (or capacity in which he fights) that is determinative. PMC employees must therefore be highly trained to distinguish between police operations and military operations, especially if they want to avoid directly participating in hostilities. Moreover, PMCs should not be used to guard objects or places that are military objectives or that are likely to become military objectives, a recommendation which leads to a discussion of the second “quirk” of IHL.

Things can become military objectives according to their *nature, location, purpose* or *use*.⁵⁹ There is no set list of military objectives.⁶⁰ Almost anything can become a military objective. If an object being guarded by a PMC

⁵⁶ For a brief but excellent overview of the legal concept of direct participation in hostilities, see Jean-François Quéguiner, “Direct Participation in Hostilities under International Humanitarian Law”, Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, November 2003, online: www.ihlresearch.org/portal/ihli/alabama.php

⁵⁷ Former US Defence Secretary Donald Rumsfeld argued that the PMCs that were operating in Iraq were only there to defend, not to attack, apparently unaware that this is a distinction without a difference as far as IHL is concerned. See the Reply of Secretary of Defense Rumsfeld to the Honorable Ike Skelton of 4 May 2004, available online: http://www.house.gov/skelton/5-4-04_Rumsfeld_letter_on_contractors.pdf (last accessed 1 October 2006).

⁵⁸ The fact that security operations by these actors often goes beyond mere police operations is illustrated by numerous news reports as well as the fact that many are known to arm themselves with grenades and other non-police-type arms.

⁵⁹ Article 52 Protocol I.

⁶⁰ See M. Sassòli and L. Cameron, “The Protection of Civilian Objects – Current State of the Law and Issues *de lege ferenda*”, in N. Ronzitti and G. Venturini (eds.), *The Law of Air Warfare – Contemporary Issues*, (Netherlands: eleven International Publishing, 2006) pp. 35 – 74 at pp. 39 – 41.

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

Page 9

employee suddenly becomes a military objective by its use (for example, a building normally used for civilian purposes is, unbeknownst to him, temporarily filled with combatants) and he continues to guard it, he may be a civilian who is unlawfully participating in hostilities. This would mean that the enemy could lawfully target the PMC employee directly, in addition to the building itself. But what happens when the object ceases to be used as a military object and he continues to guard it? Does he cease to participate in hostilities? How can such a change in status reasonably be expected to be understood and taken into account by opposing forces? Specifying in any regulatory scheme that PMCs may not be used to guard any objective that is military in nature would help to diminish this problem but it cannot eliminate it altogether. PMCs should also not be used as security guards in highly unstable zones where hostilities may occur, which may defeat the purpose of hiring them altogether in many instances.

Finally, the whole concept of what constitutes direct participation in hostilities, aside from actually fighting against opposing forces and guarding military objectives, remains undefined, thus making it hard to list in an exhaustive way the activities that must be banned for PMCs. The ICRC Commentary characterizes direct participation in hostilities as “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”⁶¹ However, the Commentary continues, “[t]here should be a clear distinction between direct participation in hostilities and participation in the war effort.”⁶² Participation in the war effort is perhaps best exemplified by munitions factory workers; while these individuals certainly help the war, their activities are not legally considered to constitute direct participation *in hostilities*.

Many activities carried out by PMCs, such as support and logistics activities, *i.e.* catering and construction and maintenance of bases, are *not* direct participation in hostilities. As noted above, Article 4A(4) of Convention III foresees that civilians will perform tasks such as supplying the armed forces with food and shelter but that those persons retain their civilian status. This indicates that PMC employees may not be perceived as directly participating in hostilities merely for performing such support services. However, it is imperative that their roles be restricted to those duties, which may be problematic. At times, logistics personnel (when they are members of the armed forces) are called in to support troops if those troops need extra help in a tight battle.⁶³ If the kitchen

staff is left to guard the military base due to short staffing, and the kitchen staff are employees of a private military company, they are put in the awkward position of guarding and fighting for a legitimate military objective, which likely means that they are directly participating in hostilities. In the discourse on PMCs, the problem of a lack of back-up armed forces (logistics staff) is perceived as merely a strategic issue. However, increased reliance on civilian contractors in these roles has important implications under IHL if they are indeed called upon to act in a way that could be construed as direct participation in hostilities.

Moreover, many of the new activities handled by PMCs may constitute direct participation in hostilities. These activities may be less obvious and more difficult to identify because a PMC employee does not need to be on a battlefield firing a gun to be directly participating in hostilities; rather, a person may be sitting at a computer far away programming a weapon to strike certain targets. It would be lawful for enemy forces to target that individual directly even an ocean away, just as it would be lawful for them to target a person in front of them pulling a trigger. Changes in technology have led to an increased potential for participation in hostilities by civilians. Complex weapons may be furnished with a civilian to maintain and operate them, and other forms of attack may demand sophisticated technical knowledge and input supplied by the private sector.⁶⁴ PMCs may also provide these services and their employees would therefore be directly participating in hostilities.

It is important to observe that it is not only what one might label “humanitarian do-gooders” who seek to lessen direct participation in hostilities by civilians. In fact, the legal battle raging in the United States at the present time over the status and treatment of the “unlawful combatants” held in Guantánamo Bay arises precisely out of US consternation regarding persons without combatant status fighting against US forces. In the context of the “war on terror”, US authorities insist that those who engage in hostilities against US armed forces who do not have combatant status are “unlawful combatants”; some furthermore argue that such individuals should benefit from a severely limited scope of rights as compared with prisoners of war or protected civilians when they fall into US hands.⁶⁵ Since the debate on private military companies raises the central issue of who is a combatant (and therefore who is a civilian) under international humanitarian law, as well as the consequences for direct participation in hostilities, this debate should be viewed as an

⁶¹ ICRC Commentary, *supra* note 22, to Article 51(3) Protocol I at para. 1944.

⁶² *Ibid.*

⁶³ Peter Singer notes that this occurred during WWII at the Battle of the Bulge, but it also occurred as recently as the mission in Somalia in the early 1990s. See Singer, *Corporate Warriors*, *supra* note 3.

⁶⁴ See Heaton, *supra* note 9 for a full discussion of changes in technology leading to increased direct participation by civilians in combat activities.

⁶⁵ See Knut Dörmann, “The Legal Situation of ‘Unlawful/Unprivileged Combatants’”, 85 *International Review of the Red Cross* (2003), pp. 45 – 75 for a comprehensive overview of this issue.

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

Page 10

integral part of the debate on “unlawful combatants”. The principle of equality of belligerents and the need for incentive to comply with IHL demands consistency when interpreting the law vis-à-vis insurgents in Iraq, Al Qaeda fighters in Afghanistan, and PMC employees.

There are clearly myriad ways in which civilian employees of PMCs can find themselves directly participating in hostilities, even without their intention or desire to do so. There are at least three crucial reasons why we should be concerned about this distinct possibility for increased direct participation in hostilities by civilians. First, it may lead to an erosion of the principle of distinction, thus lessening the protective power of that principle for peaceful civilians.⁶⁶ The impact of this cannot be stated strongly enough: the principle of distinction “is the foundation on which the codification of the laws and customs of war rests.”⁶⁷ Second, PMCs may lack a disciplinary structure normally inherent to combatant groups, which allows for and in fact demands the sanctioning of violations of IHL by commanding officers, thereby putting peaceful civilians at greater risk from the effects of hostilities. Commanding officers normally have immense power to punish their soldiers immediately to stop violations of IHL from occurring, but it is unthinkable (and highly undesirable) that a PMC would allow one of its employees to shoot and kill another employee for disobeying orders. Nevertheless, the lack of an effective disciplinary mechanism puts civilians at risk. Finally, direct participation in hostilities places the PMC employees themselves in an extremely vulnerable position; aside from the fact that they may be directly targeted, they may be tried and executed if they kill an enemy combatant, a result which may be shocking to them. Thus, at the very least, they should be informed of their precarious position. On a final note, some US military officers argue in the context of PMCs that “a state using civilians in violation of the law of war will be in breach of its responsibilities under that law.”⁶⁸ Although there is no explicit prohibition in IHL treaties for civilians to participate directly in hostilities, one may argue that such participation violates the spirit of the law and thus entails state responsibility.

Regulation

If regulation of PMCs is to be effective, it must take into account the full complexity of IHL. It can be expected that armed forces hiring PMCs will have carefully defined rules on when they may directly participate in hostilities or be engaged in activities likely to lead to such par-

ticipation.⁶⁹ However, a PMC employee hired by a reconstruction company to guard a construction site or hired by an NGO to guard a food convoy may also end up unlawfully participating in hostilities. Given the constraints illustrated above, what kind of regulation is feasible? Both the form and content of potential regulation need to be considered. These regulations should complement and facilitate the implementation of existing IHL rather than devising new law.

In terms of form, several possibilities exist. A number of companies within the industry itself have proposed their own code of conduct, seeking to demonstrate a will to self-regulate.⁷⁰ This gesture is laudable, but people handling weapons in situations of armed conflict clearly need to be bound by more than a voluntary code of conduct. Some have sought to regulate PMCs by changing the definition of what is a mercenary.⁷¹ Others advocate for the adoption of an international convention, taking the approach that the transfer of military services can be regulated much in the same way as the transfer of military goods.⁷² However, drafting, negotiating and adopting a new international convention on PMCs is not a very practical means of proceeding. It tends to take a long time to get states to agree to the terms of and become parties to international conventions – too long, in this case, to be an effective means of dealing with the immediate proliferation of the companies. Another approach is to advocate that states adopt national laws regulating the companies, including licensing and oversight mechanisms.⁷³ Indeed, this appears to be the

⁶⁹ Indeed, the US has elaborate instructions. See DoD Instructions, *supra* notes 26 and 13.

⁷⁰ See the website of the umbrella organization, International Peace Operations Association: www.ipoaonline.org and in particular, their Code of Conduct of 31 March 2005.

⁷¹ See, for example, Ellen Frye, “Private Military Firms in the New World Order: How redefining “mercenary” can tame the “dogs of war”” 73 *Fordham Law Review* (2005). She proposes to re-define mercenaries so that PMC operatives fall within the definition of a mercenary and are criminalized under the UN Mercenary Convention. Her definition would catch only those PMC employees who are not citizens or subjects of the territory/country in which they are acting. However, we know that many security companies in Iraq have hired local Iraqis to act as security guards. This poses very different problems for the schema of IHL civilians/combatants, but nonetheless remains outside the framework. Moreover, it is beyond highly unlikely that the Additional Protocols will be amended to make such a change given resistance on the part of all parties to open it up for revision.

⁷² See Todd Milliard, “Overcoming Post-Colonial Myopia: A call to recognize and regulate private military companies” 176 *Military Law Review* 1 (2003), Appendix A: Proposed Draft Convention: International Convention to Prevent the Unlawful Transfer of Military Services to Foreign Armed Forces.

⁷³ See e.g. Caroline Holmqvist, *Private Security Companies: The Case for Regulation*, SIPRI Policy Paper No. 9, January 2005, Fred Schreier and Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, DCAF, Geneva, 2005. Available online: www.dcaf.ch.

⁶⁶ US military officers are also concerned about an erosion of the principle of distinction vis-à-vis their own civilian contractors accompanying the forces, aside from peaceful civilians. See Maxwell, *supra* note 28, Heaton, *supra* note 9, Guillory, *supra* note 28.

⁶⁷ ICRC Commentary, *supra* note 22, p. 558.

⁶⁸ Heaton, *supra* note 9 at beginning; see also Maxwell, *supra* note 28.

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

Page 11

approach of the government of the United Kingdom and the Swiss government in cooperation with the International Committee of the Red Cross.⁷⁴ States should indeed be encouraged to regulate companies registered and/or headquartered in their jurisdiction, hired by them, or hired by other corporations registered in their jurisdiction.⁷⁵ However, it is imperative that as many states as possible adopt such regulations to avoid migration of the companies to countries without regulations, and ideally there will be a high degree of harmony between states in terms of the content of their regulations to avoid facilitating PMCs' gravitation to the state with the loosest regulations.

With regard to the content of such national regulations, serious and careful work needs to be done to unpack the obligations in IHL and elucidate their application to and by PMCs. Nonetheless, in broad terms, the following recommendations can be made: Companies should have to go through very strict licensing procedures.⁷⁶ States must ensure that these companies and their employees are trained in international humanitarian law, even if the state has to offer to provide such training.⁷⁷ If a private military company is deployed in a region where a state's armed forces are already active, the licensing regime could provide for an extension of that state's normal military jurisdiction so that violations of humanitarian law and human rights law can be dealt with effectively *sur place*. However, in the case of a private military company being deployed where none of the home state's armed forces are present, there is no easy solution for maintaining discipline and enforcing humanitarian law.⁷⁸ A licensing scheme could require that a state contracting and importing services from a private military company be prohibited from granting immunity for criminal violations of law. It should also create a mechanism to facilitate the hearing of claims and provision of remedies for violations of human rights and humanitarian law by populations residing in places where licensed PMCs are active. However, one can surmise that a state having recourse

to large numbers of private military companies will not likely be in a position to enforce the law on a large scale.

The proposed convention of one author admits for the possibility that some contractors may take a direct part in hostilities, but, despite the fact that the proposing author is a military lawyer, his only solution is that "Engaging in direct combatant activities shall subject the licensed military service provider to the highest scrutiny by the Authorizing State and the United Nations High Commissioner for Human Rights, including, but not limited to, enhanced reporting requirements and deployment of monitoring teams from the Authorizing State, United Nations, or International Committee of the Red Cross."⁷⁹ It is unclear why the author of this proposal would advocate the High Commissioner for Human Rights as ideal for scrutinizing direct combat, except perhaps for want of a better candidate. Nonetheless, designation of a monitoring body or other monitoring mechanisms is an important element. Not all violations of IHL are crimes or war crimes, but a consistent practice of abiding by all of its rules is integral to preventing more serious violations by impeding the development of a culture of impunity. In addition, the companies themselves should be obliged to disclose to employees their potentially vulnerable position if, in the course of their work, they do participate directly in hostilities. Ideally, any State wishing to employ a PMC whose employees are likely to engage in combat would integrate those individuals into its armed forces through its normal recruitment procedures. To avoid that democratic control over armed forces is weakened, regulations should require oversight by elected representatives, and the requirement that legislators receive notification of and approve contracts with PMCs should not be subject to the contract price.⁸⁰ Finally, special rules for incorporating such companies may also help to avoid additional (non-IHL) problems that are associated with the industry, such as trafficking in individuals in order to increase the labour pool.⁸¹

Clearly, the issues are complex, and control of non-state actors in conditions of armed conflict is not easy. Nevertheless, such regulatory measures would go a long way to improving the compatibility of PMCs with IHL and would provide important mechanisms to implement the law and enhance its capacity to protect peaceful civilians who have the misfortune of finding themselves in dire situations.

⁷⁴ UK, Green Paper, *supra* note 5; Swiss Rapport, *supra* note 5, esp. at section 6.

⁷⁵ This three-pronged approach is currently the way the ICRC and the Swiss government are addressing the issue. For more information on the initiative, see the website of the Swiss Federal Department of Foreign Affairs, Directorate of International Law:

http://www.dv.admin.ch/content/sub_dipl/e/home/thema/psc.html (accessed 30 November 2006).

⁷⁶ Most political scientists approve of the idea of a licensing regime. See *supra* note 73.

⁷⁷ This obligation of the state can be drawn from Article 1 common to all four Geneva Conventions, in which "The High Contracting Parties undertake to respect *and to ensure respect* for the present Convention in all circumstances." (Emphasis added.)

⁷⁸ This may be the case, for example, in Afghanistan should the US withdraw all of its forces yet leave the PMCs it has hired and that are already operating there to remain in support of NATO and/or ISAF.

⁷⁹ See Milliard, *supra* note 72, Proposed Draft Article 1(5).

⁸⁰ For example, although the US has legislation on exporting military services, Congress does not have to be notified of contracts for less than \$50 million, which provides a means to escape transparency by simply cutting a contract with a company into several smaller deals.

⁸¹ US Department of State Trafficking in Persons Report 2006, June 2006 at p. 19, online: www.state.gov/g/tip/rls/tiprpt/2006 (last viewed 20 September 2006).

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

IV. CONCLUSIONS – A LOOK TO THE FUTURE

This paper would be incomplete without some consideration of the direction the industry can be expected to turn after Iraq. Many PMCs see their financial future in peace operations. Any doubts about that can be put to rest by the fact that the American PMC lobby group is called the International Peace Operations Association.⁸² It has started to lobby for a prominent role in peacekeeping, especially in peace enforcement operations where States are reluctant to send their own soldiers.⁸³ Although not insensitive to the idea that an apathetic international community should not justify passivity in the face of an apparent genocide, the United Nations Deputy Secretary-General for Peacekeeping is not enthusiastic about the idea, insisting that the responsibility to protect must rest with states.⁸⁴ In addition to the use of PMCs contributing to erosion of states' sense of responsibility and duty toward one another, a brief overview of the international legal regime applicable to peacekeepers illustrates that that solution also entails important legal ramifications.

Peace operations have evolved in a manner that is not exactly what the United Nations Charter originally prescribed. According to the Charter, states were supposed to "make available to the Security Council...armed forces...necessary for the purpose of maintaining international peace and security."⁸⁵ The plan was thus that a Military Staff Committee would advise the Security Council and be responsible for the strategic direction of those armed forces.⁸⁶ However, this manner of preserving international peace and security never got off the ground in the context of the Cold War. Instead, peace operations are now usually created as subsidiary organs of the Security Council and staffed with troops in a variety of ways – most often by states sending contingents to be placed under UN command and control, or by regional organizations providing troops and commanding them

alongside UN commanders. Classical peacekeeping missions are based on the consent of the parties, the impartiality of the interposition forces, and the use of force only in self-defense.⁸⁷ However, over time, the degree of force authorized has become an extremely thorny question, and is not always clear from the resolution establishing the mission. Beyond peacekeeping missions, there is the realm of peace *enforcement* missions. These missions are created when the Security Council merely adopts a resolution under Chapter VII of the Charter authorizing states to take "all necessary means" to contain a situation deemed to threaten international peace and security, allowing states to engage in a military operation against the outlaw state. However, a peacekeeping mission under UN command and control may also be transformed into a peace enforcement mission if it receives a new mandate to use force clearly beyond self-defense. It is therefore not always obvious from the outset exactly what role the peacekeepers will be called upon to play. In either situation, IHL is applied and enforced at the level of the state, with each state being responsible to prosecute and punish violations by its own troops. In peace enforcement operations which are not under UN command and control, the legal framework outlined above would apply.

Would it be possible for a state to hire a private military company as its troop contribution to a peacekeeping mission under UN command and control? This is certainly a more involved question than can be dealt with here and deserves a more comprehensive answer than can be given here. However, the short answer is likely to be no under the current state of international law. First of all, it is doubtful whether such contributions would be accepted by the Security Council.⁸⁸ Second, one of the key principles of the legal relationship created in a troop contribution is that "the personnel of the force remain in their national service but are for the period of their assignment international personnel."⁸⁹ This dual relationship continues throughout the deployment, with the sending state retaining certain powers over its troops (administrative decisions and criminal jurisdiction) even though the operation is otherwise under the authority of the Secretary-General. The essential role of the state in this arrangement is absent if a state merely hires a PMC without incorporating its members into its armed forces, and much of the rest of the legal framework of peace operations would be jeopardized by that absence. Finally, assuming that IHL of international armed conflicts

⁸² Online: <http://www.ipoaonline.com>.

⁸³ Max Boot, "Darfur solution: Send in the mercenaries", *Los Angeles Times*, 31 May 2006, p. B13. See also Kristen Frichione, "Casualties in Evolving Warfare: Impact of Private Military Firms' Proliferation on the International Community" *Wisconsin International Law Journal*, Vol. 23, Fall 2005, who takes up the argument that PMCs could be used in peace operations without resolving the extremely delicate matter of participation in hostilities of peace forces and the lack of combatant status for private military company employees. See also Victoria Burnett *et al.*, "Who takes responsibility if one of these guys shoots the wrong people?: The hiring of contractors for military tasks extends even to their use in peacekeeping operations. But, as the final part of an FT investigation reveals, concerns remain over how they should be held to account and regulated", *Financial Times*, 12 August 2003, p. 16.

⁸⁴ Bruce Jones, *Evolving Models of Peacekeeping: Policy Implications and Responses*, External Study, UN DPKO, online: <http://pbpu.unlb.org/pbpu/library/Bruce%20Jones%20paper%20with%20logo.pdf>, p. 10.

⁸⁵ Article 43 Charter of the United Nations.

⁸⁶ Articles 46 and 47 of the Charter of the United Nations.

⁸⁷ These elements were identified by Secretary-General Dag Hammarskjöld at the time of the creation of the first peacekeeping operation in 1956: *Report of the Secretary-General to the General Assembly 6 November 1956, First Emergency Special Session, Annexes*, agenda item 5, document A/3302.

⁸⁸ For a clear overview of how peace support operations are established, see Marten Zwanenburg, *Accountability of Peace Support Operations* (Leiden: Martinus Nijhoff, 2005), especially at pp. 35 and following.

⁸⁹ *Ibid.* at p. 37.

GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

Page 13

would apply⁹⁰ to the kind of operations PMCs seem to be keen to embark on – peace enforcement operations – they run up against the same problem of lacking combatant status as is described above.

Thus, while it seems like a tantalizing idea to send private military forces to the rescue of populations that states prove unwilling to risk their own armed forces to protect, in addition to important ethical, political and strategic problems with this solution, the existing legal order does not seem to permit it. PMCs may be important "force multipliers" in peace operations by carrying out non-combatant activities, but they cannot be sent to take on combat roles. In view of the present legal framework, the future is not privatized peace.

Concerns about the erosion of the state monopoly on the use of military force that may accompany the rise of private military companies (PMCs) will significantly influence the choices States make in determining how to regulate those companies. Policy concerns aside, however, existing public international law – and in particular the international humanitarian law (IHL) of armed conflicts – sets certain parameters affecting the scope of possible action private companies may take in the context of armed conflicts. It is therefore imperative to understand how IHL applies to and governs private military companies in order to ensure that any regulations that are developed are commensurate with existing law.

This paper will therefore provide the legal framework for PMCs operating in international armed conflicts, non-international armed conflicts and in peace operations. Arguing that there are no gaps in IHL with respect to these actors, but that any regulatory framework must operate within the confines of existing IHL, this paper will outline the different categories of persons and what they may do as established under IHL. As such, it will set out the definitions of combatants and civilians (the only two possibilities under IHL) and map PMCs onto that framework, taking into account PMCs that provide support services such as catering and construction, weapons maintenance, and combat activities. In so doing, it will briefly explain the legal definitions of mercenaries and show why that framework is mostly unhelpful for the legal

regulation of private military companies. The paper will use examples from Iraq to demonstrate the consequences of the prohibition on civilians to directly participate in hostilities and to consider the related question of the use of human shields.

Private military companies themselves are seeking an increased role in peace-keeping, both in reconstruction activities and in "peace-enforcement". The application of IHL to peace-enforcement operations and the possible use of PMCs in those ventures will be discussed. This is a significant, new direction for PMCs with complex legal implications that attempts at regulation must take into account.

The absence of a specific convention or even of a particular provision in the Geneva Conventions and their Protocols on PMCs does not mean that there is a legal vacuum when it comes to these companies under humanitarian law. Nevertheless, some form of regulation of such companies may help States to ensure that they fulfill their existing obligations under IHL when engaging such companies and may help to clarify state responsibility in case of wrongs. This paper will aim to provide a clear, concise overview of IHL and legal issues that need to be considered when contemplating regulation of such companies. If requested by the conference convenors, the author may also provide some overview of current initiatives to regulate PMCS.

⁹⁰ Again, the application of IHL to peace operations is a highly complex issue, but for the type of operations PMCs are seeking, it can be fairly assumed to apply.