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THE STATUS OF PRIVATE MILITARY CONTRACTORS UNDER INTERNATIONAL HUMANITARIAN LAW

WON KIDANE*

I. INTRODUCTION

The resort to and conduct of warfare has a long history of regulation.¹ The set of rules commonly known as the *jus ad bellum* provide the legal limits to the commencement of warfare.² The set of rules known as the *jus in bello* set forth the legal limits to its conduct.³ The latter set of rules properly identifies all of the

* Assistant Professor of Law, Seattle University School of Law. An earlier version of this article was presented at a faculty workshop at the Penn State Dickinson School of Law. I would like to thank members of the faculty for their thoughtful suggestions. In particular, I would like to thank Professors Stephen Ross and Tiya Maluwa for their written comments. I would also like to thank my former colleague, a former co-author and friend, Thomas R. Snider of the law firm of Wilmer Hale, for his thorough review of the manuscript and valuable suggestions. Finally, I would like to thank Mr. Darren Thomason and Ms. Junsen Ohno for their able research, editorial, bluebooking, and formatting help.

1. A very good example of an ancient Western tradition of some sense of justice in war is the Roman general Scipio Africanus' equation of the talents of a great army general with that of a surgeon who operates on a human body with due care not to cause an unnecessary injury. See STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 21 (2005) [hereinafter NEFF]. A very good example of an ancient non-Western tradition is contained in the Confucian Classic, *The Book of Changes* – I Ching, Shih- The Army, <http://www.cfcl.com/ching/P/07.20.shtml>.

Long before the emergence of the traditional international legal theories of the nineteenth century, there were serious discourses relating to the relevance of law to war. While some had dismissed law's relevance to war entirely, others maintained its relevance at least in the sense of ethics, justice, and religious values. Von Moltke and Clausewitz may be cited as examples of those who had dismissed the law's relevance to war. See DAVID KENNEDY, *OF WAR AND LAW* 46 (1954) [hereinafter KENNEDY]. Catholic thinkers such as Francisco de Vitoria (1480-1546), Francisco Suárez (1584-1617), and the Protestant thinkers such as Hugo Grotius (1583-1645) and Alberico Gentili (1552-1608), may be cited as those who have advocated the law's relevance to war in different forms. See *id.* at 48. For Professor Kennedy's discussion of the works of the latter thinkers, see generally David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986). See also, HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, VOL. II 470 (Francis W. Kelsey trans., 1925) (discussing the obligation of authors of war to provide restitution).

2. In its current form, the *jus ad bellum* is essentially based on Article 2(4) and Chapter VII of the United Nations Charter. See U.N. Charter art. 2, para. 4, ch. VII. See also George Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42 (2000), and FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR* 84, 170 (International Committee of the Red Cross 2001) (1987).

3. *Jus in bello* rules of most current importance are contained in the Four Geneva Conventions of 1949 (Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva

parties involved in hostilities and defines their rights and responsibilities.⁴ In contemporary usage, the latter set of rules is commonly referred to as International Humanitarian Law (IHL).⁵ Although IHL is not premised on the recognition that war is inevitable,⁶ it seeks to mitigate the tragic consequences through regulations whenever and wherever it occurs.⁷ The difficult equilibrium that it seeks to maintain is between military necessity and humanity.⁸ As early as 1868, one of the landmark declarations known as the St. Petersburg Declaration neatly put the difficult equation as “the technical limits at which the necessity of war ought to yield to the requirements of humanity.”⁹

Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV], and the Two Additional Protocols of 1977 (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II], and Laws and Customs of War on Land (Hague II), art. 43, July 29, 1899, 32 Stat. 1803, T.S. 403, *reprinted in* ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 67-84 (3rd ed. 2004) [hereinafter ROBERTS & GUELFF]).

4. It must, however, be noted that there are some overlaps between the *jus ad bellum* and *jus in bello* rules at different levels. ROBERTS & GUELFF, *supra* note 3, at 1-2.

5. The origin of this term is relatively recent and is not contained in the Geneva Conventions of 1949; however, it is currently used in relation to these Conventions and the Additional Protocols of 1977. See Christopher J. Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1-15 (Dieter Fleck ed., 2nd ed. 2008) [hereinafter FLECK]. “International Humanitarian Law comprises all those rules of international law which are designed to regulate the treatment of the individual – civilian or military, wounded or active – in international armed conflicts.” *Id.* at 11. See also, ROBERTS & GUELFF, *supra* note 3, at 2 (discussing the origins and current usage of the term).

6. John Carey, *Introduction to the Three-Volume Work*, in INTERNATIONAL HUMANITARIAN LAW: ORIGINS xi-xii (John Carey et al. eds., 2003) [hereinafter INTERNATIONAL HUMANITARIAN LAW: ORIGINS] (discussing that in its solemn appeal to the international community on the occasion of the 50th Anniversary of the Four Geneva Conventions of 1949, the International Committee of the Red Cross (ICRC) urged all nations to reject the notion that war is inevitable and asked them to make profound efforts to eliminate the underlying causes); Int’l Review of the Red Cross, *People on War – Solemn Appeal*, 459-60, ICRC No. 835 (Sept. 30, 1999), available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jq2r?opendocument>.

7. See YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 20-26 (2004) [hereinafter DINSTEIN]. Some proponents of the complete abolition of armed forces and peaceful resolution of all conflicts suggest that an attempt to regulate warfare may prejudice its complete abolition. See, e.g., ROBERTS & GUELFF, *supra* note 3, at 28 (suggesting that “the need to mitigate the worst effects of armed conflict, by upholding the idea that there are standards of civilization by which conduct can be judged, remains. The legal regime embodying these standards is by no means prejudicial to various proposals to limit the use of force, and may even contribute to the achievement of broader ideas and objectives referred to above.”).

8. DINSTEIN, *supra* note 7, at 16.

9. *Id.* at 17, explaining that:

[i]f military necessity were to prevail completely, no limitation of any kind would have been imposed on the freedom of action of belligerent States: *à la guerre comme à la guerre*. Conversely, if benevolent humanitarianism were the only beacon to guide the path of armed forces, war would have entailed no bloodshed, no destruction and no human suffering; in short war would not have been war.

Dinstein concludes by saying that Humanitarian Law essentially takes the middle

The fundamental approach designed to attain a principled equilibrium between military necessity and humanity is the definition of the status of each and every party and individual involved and affected by warfare. The laws that regulated warfare prior to the Second World War focused on the protection of persons who had already fallen victim to warfare and rendered harmless, including the wounded, the captive, and the interned.¹⁰ As the nature and magnitude of warfare changed, the scope of its reach obviously widened.¹¹

The International Committee of the Red Cross (ICRC) commentary on Geneva Convention IV notes that the legal norms that regulated warfare prior to 1945 “had only applied to the armed forces, a well-defined category of persons, placed under the authority of responsible officers and subject to strict discipline” but then it became necessary “to include an unorganized mass of civilians scattered over the whole of the countries concerned.”¹² That essentially led to the adoption of the Geneva Convention IV, which protects civilians in times of war.¹³ The Convention identifies each individual involved in and affected by warfare and defines the scope of protection.¹⁴

In the summary of rationales section of their introduction to Documents on the Laws of War, professors Roberts and Guelff point out that one of the two most important rationales of the laws of war is that “[a]rmed hostilities should as far as possible be between organized armed forces, not entire societies: hence the efforts to maintain a ‘firebreak’ distinguishing legitimate military targets from civilian objects and people not involved in armed hostilities.”¹⁵

It follows that the major distinction that the law makes is between combatants and non-combatants or civilians.¹⁶ This distinction is extremely important because it determines the most important issue of who may kill or injure another human being during combat without fear of prosecution.¹⁷ To this effect, article 43 of Additional Protocol II provides that “[m]embers of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.”¹⁸ No other person is ordinarily entitled to a combatant status. If a person who does not have a combatant status gets involved in hostilities, he not only loses protection as a civilian but may also be prosecuted for any actions, including for killing an enemy soldier.¹⁹ Others claiming civilian

ground. *Id.* at 16-17.

10. See JEAN S. PICTET (ED.), ICRC, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 5 (1958).

11. *Id.*

12. *Id.*

13. *Id.* See also generally Geneva Convention IV, *supra* note 3.

14. Geneva Convention IV, *supra* note 3, art. 4 (defining protected persons).

15. ROBERTS & GUELFF, *supra* note 3, at 27.

16. See FLECK, *supra* note 5, at 79-117 (discussing combatants and non-combatants).

17. See DINSTEIN, *supra* note 7, at 29-31.

18. See Additional Protocol I, *supra* note 3, art. 43(2).

19. *Id.* at art. 45. See also FLECK, *supra* note 5, at 83.

status who may be prosecuted include mercenaries,²⁰ spies,²¹ and other kinds of unlawful combatants.²²

In the post-Cold War era, the legal regulation of armed conflict has been complicated by the advent of a remarkable new player: the privatized military industry.²³ This multi-billion dollar industry drew its strength from providing efficient services to sovereign governments.²⁴ Today, private military contractors operate from “Albania to Zambia” and perform anything from transporting food and medicine to designing precision weaponry and performing outright combat duties.²⁵ Their clients range from brutal dictators to democratic governments and humanitarian agencies.²⁶ Because IHL took its current shape and form prior to and during the Cold War, the new players were not a significant part of the equation. As such, the status of today’s private military contractors is ambiguous at best.²⁷

The debate over the desirability of engaging private military contracts in activities traditionally performed by uniformed military personnel raises complex

20. Additional Protocol I, *supra* note 3, art. 47. (“A mercenary shall not have the right to be a combatant or a prisoner of war.”). This topic is discussed more fully in relation to civilian military contractors in Part IV *infra*.

21. *Id.* at art. 46 (stating that “[n]otwithstanding any other provision of the Conventions or this Protocol, any member of the armed forces of a party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy”). See *infra* Parts III, IV.

22. See *infra* Part III.

23. See P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 8 (2003) [hereinafter CORPORATE WARRIORS].

24. No precise current date is available; however, older data suggests that from 1994 to 2002, the Department of Defense of the United States entered into 3,000 contracts with private military contractors, the value of which is estimated at about \$300 billion. See *id.* at 15 (citing INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISM, MAKING A KILLING: THE BUSINESS OF WAR (2002)). The contracted out duties included the maintenance and administration of B-2 bombers, the F-117 fighters, and several surface warfare ships. *Id.* Obviously, the number has since increased dramatically because of the conflicts in Iraq and Afghanistan. For example, the ratio of private contractors to uniformed military personnel now is ten times more than the ratio during the Gulf War of 1991. P.W. Singer, *War, Profits and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT’L L. 521, 522-23 (2004) [hereinafter *War, Profits and the Vacuum of Law*].

25. See CORPORATE WARRIORS, *supra* note 23, at 9.

26. *Id.* For example, the now defunct South African based military private contractor, Executive Outcomes (EO), had provided combat services to various factions in different African countries, including in Sierra Leone and Angola, where its role was considered outcome-determinative. See *id.* at 4, 9. Although the United Nations has not yet involved private military contractors in peacekeeping missions, proposals have surfaced from time to time. See e.g., U.K. Foreign and Commonwealth Office, Private Military Companies: Options for Regulation, 2001-02, H.C. 577, at 18 (cited in Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT’L L. 383, 394 (2006) [hereinafter *Public Law Values in a Privatized World*]). See also Peter H. Gantz, *Refugee International, The Private Sector’s Role in Peacekeeping and Peace Enforcement*, Global Pol’y F., Nov. 18, 2003 (cited in *id.*).

27. In this article, the term “private military contractors” is used to limit the discussion to only a segment of the wider private military industry with a recognizable role in armed conflict situations. This limitation is important because the industry is otherwise extremely broad. In the words of Dr. Singer, the industry is so broad that “many Americans unknowingly own slices of the industry in their 401(k) stock portfolio.” *War, Profits and the Vacuum of Law*, *supra* note 24, at 522.

legal, political, and socio-economic issues and is outside the scope of this article. This article, however, attempts to characterize the status of civilian military contractors under IHL, which has traditionally governed the conduct of armed conflict where the status of all parties to the conflict is clearly defined, and identify appropriate IHL standards that could be used for the regulation of civilian military contractors. Professor David Kennedy makes an interesting observation when he notes that “[i]n broader terms, modern war reflects modern political life. In large measure, our modern politics is legal politics: the terms of engagement are legal, and the players are legal institutions, their powers expanded and limited by law.”²⁸ Accordingly, this article argues and properly assumes that the most pertinent body of law is IHL because the very existence of the private military industry is inextricably linked to the existence of the threat and use of military force; in other words, the existence of war. It further contends, therefore, that identification of the exact legal status under IHL of all the players is an essential step in understanding and regulating their future role.

Because event driven scholarship often tends to focus on the specifics of the given event, the legal literature that followed the news of the involvement of private military contractors in the abuses that occurred in the Iraqi prisons, particularly at Abu Ghraib, almost exclusively focused on ways and means of holding them immediately accountable for their role in the reported abuses.²⁹ Little effort seems to have been made to assess their general status under IHL. Such assessment is useful for several important reasons. Primarily, it identifies the gaps in the existing law, not only as it pertains to their accountability, but also as it relates to their own protection and the responsibilities of the states which host them and use their services. Secondly, it offers an important guidance as to how to supplement the gap and provide for their regulation. Thirdly, it helps to reemphasize the notion that the principal theoretical foundation for the discourses pertaining to the regulation of this particular industry must begin with IHL standards.

With this view, this article is divided into five parts. Part II provides a historical background on the legal limitations in warfare, and the monopoly of the use of coercive force by states to the exclusion of all other types of entities, including organized private forces. It also highlights the perceived necessity and philosophical underpinnings of the monopoly of the use of force by the state. Part III discusses the concept of lawful combatancy, and offers an analysis of the

28. See KENNEDY, *supra* note 1, at 13.

29. The seminal work that dealt with the issue of private military contractors following these events was SINGER, *supra* note 23; see also, e.g., Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, 47 WM. & MARY L. REV. 135, 142 (2005) [hereinafter *Government for Hire*] (advocating a contracts based accountability approach); *Public Law Values in a Privatized World*, *supra* note 26, at 389 (advocating similarly for a contracts based accountability approach); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005); Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367 (2006) (advocating a courts-martial jurisdiction for civilian contractor misconduct) [hereinafter Peters].

definition of the status of each and every party involved and affected by armed conflict and sets the stage for the discussion of the status of today's private military contractors. Part IV highlights the nature and functions of the private military contracts and attempts to define their status under IHL based on the discussion in Part III of the various possible statuses. To put their status into perspective, it provides a detailed discussion of the various functions they perform in a legal continuum, and suggests an IHL based theoretical framework for the regulation of their operations. Part V concludes the article.

II. THE DEVELOPMENT OF LIMITATIONS IN WARFARE AND MONOPOLY OF THE USE OF FORCE BY NATION-STATES

Part II provides a brief description of the historical and philosophical underpinnings of limitations in warfare, and the notion, perceived necessarily, and development of the monopoly of all instruments of coercion by the state.

A. Limitations in Warfare

Military historian J.F.C. Fuller notes that “[p]rimitive tribes are armed hordes, in which every man is a warrior, and because the entire tribe engages in war, warfare is total.”³⁰ He further notes that the objective of war was not only to defeat the armed forces of the opposing tribes but to overturn their entire social structure.³¹ In situations where every man is a warrior, and the objective is to overturn the entire structure of the society, it is difficult to imagine the applicability of recognizable limits to warfare. Writing in the context of the historical development of state responsibility, Professor Brownlie noted that “[t]racing the origins of legal concepts and institutions can be an artificial and practically fruitless endeavor.”³² Indeed, pinpointing to a particular historic juncture during which states raised armies and monopolized all types of coercive force to the exclusion of all other entities and began to abide by certain rules of war could be very difficult.

In fact, perspectives seem to differ on whether limitations of humanity have always characterized human conflict. For example, Professor Stephen Neff suggests that war seems to have always been understood “as an exercise more in skill and craftsmanship than blind anger or emotion.”³³ To support his position, he quotes from Proverbs:

Wisdom prevails over strength,
Knowledge over brute force;
For wars are won by skilful strategy, and
victory is the fruit of long planning.³⁴

30. J.F.C. FULLER, *THE CONDUCT OF WAR, 1789-1961* 31 (1961), *quoted in* PETER MAGUIRE, *LAW AND WAR: AN AMERICAN STORY* 38 (2000) [hereinafter MAGUIRE].

31. *Id.*

32. IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY PART I* 1 (1983).

33. NEFF, *supra* note 1, at 20.

34. *Id.* at 21 (quoting 24 Proverbs 5-6).

He further notes that in Greek mythology, the goddess Athena symbolized not only bravery but also knowledge, wisdom, and skill.³⁵ Professor Neff also seeks support from the ancient Chinese Confucian tradition of fair play in war. According to this tradition, exploiting the weaknesses of the enemy was viewed as dishonorable, and because of that, for example, the days and places of battle were commonly fixed.³⁶

Howard Levie takes a completely opposite point of view. He begins his thesis with the following remark:

For many millennia there was no such thing as humanity in land warfare. From the caveman to Biblical times, and for centuries thereafter, the winner in battle took from the loser not only his life, but also all of his available belongings, including women, children, domestic animals, and personal property.³⁷

To support this conclusion, he cites to the following Biblical verse:

They made war on Midian as the Lord had commanded Moses, and slew all men. In addition to those slain in battle, they killed the kings of Midian – Evi, Rekem, Zur, Hur and Reba, the five kings of Midian – and they put to death also Balaam, son of Beor. The Israelites took captive the Midianite women and their dependents, and carried off their beasts, their flocks, and their property. They burnt all their cities, in which they had settled, and all their encampments. They took all the spoil and plunder, both man and beast.³⁸

Professor Peter Maguire takes a somewhat middle ground and asserts that, at least in the European and American historical perspective, the rules of engagement seem to have depended on the nature of the enemy. He begins his inquiry by noting that “what is often overlooked is that the gentlemanly rules of war outlined by both Christian scholars and the Heralds applied only to warriors of the same race and class. When invasive ‘others’ like Norsemen and Muslims descended on early European states, the only law of war was survival.”³⁹

In the American historical context, Professor Maguire cites historian Fredrick Jackson Turner as saying that the first era of the formation of the United States

35. *Id.* at 20-21. Most scholarly inquiries regarding the origins of limitations in warfare began from the ancient Greek and Roman times because historical evidence seems to suggest that the Greeks and the Romans respected certain humanitarian principles, which later became the foundations of the modern conception of the laws governing warfare. ROBERTS & GUELF, *supra* note 3, at 3 (citing COLMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME*, Vol. II 166-384 (1911)).

36. NEFF, *supra* note 1, at 22.

37. Howard S. Levie, *Humanitarian Law and the Law of War on Land*, in *INTERNATIONAL HUMANITARIAN LAW: ORIGINS*, *supra* note 6, at 181.

38. *Id.* (quoting *Numbers* 31:7-11). Professor Levie also quotes verses from the Koran for an exception: “When you meet in battle those who have disbelieved, smite their necks, and after the slaughter tighten fast the bonds, until the war lays aside its burdens. *Then either release them as a favor, or in return for ransom.*” *Id.* (quoting Surah xlvii ¶ 4 (M.Z. Kahn trans., 1971)).

39. MAGUIRE, *supra* note 30, at 19.

required “determination and brutality” to clear and pacify the western frontiers.⁴⁰ He further notes that “[b]efore there were ‘war criminals,’ there were ‘barbarians,’ ‘heathens,’ and ‘savages,’ who did not qualify as equals in the arena of ‘civilized warfare.’”⁴¹ He further notes that the founding fathers of the United States always considered the American Indians barbarians. He cites President John Adams’s description of the Indian warfare of 1775: “The Indians are known to conduct their Wars so entirely without Faith and Humanity, that it will bring eternal infamy To let loose these blood Hounds to scalp Men and butcher Women and Children is horrid.”⁴² He concludes that this perception justified the lack of any traditional European restraints to the means and methods of warfare vis-à-vis the indigenous people.⁴³ He contrasts this with the treatment of armed forces of the Confederacy during the American Civil War. He notes that although the Federal Government “did not consider the Rebel Army lawful combatants . . . they were not ‘others’ who stood outside the circle and so not considered barbaric. This distinction was reserved for racial and cultural others who flouted the military customs of the West. The Confederates were both white and American.”⁴⁴

Although perspectives differ, it is clear that some concepts of restraint in warfare and humanitarianism had earlier historical origins rooted in theological and classical philosophical precepts.⁴⁵ The convergence of customs and the attainment of general consensus on some fundamental principles of humanitarian rules of warfare are phenomena that took a long time to crystallize.⁴⁶ Indeed, it was not until the nineteenth century that codifications of what might be considered customary rules of warfare began.⁴⁷ But then, the last century saw marked advancement in the refinement and codification of customary norms of humanitarian law.⁴⁸ Currently, humanitarian law stands as one of the most highly systematized and crystallized bodies of international law.

40. *Id.* at 20.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 37. It is important to note that this does not mean that existing European norms of restraint in warfare were respected in significant measure during the Civil War. Professor Maguire gives many examples which suggest otherwise. For example, he quotes George Nicolas, General Sherman’s aide-de-camp as saying: “the only possible way to end this unhappy and dreadful conflict . . . is to make it terrible beyond endurance.” *Id.* at 38 (quoting J.F.C. FULLER, *THE CONDUCT OF WAR 1789—1961* 109 (1961)). General Sherman himself said: “war is cruelty and you cannot refine it.” *Id.* Describing General Sherman’s march on Atlanta, historian J.F.C. Fuller said: “Nothing like this march had been seen in the West since the maraudings of Tilly and Wallenstein in the Thirty Years War Terror was the basic factor in Sherman’s policy, he openly says so.” *Id.* at 39 (quoting J.F.C. FULLER, *DECISIVE BATTLE OF THE U.S.A.* 305-08 (1993)).

45. See Christopher Greenwood, *Historical Development and Legal Basis*, in FLECK, *supra* note 5, at 12.

46. *Id.*

47. *Id.*

48. *Id.*

B. Monopoly of the Use of Force by Organized and Disciplined Armed Forces of the State

Today the world is seemingly organized into territorial unities under sovereign entities. Although the political landscape is far more complicated than this simple assertion,⁴⁹ presumably, these sovereign entities command their own armies and protect their own territorial integrity. Although different historic eras saw different forms and shapes of the exercise of sovereign authority, the underlying notion of the monopoly of the means of coercion by sovereign entities of some sort is not a recent phenomenon.⁵⁰ Organized and disciplined militaries existed as far back as the Greek and Roman times.⁵¹ Their organization was such that some military offenses punishable by law today were also punishable under the laws of the Greeks and the Romans.⁵² These offenses, for example, include desertion, mutiny, violence to superiors, and the sale or misappropriation of arms.⁵³ The punishment also included such familiar determinates as dishonorable discharge.⁵⁴

49. Commenting on the complexity of today's international political environment, Professor David Kennedy said: "[T]he international political system today is a far more complex multilevel game than the rows of equivalent national flags arrayed at U.N. headquarters would suggest. States and their governments differ dramatically in powers, resources, and independence." KENNEDY, *supra* note 1, at 14.

50. P.W. Singer of the Brookings Institution provides a good historical background of the private military industry in his seminal book, *CORPORATE WARRIORS*, *supra* note 23, at 19-39. He argues that: "In fact, the monopoly of the state over violence is the exception in world history, rather than the rule." *Id.* at 19 (citing JANICE THOMSON, *MERCENARIES* (1994)). In conclusion, he quotes Jeffrey Herbst as saying: "The private provision of violence was a routine aspect of international relations before the twentieth century." *Id.* (quoting JEFFREY HERBST, *THE REGULATION OF PRIVATE MILITARY FORCES*, *in* GREG MILLS & JOHN STREMLAU, *THE PRIVATIZATION OF SECURITY IN AFRICA*, 117 (1997)). Recognizing the significant role that private military service providers have played in history, Singer's assessment that states' monopoly of the use of force has been the exception seems to be an overstatement. In fact, towards the end of the chapter on the history of private warriors (chapter two), Singer, himself, provides what seems to be a balanced account of their role. He states:

At numerous stages in history, governments did not possess anything approaching a monopoly on force. Instead, rulers were often highly reliant on the supply of military services from business enterprises. Private actors, such as free companies, contracted units, military entrepreneurs, and charter companies played key roles in state-building and often served governmental interests. These organizations also had the tendency to become powers unto themselves, however, and often grew superior in power to local political institutions, particularly in areas of weak governance. *Id.* at 39.

His final and reasoned conclusion on the history and its importance reads: "In sum, the line between economies and warfare were never clear-cut. From a broad view, the state's monopoly of both domestic and international force was a historic anomaly. Thus, in that future, we should not expect that organized violence would only be located in the public realm." *Id.*

51. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS*, 17 (1988) [hereinafter WINTHROP].

52. *Id.*

53. *Id.*

54. Although no written military codes of these times remain today, this constitutes a part of the historic record. See *id.*

As a natural continuation of this, the Romans did not consider a non-state entity as an enemy proper. Cicero, for example, pointed out that a true enemy of Rome must be a recognizable state possessing the following characteristics: “a Commonwealth, a Senate-house, a treasury, a consensus of likeminded citizens.”⁵⁵ According to him, an enemy state must be distinguished from irregular entities such as pirates and bandits.⁵⁶ Any operation to eradicate the latter category was thus viewed as a law enforcement task rather than the conduct of war.⁵⁷ A similar suggestion is contained in the classical work of Ulpian. According to him, any armed forces other than states against which Rome declared war, or the vice versa, are just “robbers and bandits” who must be dealt with accordingly.⁵⁸ Cicero further noted that irregular armed forces, such as bandits, did not have legal status and unlike states, they neither acquired ownership title to any property they might have captured nor did they possess any authority to enslave prisoners they might have taken.⁵⁹

Furthermore, states were not required to make deals or respect any truce made with such irregular forces as opposed to other states.⁶⁰ However, apparently some such forces called the *latrociniae* were so powerful that military operations were at times necessary to deal with them.⁶¹ Practically, Rome had to take a middle ground by conducting a limited military campaign against them.⁶² That does not seem to have changed their perceived legal status.

The legitimacy and moral superiority of the monopoly of the use of force by states is a complex subject. St. Augustine's characterization of the Roman State as a “magna latrociniae” might be cited as an example of the school of thought that challenges the moral superiority of the state with respect to the use of force to the exclusion of others.⁶³

Nonetheless, the perception of sovereign and lawful authority as opposed to unlawful irregular forces persisted throughout history. For example, written

55. NEFF, *supra* note 1, at 18 (quoting Cicero, *Philippics*, at 143).

56. *Id.*

57. *See id.* (citing Cicero, *On Duties*, at 141).

58. *Id.* (citing Justinian, *Digest*, at 49.15.24).

59. *Id.* (citing Cicero, *On Duties*, at 17-18, 141-45).

60. *Id.*

61. *Id.* at 19 (citing Cicero, *On Duties*, at 78, n. 1).

62. *See id.* Although the scale of these operations may not be characterized as the conduct of war, it is suggested that it is also difficult to characterize them as acts of law enforcement because the scale of operations did not allow the determination of the criminal guilt of everyone involved. *See id.* (citing O.F. ROBINSON, *THE CRIMINAL LAW OF ANCIENT ROME* 28-29 (1995)). This phenomenon is also of current jurisprudential importance because it pertains to a critical point of departure between the applicability of the emergency provisions of international human rights law which suggests an emergency situation, and the applicability of Common Article 3 to the Geneva Conventions, which suggests the existence of a state of armed conflict. For commentary on this issue, *see generally*, OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 326-64 (2006).

63. Patrick Giddy, *Character and Professionalism in the Context of Developing Countries – the Example of Mercenaries*, 4 *ETHIQUE ET ÉCONOMIQUE/ETHICS AND ECONOMICS* 9 (2006) [hereinafter Giddy]. “Magna latrociniae” is translated as “a great band of robbers.” *Id.*

European codes of military conduct date as far back as the fifth century.⁶⁴ In his seminal treatise, William Winthrop states that existing military codes of continental Europe have their origins in the French *ordonnance* of military law of 1378; the first German Kriegsartikel of 1487, and the celebrated 1532 penal code of Emperor Charles V.⁶⁵

That is not to suggest that irregular armed forces such as mercenaries did not play a significant role in shaping the history of the world. Machiavelli's discussion of mercenaries and other irregular forces that he calls auxiliaries and mixed soldiery in *The Prince*, is instructive on how involved they were in the political and military environment of Sixteenth and Seventeenth-Century Europe.⁶⁶ Although it seems that many legitimate authorities sought their assistance in different forms, it is clear that they were a disfavored group of discrete entities.⁶⁷ Although it may not be representative of the general opinion that prevailed during that time in Europe, Machiavelli suggests that relying on mercenaries for military duties was utterly useless.⁶⁸

I say, therefore, that the arms with which a prince defends his state are either his own, or they are mercenaries, auxiliaries, or mixed. Mercenaries and auxiliaries are useless and dangerous; and if one holds his state based on these arms, he will stand neither firm nor safe; for they are disunited, ambitious and without discipline, unfaithful, valiant before friends, cowardly before enemies; they have neither the fear of God nor fidelity to men, and destruction is deferred only so long as the attack is; for in peace one is robbed by them, and in war by the enemy. The fact is, they have no other attraction or reason for keeping the field than a trifle of stipend, which is not sufficient to make them willing to die for you.⁶⁹

The history of the British military's laws of proper conduct offers another example of the importance historically attached to assignment of the responsibility of the use of coercive force to an organized, disciplined, and accountable entity. Published statutory military codes of Great Britain date as far back as 1689.⁷⁰ Much older British laws of military discipline and conduct existed. These laws took the form of specific directives or orders issued from the government to the army.⁷¹

64. These military laws were incorporated in what is called the Salic Code, originally compiled by the Chiefs of the Salians during this period. See WINTHROP, *supra* note 51, at 17-18. This Code was revised and improved by successive Frankish kings. *Id.* at 18.

65. *Id.* at 18. William Winthrop also lists other notable laws of military discipline including the Articles of War of the Netherlands of 1590, republished in 1705; the regulations of Louis XIV of 1651 and 1665; and the Penal code of 1768 of the Empress Maria Theresa. *Id.*

66. NICOLÓ MACHIAVELLI, *THE PRINCE*, reprinted in *GREAT BOOKS OF THE WESTERN WORLD* 17-21 (Robert Maynard Hutchins ed., 1952).

67. *Id.*

68. See *id.* at 18.

69. *Id.*

70. See WINTHROP, *supra* note 51, at 19.

71. *Id.* at 18. "They were commonly ordained directly by the King, by virtue of his royal

One of the most important requirements of these laws has been the taking of the oath of fidelity. For example, the Articles of War of James II issued in 1688 required every officer and other member of the army to take the following oath:

I, A.B., Do swear to be true and faithful to my Sovereign Lord King JAMES, and to His Heirs and Lawful Successors; and to be Obedient in all things to His General, Lieutenant General, or Commander in Chief of His Forces, for the time being, And will behave myself obediently towards my Superior Officers in all they shall command me for His Majesty's Service . . . I do likewise Swear, That I believe, That it is not lawful upon any Pretence whatsoever, to take Arms against the King and that I do Abhor that Traitorous Position of taking Arms by His Authority against His Person, or against those that are Commissioned by Him. *So help me God.*⁷²

The oath of allegiance and fidelity to a sovereign entity remained at all times relevant to military service. It would not be an overstatement to say that an oath is perhaps one of the most important features that distinguishes a regular and disciplined military force from all other types of forces.

The history of law of the United States military is directly and immediately linked to the British military articles and codes briefly mentioned above. In fact, the raising of the armed forces of the United States predated the Constitution of the United States itself. It was on June 14, 1775, that the Continental Congress "resolved" to raise a military force and set up a committee consisting of George Washington and three other members to draft rules and regulations for the administration of the armed forces so raised.⁷³ The committee then drafted a military code consisting of sixty-nine articles. This code fundamentally relied on the same principles as the British army.⁷⁴ William Winthrop makes an interesting observation when he notes that the two opposing armies were in fact governed by a similar set of military rules.⁷⁵

With the adoption of the United States Constitution, all preexisting military laws became part of the constitutional system.⁷⁶ The Constitution leaves no room

prerogative, and with the aid and counsel of his peers, especially of the High Constable and Earl Marshall, official . . . viewed by some writers as the proper original of the court-martial in England." *Id.* (citing FRANCIS GROSE, *MILITARY ANTIQUITIES RESPECTING A HISTORY OF THE ENGLISH ARMY* 58 (1801)).

72. ARTICLE OF WAR OF JAMES II; RULES AND ARTICLES FOR THE BETTER GOVERNMENT OF HIS MAJESTIES LAND FORCES IN PAY (1688), art. VI., *reprinted in* WINTHROP, *supra* note 51, at 920-28 (emphasis in original). It is important to note that implicit in the contents of this oath is the notion that only the sovereign can raise and maintain armed forces to the exclusion of all others.

73. *See id.* at 21 (quoting 1 Journals of Congress, 82). The other four members of the committee were Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes. *Id.*

74. The immediate precursor of this code was, however, the Massachusetts Articles, which is said to be the first American Code of military conduct. *Id.*

75. *See id.* at 22 n.81.

76. *See id.* at 15. "The Constitution itself provides for military government as well as for civil government. . . . There is no law for the government of the citizens, the armies, or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution."

for doubt that only Congress could raise, maintain, and regulate armed forces.⁷⁷ The President, as the Commander-in-Chief of the armed forces is responsible for the “faithful” execution of the laws.⁷⁸ Commenting about the role of the military following the American Civil War, Professor Peter Maguire wrote that “[a]bove all, what the Civil War demonstrated was the military was no longer the praetorian guard of the political elite. Instead, it was an instrument of democracy, and democratic political leaders could not be content to win a limited military victory and striking an advantageous diplomatic solution.”⁷⁹ Similarly, contemporary political scientist Samuel Huntington remarked that “[w]hile all professions are to some extent regulated by the state, the military profession is monopolized by the state.”⁸⁰

Given this historical background, the legal status of any other types of armed forces is a matter that needs to be looked into very carefully.

III. LAWFUL COMBATANCY, IDENTIFICATION OF THE PARTIES, AND STATE RESPONSIBILITY

Part III offers a detailed discussion of the various possible statuses that every party involved in and affected by warfare may have in a continuum. It also provides a description of the consequences attached to each legal status, including individual and state responsibility. By so doing, it identifies the parameters by which the status of private military contractors must be measured.

A. Theoretical Background of Lawful Combatancy

The philosophical underpinnings of lawful combatancy are perhaps more complex than the legal prescriptions. In simple terms, a morally justifiable war, or a just war as to which it is often referred, would require right intentions, legitimate authority, and proportionate ends.⁸¹ Michael Brough notes that “if the war is

(quoting Chief Justice Chase, in *Ex Parte Milligan* 4 Wallace, 137).

77. See U.S. CONST. art. I, § 8.

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; To provide and maintain a navy; To make rules for the government and regulation of the land and naval forces; To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions; To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

78. See U.S. CONST. art. II, §§ 1, 2, & 3. The President’s powers include the commissioning of officers of the armed forces.

79. MAGUIRE, *supra* note 30, at 38.

80. CORPORATE WARRIORS, *supra* note 23, at 8 (quoting SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVILIAN-MILITARY RELATIONS* 37 (1957)).

81. See Michael W. Brough, *Dehumanizing the Enemy and the Moral Equality of Soldiers*, in MICHAEL W. BROUGH, JOHN W. LANGO, HARRY VAN DER LINDEN, *RETHINKING THE JUST WAR TRADITION* 149, 162 (eds., 2007). Of course, this is a simplification of the deep philosophical inquiry that dates as far back as the history of warfare itself. The fundamental assumption throughout history remained to be that a legitimate authority may employ force in self-defense or for some legitimate reason and use proportionate means to attain the objective. For a succinct summary of the early

justified . . . then the soldiers must be allowed to kill. States must be allowed to direct the killing"⁸² Even if the decision by the state to go to war may not be justified or is in violation of the *jus ad bellum*, from a philosophical perspective, the soldiers who are ordered to kill may not lose their moral authority. In this respect, Michael Walzer notes:

[T]he moral status of individual soldiers on both sides is very much the same: they are led to fight by their loyalty to their own states and by their lawful obedience. They are most likely to believe that their wars are just they are not criminals; they face one another as moral equals.⁸³

There is no dispute that loyalty to one's own state, citizenship, and obedience to the laws of the states are the important justifications for the soldiers' moral as well as legal authority to defend his or her nation and kill on its behalf when the circumstances so demand. It is this fundamental moral and legal authority that is usually missing in profit-driven military enterprise. In relation to this notion, Professor Patrick Giddy notes:

But killing is not proportional to the private ends of contractual warriors, whatever these might be – say, supporting a middle-class family: this end is not grave enough to justify killing. Killing is only a proportionally appropriate act when military action for the just cause (restoring justice and peace) has been embarked upon by the proper authority, as a last resort with a reasonable chance of success.⁸⁴

These historical and philosophical notions underpin the legal classification of parties involved and contribute to the legitimate use of force. Professor David Kennedy makes an important observation when he notes that the earlier thinkers considered the law not only as an ethical limit on military power but also as a license.⁸⁵ This suggestion has an enduring relevance to IHL because it pertains to the issue of lawful combatancy. In other words, it raises the question of who has the license to kill another human being without fear of prosecution. Writing from a moral and philosophical perspective, Pauline Kaurin notes:

medieval, the medieval, the early modern and contemporary paradigms of the just war doctrine, see generally, William E. Murnion, *A Postmodern View of Just War*, in STEVEN P. LEE, INTERVENTION, TERRORISM, AND TORTURE 23, 23-40 (2007) [hereinafter INTERVENTION, TERRORISM, AND TORTURE].

82. Brough, *supra* note 81, at 163.

83. Brough, *supra* note 81, at 149 (quoting MICHAEL WALZER, JUST AND UNJUST WARS (3d ed. 2000)). Michael Brough further notes that according to Grotius, less than half of the wars ever fought were justified and according to the *jus ad bellum*. Accordingly, any randomly chosen war would be without justification. But in any case, the soldiers who were recruited by their states to fight and kill would be justified regardless of the justness of the war. See DAVID RODIN, WAR AND SELF DEFENSE, 165-73 (2002), cited in *id.* at 150. For a critique on Michael Walzer's, Just and Unjust Wars, see also, David Duquette, *From Rights to Realism: Incoherence*, in *Walzer's Conception of Jus in Bello*, in STEVEN P. LEE, INTERVENTION, TERRORISM, AND TORTURE, *supra* note 81, at 41-57. See also Patrick Hubbard, *A Realist Response to Walzer's Just and Unjust War*, in LEE, INTERVENTION, TERRORISM, AND TORTURE, *supra* note 81, at 57-71 (2000).

84. See Giddy, *supra* note 63, at 13.

85. See KENNEDY, *supra* note 1, at 49.

The clarity of the combatant / noncombatant distinction is crucial since it preserves the essential moral difference between a soldier and a murderer; the difference between doing one's duty and committing a war crime; the difference between coming home in honor or coming home in shame, with the attendant effects for both the soldier and society. If this distinction cannot be rendered in a way that is practical in the field, soldiers become murderers, committers of war crimes and bearers of individual and collective shame.⁸⁶

The legal ramifications are even more serious. The following section provides a detailed discussion of the legal status of the various parties involved and affected by warfare and describes their rights and responsibilities. It is intended to set the stage for the discussion of the particular status of the private military contractors by showing the continuum of the various types of legal statuses under IHL. Because private military contractors perform various types of activities, their status would naturally depend on the types of activities they perform. The discussion of an activity-based continuum of legal statuses in Part III provides the standards against which the functions of the private military contractors should be measured.

B. Overview of Legal Statuses under International Humanitarian Law

In July 2002, fifteen-year old Omar Khadr allegedly threw a grenade and killed Sergeant Christopher J. Speer of the U.S. military during a firefight in southeastern Afghanistan.⁸⁷ He was later captured, held at Guantánamo Bay, Cuba, and brought to justice.⁸⁸ The fundamental legal question in his preliminary hearing before a military commission set up by the U.S. military for this purpose⁸⁹

86. Pauline Kaurin, *When Less Is Not More: Expanding the Combatant/Noncombatant Distinction*, in BROUGH, ET AL., *RETHINKING THE JUST WAR TRADITION*, *supra* note 81, at 116.

87. See Josh White, *Charges Against Guantanamo Detainee Set for Trial Dropped Over Limit on Law*, WASH. POST, June 5, 2007, at 1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/04/AR2007060400188.html> [hereinafter White].

88. *Id.* at 1.

89. The constitutionality of military tribunals set up to try persons detained in relation to the armed conflicts in Iraq and Afghanistan has remained a subject of great controversy. For a discussion of constitutional issues relating to this matter, see generally, Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002). This particular Military Commission was set up following the enactment of the Military Commission Act of 2006, Pub L. No. 109-366, 120 Stat. 2600 (2006). Prior to the enactment of this law, several cases challenged earlier attempts by the government to try detainees by ad hoc military tribunals. For example, in *Hamdi v. Rumsfeld*, the Supreme Court held that the government should provide a meaningful opportunity for detainees to contest the factual allegations against them before a neutral decision maker. The respondent in this case was a U.S. citizen. The Court suggested that a military commission duly constituted by an act of Congress would be sufficient. See generally, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Thereafter, Congress enacted the Military Commission Act cited above. Other cases that dealt with related jurisdictional issues include: *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). Particularly relevant to the passage of the Military Commission Act was the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (requiring a congressional act for the establishment of a military commission and suggesting minimum requirements of due process).

was his combatant status.⁹⁰ The Military Commission suspended the charges against him on the grounds that his combatant status merely states “enemy combatant” while the Commission’s jurisdiction only extends to the trial of “unlawful enemy combatants.”⁹¹ Determination of whether he was a lawful or unlawful combatant would essentially decide his fate, because if he had lawful combatant status when he caused the death of Sergeant Speer, he would be immune from prosecution.⁹² The following quote from Professor Dinstein’s book on the conduct of hostilities properly explains the essence of this assertion:

90. See White, *supra* note 87.

91. *Id.* The usage of the terms “enemy combatant” and “unlawful enemy combatant” has recently been a source of some dispute primarily because of their inconsistent usage in the past in domestic and international jurisprudence. Nowhere is the term “enemy combatant” defined. The term first appeared in the U.S. domestic case of *Ex parte Quirin*, 317 U.S. 1 (1942). For a discussion of the history of this case, see Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59 (1980). *Quirin* is a World War II case. In this case, eight German-born men were apprehended while attempting to sabotage installations in the U.S. and brought before a military commission. The Court held that their trial by a military commission was lawful. See *Quirin*, 317 U.S. at 45. The Court had to distinguish this World War II decision from its Civil War decision of *Ex parte Milligan*, 71 U.S. 2 (1866). In *Milligan*, the Court held that the use of military tribunals is not appropriate where the courts are open and their processes unobstructed. More particularly, the Court stated:

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.” *Id.* at 80-81.

The *Quirin* court distinguished this ruling. The major point of distinction that the Court made was that in *Quirin*, the defendants were “enemy combatants,” while in *Milligan*, they were U.S. citizens who were alleged to have committed military-related crimes in peacetime. It is, however, clear from the reading of the *Quirin* opinion that the Court used the term “enemy combatants” to mean “unlawful combatants” because it characterized the defendants as not wearing uniforms, and secretly passing across enemy lines in a time of war. See *Quirin*, 317 U.S. at 31. Subsequent cases did not elaborate the usage of terminologies in *Quirin*. As such, the usage of the terminologies became a subject of dispute following the commencement of the current terrorism-related war in 2001. To clarify the uncertainty relating to the usage of terms, the Military Commission Act of 2006 used the term “unlawful enemy combatant” and defined it as one who is not a “lawful enemy combatant.” See Military Commission Act of 2006, *supra* note 89. The issue in the pending Omar Khadr case, which the Military Commission suspended, centered exactly on the designation of the individual as an “enemy combatant” as opposed to an “unlawful enemy combatant” by the military’s status review tribunals. The Commission deemed this distinction important because the Act limits the Commission’s jurisdiction to the trial of “unlawful combatants” and the defendant was not so designated by the military. See White, *supra* note 87, at 2.

92. See White, *supra* note 87, at 2.

At bottom, warfare by its very nature consist of a series of acts of violence (like homicide, assault, battery and arson) ordinarily penalized by the criminal codes of all countries. When a combatant, John Doe, holds a rifle aims it at Richard Roe (a soldier belonging to the enemy's armed forces) with the intent to kill, pulls the trigger, and causes Richard Roe's death, what we have is a premeditated homicide fitting the definition of murder in virtually all domestic penal codes. If, upon being captured by the enemy, John Doe is not prosecuted for murder, this is due to one reason only. LOIAC [Law of International Armed Conflict, a body of International Humanitarian Law] provides John Doe with a legal shield, protecting him from trial and punishment, by conferring upon him the status of a prisoner of war. If John Doe acts beyond the pale of a lawful combatancy, LOIAC removes the protective shield. Thereby, it subjects John Doe to the full rigour of the enemy's domestic legal system, and the ordinary penal sanctions provided by that law will become applicable to him.⁹³

That is precisely why the Military Commission in the aforementioned Omar Khadr case suspended the trial – so that the Commission could first determine Khadr's legal status.

As indicated above, the most fundamental distinction that IHL makes is between combatants and non-combatants. This distinction essentially defines the legal status of all parties involved. It generally provides for their rights and responsibilities.⁹⁴ As a preliminary matter, it is important to note the distinction between primary and secondary statuses that IHL assigns to persons involved in situations of warfare. A primary status is a status that the particular individual possesses as a matter of his or her assignment by his or her state as a combatant or a non-combatant.⁹⁵ A secondary status is a status that arises out of the primary status but attaches as a result of a change in circumstances.⁹⁶ For example, a person with a primary combatant status would acquire a prisoner of war status in a case of capture by the enemy state.⁹⁷ The prisoner of war status can then be considered a secondary status that emanates from the primary status of being a lawful combatant. With this noted, the following sections discuss the legal status of persons involved in warfare in different capacities.

C. Combatants and Non-combatants / Civilians

The general premise is contained in article 3 of the Hague Regulations. It provides that “[t]he armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a

93. DINSTEIN, *supra* note 7, at 31.

94. See Knut Ipsen, *Combatants and Non-Combatants*, in FLECK, *supra* note 5, at 65.

95. *Id.*

96. *Id.*

97. *Id.*

right to be treated as prisoners of war.”⁹⁸ Article 43 of Protocol I redefines the same principle and provides more elaborate guidance. It states:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.⁹⁹

This definition articulates two fundamental principles. The first principle requires a chain of command and subordination as necessary elements. Mainly states,¹⁰⁰ as subjects of international law, may lawfully raise and deploy armed forces as their agents in their international relations.¹⁰¹ The second important principle contained in this provision is that “non-combatants” may also be considered as constituting the armed forces of a state.¹⁰² Members of the armed forces that are classified as non-combatants are not authorized to take part in

98. Laws and Customs of War on Land (Hague II), art. 43, July 29, 1899, 32 Stat. 1803, T.S. 403 [hereinafter Hague II], reprinted in ROBERTS, DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 73-84. Article 1 of the Hague II provides for the qualifications of belligerents. It states:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1. To be commanded by a person responsible for his subordinates; 2. To have a fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ‘army’.

Id. at art. 1.

99. Additional Protocol I, *supra* note 3, art. 43.

100. The application of IHL does not depend on the recognition of the government of the state in question by the enemy. For example, Geneva Convention III makes it clear that armed forces of a government that is not recognized by the enemy state must be accorded prisoner of war status provided all the requirements of lawful combatancy are met. See Geneva Convention III, *supra* note 3, art. 4(A)(3). See also Additional Protocol I, *supra* note 3, art. 44. It is also important to note that this provision may also apply to non-state actors as long as they have a recognizable chain of command and discipline and meet the remaining requirements discussed more fully below.

101. See Knut Ipsen, *Combatants and Non-Combatants*, in FLECK, *supra* note 5, at 66.

102. *Id.*

armed hostilities or combat activities.¹⁰³ This category usually includes medical and religious personnel.¹⁰⁴ Summarizing these principles, Professor Ipsen notes:

This means that only a party to a conflict which is a subject of international law can have armed forces whose members are combatants. This reflects the basic relation in international law between the state (as a subject of international law), and its armed forces (as its organ), and the members of armed forces (as combatants).¹⁰⁵

Elaborating the principle further, Professor Ipsen notes that article 3 of Protocol I makes it clear that as a matter of international legal definition, if a state maintains armed forces, members of the armed forces would *ipso facto* acquire combatant status.¹⁰⁶ As such, they would have the legal authority to directly take part in hostilities.¹⁰⁷ He further notes that while the express exception is medical and religious personnel, a state may also designate, by an internal act, other members of the armed forces to be non-combatants.¹⁰⁸ By so arguing, he refutes an opposing argument, which suggests that a state possesses a broad authority to classify members of its armed forces as combatants and non-combatants.¹⁰⁹ The plain reading of the principle enshrined under article 3 paragraph 2 of Protocol I clearly supports Professor Ipsen's contention that all members of the armed forces of a state, except medical and religious personnel, are as a matter of principle presumed to be combatants.¹¹⁰ However, a state may, by an internal act, designate some of such members as non-combatants.¹¹¹ "[R]educed to a concise formula: a member of the armed forces is a combatant by nature; the status of non-combatant can only be granted to a member of the armed forces by an internal constitutive legal act."¹¹²

It follows that persons possessing combatant status are immune from prosecution for any lawful combat activity, which may include fighting, killing, and causing destruction within the legal limits.¹¹³ They will also be entitled to prisoner of war status if captured by the enemy.¹¹⁴ However, if persons who do not possess combatant status take part in hostilities and cause the same type of injury and damage as combatants, they are considered unlawful combatants and are punishable as criminals.¹¹⁵ Non-combatants or civilians¹¹⁶ who do not "take a direct part in hostilities"¹¹⁷ are, however, entitled to protection.¹¹⁸

103. *Id.*

104. *Id.*

105. *Id.*

106. See Ipsen, *supra* note 5, at 67-68.

107. *Id.* at 68.

108. See *id.* at 66.

109. *Id.*

110. See Additional Protocol I, *supra* note 3, art. 43, para. 2.

111. See Ipsen, *supra* note 5, at 68.

112. *Id.*

113. *Id.* at 68.

114. *Id.*

115. *Id.*

116. Additional Protocol I, defines a civilian as:

The primary objective of this distinction is to ensure that armed hostilities are conducted only between disciplined armed forces of states, which presumably respect the laws and customs of warfare.¹¹⁹ Equally important is the fundamental principle that seeks to identify civilians for protection. The lack of identification of civilians in combat activities vitiates two fundamental assumptions of humanitarian law. First of all, the identification is important because without identification they can never be protected. Secondly, combatants who pose as civilians mislead the enemy and take inappropriate advantage. For these reasons identification remains extremely crucial.¹²⁰ For example, combatants may hide among bushes to mislead the enemy but not among civilians for the same purpose.¹²¹ If they do so, they lose their privileges as combatants and may be prosecuted for whatever conduct they perform and injury they make possible.¹²² That is precisely why the law imposes punishment when those who are supposed to be protected as civilians take part in hostilities or commit "acts harmful to the enemy."¹²³ In fact, combatants are required to identify themselves as far as possible by carrying arms openly, wearing uniforms, and carrying distinctive emblems.¹²⁴ Although the practicability of all of these requirements may be problematic, they make the importance attached to the identification process clear.

Although the principle seems straightforward, the identification of persons who have a combatant status and those who take part in hostilities without having such status may be problematic. The appropriate legal test is contained in article 51, paragraph 3 of Protocol I. It states that "[c]ivilians shall enjoy the protection afforded by this Section, *unless and for such time as they take a direct part in hostilities.*"¹²⁵ As soon as civilians take part in hostilities, not only are they not

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. 2. The civilian population comprises all persons who are civilians. 3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Additional Protocol I, *supra* note 3, art. 50.

117. Additional Protocol I, *supra* note 3, art 51(3).

118. The protection of civilians during armed conflict is perhaps the most fundamental legal principle of IHL. As a matter of fact, the whole of Geneva Convention IV is dedicated to the protection of civilians. *See also* Additional Protocol I, *supra* note 3, at arts. 50-51.

119. *See* DINSTEIN, *supra* note 7, at 27.

120. *Id.*

121. *See* Denise Bindschedler-Robert, *A Reconsideration of the Law of Armed Conflict, The Law of Armed Conflict: Report of the Conference on Contemporary Problems of the Law of Armed Conflicts*, 1969 1, 43 (1971), *cited in* DINSTEIN, *supra* note 7, at 29.

122. *See* DINSTEIN, *supra* note 7, at 29.

123. *See, e.g.*, Additional Protocol I, *supra* note 3, art. 13 (providing that medical personnel who engage in acts that are considered harmful to the enemy could lose their protection as civilians).

124. *See, e.g.*, Geneva Convention III, *supra* note 3, art. 4(A); *see also* Additional Protocol I, *supra* note 3, art. 44. For a comprehensive discussion of all the requirements of lawful combatancy, *see* DINSTEIN, *supra* note 7, at 33-47.

125. Additional Protocol I, *supra* note 3, art. 51(3) (emphasis added). Although this provision

entitled to protection as civilians, but they may also be subjected to prosecution as unlawful combatants.¹²⁶ As indicated above, the determination of direct involvement in hostilities could be very difficult. Nowhere is this standard defined. For example, would a civilian truck driver who delivers a supply of ammunition to combatants be considered to have taken a direct part in hostilities and lose his civilian status? What if the delivery was foodstuff? The ICRC Model Manual answers the former in the affirmative but the latter in the negative.¹²⁷ How about a civilian who collects intelligence in enemy occupied territories? What if she does the same work while sitting in an office thousands of miles away from the place of hostilities? The ICRC Model Manual again answers the former in the affirmative but the latter in the negative.¹²⁸ Be this as it may, however, the difficulty of the application of this standard cannot be over stated. In fact, as of the writing of this article, the ICRC is struggling to define and elaborate the direct participation standard.¹²⁹

Professor Dinstein notes that because nobody is born a combatant, combatants may become non-combatants and vice versa.¹³⁰ He cautions, however, that a constant shift in status may create serious problems.¹³¹ In line with this, he says “one cannot fight the enemy and remain a civilian.”¹³² To support this conclusion he cites to the Paris Declaration of 1856, one of the very first modern codifications of laws and customs of warfare in the sea. The very first article of this Declaration provides: “Privateering is, and remains, abolished.”¹³³ Privateers were organized groups who attacked enemy merchant vessels upon the official request by the governments of belligerent states.¹³⁴ The law of warfare on land subsequently proscribed the same types of conduct by agents who paralleled the privateers of the maritime world.¹³⁵

contains perhaps the clearest expression of this principle, it is derived from Common Article 3 of the Geneva Conventions and it now appears in various provisions.

126. International Committee of the Red Cross, Official Statement: The Relevance of IHL in the Context of Terrorism, <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705>.

127. See DINSTEIN, *supra* note 7, at 27-28 (citing A.P.V. Rogers & P. Malherbe, *Model Manual on the Law of Armed Conflict*, 29 (ICRC, 1999)).

128. *Id.*

129. The ICRC has recently released a detailed interpretive guide on the notion of direct participation on hostilities. The report is guide is available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-ihl-article-020609/\\$File/direct-participation-guidance-2009-ICRC.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-ihl-article-020609/$File/direct-participation-guidance-2009-ICRC.pdf). Since the specific meaning of this notion is outside of the scope of this article, no attempt is made to discuss the contents of the guide. It must, however, be emphasized that this guide is very useful in drawing the lines between the permissible and impermissible involvements of private military contractors.

130. DINSTEIN, *supra* note 7, at 28.

131. *Id.*

132. See *id.* at 27-28 (citing A.P.V. Rogers & P. Malherbe, *Model Manual on the Law of Armed Conflict*, 29 (ICRC, 1999)).

133. Paris Declaration Respecting Maritime Law, 1856, Laws of Armed Conflicts 787, 788, *cited in* DINSTEIN, *supra* note 7, at 28.

134. *Id.* They are sometimes called corsairs.

135. *Id.*

The other two important factors included in the definition of armed forces are the existence of a chain of command and internal discipline.¹³⁶ The chain of command and discipline requirements are necessary because of the state responsibility attached to the conduct of organs operating at the behest of the state, which is a subject of international law.¹³⁷ The law gives a state some flexibility as to who it may incorporate into its armed forces, including militia and volunteer corps.¹³⁸ However, it also requires the state to maintain a chain of command and ensure discipline.¹³⁹ In other words, it requires the state to ensure respect for IHL. The failure by any organ associated with the government to observe rules of IHL could potentially give rise to international legal responsibility for the state.¹⁴⁰ That is another important reason why states must be certain of the status of any entities with which they engage in any type of warfare-related duties. They should particularly be careful in involving forces outside their military's chain of command and not subject to their discipline. The last part of this section will be discussed more fully in Part IV below.

D. Non-combatants Accompanying the Armed Forces

Non-combatants may lawfully accompany armed forces and are entitled to civilian status as long as they refrain from combat activities.¹⁴¹ Their primary status is civilian.¹⁴² A near exhaustive list of non-combatants who are entitled to civilian status is contained in article 4A(4) of Geneva Convention III. It accords the following civilians prisoner of war status: "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 the armed forces."¹⁴³ This category also includes "[m]embers of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civilian aircraft of the Parties to the conflict."¹⁴⁴

The Convention also requires that such persons obtain authorization from the armed forces which they accompany, and carry an identity card that mimics a model that the Convention provides.¹⁴⁵ Identification and ascertainment of all parties involved in conflict situations is so important that the Convention provides a model identity card for state parties to issue to civilians that accompany their armed forces.¹⁴⁶ The card, which is reproduced below, specifically asks parties to complete the following statement: "Accompanying the armed forces as" The answer must be specific. As is seen below, it also requires the identification of the

136. Additional Protocol I, *supra* note 3, art. 43(1).

137. See Knut Ipsen, *Combatants and Non-Combatants*, in FLECK, *supra* note 5, at 70-71.

138. Additional Protocol I, *supra* note 3, at art 43.

139. *Id.*

140. See Knut Ipsen, *Combatants and Non-Combatants*, in FLECK, *supra* note 5 *supra* note 5, at 71.

141. See, e.g., Additional Protocol I, *supra* note 3, art. 13.

142. See Knut Ipsen, *Combatants and Non-Combatants*, in FLECK, *supra* note 5, at 95.

143. Geneva Convention III, *supra* note 3, art. 4(A)(4).

144. *Id.* at art. 4(A)(5).

145. *Id.*

146. See Geneva Convention III, *supra* note 3, Annex IV.

issuing authority. All persons who accompany the armed forces as non-combatants must carry this identification card.¹⁴⁷ The card serves as evidence of authorization to perform whatever civilian duties that the person carrying the card performs. Most importantly, if a civilian falls in the hands of the enemy, it would serve as evidence of entitlement to prisoner of war status.¹⁴⁸

ANNEX IV
A. IDENTITY CARD
(see Article 4)

NOTICE This identity card is issued to persons who accompany the armed forces of a party to the conflict, but are not part of them. The card must be carried at all times by the person to whom it is issued. If the bearer is taken prisoner, he shall at once hand the card to the detaining authority, to assist in his identification.		Fingerprints (optional) (Left forefinger) (Right forefinger)		Any other mark of identification
Official seal	Blood type	Religion		
Sex	Eyes	Weight	Height	
<div>Photograph of the bearer</div> <div>(Name of the country and military authority issuing this card)</div> <div>IDENTITY CARD</div> <div>FOR A PERSON WHO ACCOMPANIES THE ARMED FORCES</div> <div>Name _____</div> <div>First names _____</div> <div>Date and place of birth _____</div> <div>Accompanies the Armed Forces as _____</div> <div>Date of issue _____</div> <div>Signature of bearer _____</div>				

Remarks. — This card should be made out for preference in two or three languages, one of which is in international use. Actual size of the card: 13 by 10 centimetres. It should be folded along the dotted line.

Civilian status has significant benefits. Persons having a status of “civilian accompanying the armed forces,” and identified as such could be entitled to dual protection. Firstly, they cannot be targeted by the enemy. Secondly, they are

147. See Geneva Convention III, *supra* note 3, art 4(A)(4); see also the “Notice” section of the card reproduced above.
148. See Geneva Convention III, *supra* note 3, art. 4(A)(4).
149. Geneva Convention III, *supra* note 3, Annex IV, sample available at <http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument> (last visited June 6, 2007).

entitled to prisoner of war status if they fall into the hands of enemy forces. The two protections are discussed in turn below.

Article 57 of Additional Protocol I articulates what could be considered one of the most fundamental principles of IHL. The essence of this provision is the protection of civilians. It states in part: "Those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection."¹⁵⁰ The same provision goes on stating that persons who plan an attack must "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."¹⁵¹ It further provides that "effective advance warning shall be given of attacks which may affect the civilian population, unless the circumstances do not permit."¹⁵² And of course, what this essentially requires is the reasonable balancing of the interests of military advantage and the extent of collateral damages.¹⁵³ It is important to note that by accompanying the armed forces, civilians assume the risk of becoming collateral victims. Such victimization may not necessarily be a result of the enemy's unlawful conduct if the military advantage it obtains by including civilians in the attack outweighs the civilian injury caused by the attack.¹⁵⁴

The second important protection that civilians accompanying the armed forces get is a prisoner of war status if they fall into the hands of the enemy. As indicated above, Geneva Convention III specifically accords civilians who accompany the armed forces, and are properly identified as such, prisoner of war status.¹⁵⁵ Prisoner of war status is extremely beneficial not only because persons having such status must be repatriated to their country as soon as hostilities cease,¹⁵⁶ but also because it entitles the prisoner to several protections while in captivity.¹⁵⁷

In the case of combatants, as discussed in Part II above, it would serve as a shield from prosecution for death, injury, and damage they might have caused

150. See Additional Protocol I, *supra* note 3, art. 57(2)(a)(i).

151. *Id.* art. 57(2)(a)(iii).

152. *Id.* art. 57(2)(c).

153. See, e.g., *id.* art. 57(2)(b)

[A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

154. See *id.*

155. See Geneva Convention III, *supra* note 3, art. 4(A).

156. See also Geneva Convention III, *supra* note 3, arts. 109-17 (providing for circumstances whereby repatriation should occur prior to the conclusion of hostilities). See *id.* arts. 118-19.

157. Protection begins from the time of captivity, see, e.g., Geneva Convention III, *supra* note 3, art. 17-20. For protection during internment, see *id.* § II.

during combat.¹⁵⁸ What is extremely important to note here is that if civilians conduct themselves outside their civilian duties and are suspected of combat behavior, the repercussions could be extremely serious. Not only would they lose their protection as civilians, but they would also lose prisoner of war status and may be prosecuted for war crimes and other related forms of criminal offenses, which they could have avoided if they had a combatant status. That is precisely the reason why there should be no room for lack of identification of the exact status of persons involved in any capacity in situations of hostility.

The provisions of Additional Protocol I relating to the protection of medical personnel demonstrate the link between legal status and the treatment the status-holder must receive.

Article 12 provides that medical personnel must be protected at all times and must not be made targets of attack;¹⁵⁹ however, this provision conditions the protection on numerous specific grounds. These grounds include: (1) the given civilian medical unit must “belong to one of the Parties to the conflict”¹⁶⁰ and (2) they must be “recognized and authorized by the competent authority of one of the Parties to the conflict”¹⁶¹ or otherwise be authorized by Parties permitted by the Protocol and Geneva Convention I.¹⁶² Moreover, the parties are required to identify the locations of their medical units so that they may not be targeted by the enemy.¹⁶³ Of course, shielding military objectives from attack under the pretext of medical units is strictly prohibited.¹⁶⁴

Most importantly, the Protocol provides for conditions for the discontinuance of protection to civilian medical units. It provides that protection may cease if they are “used to commit, outside their humanitarian function, acts harmful to the enemy.”¹⁶⁵ The Protocol does not define what constitutes “acts harmful to the enemy;” however, it contains a list of acts that are not considered harmful to the enemy.¹⁶⁶ The opposite could easily be extrapolated from the list.

The following are not considered to be harmful to the enemy:

- a. that the personnel of the unit are equipped with light individual weapons for their own defense or for that of the wounded and sick in their charge;
- b. that the unit is guarded by a picket or by sentries or by an escort;

158. See DINSTEIN, *supra* note 7, at 31.

159. See Additional Protocol I, *supra* note 3, art. 12(1).

160. See *id.* art. 12(2)(a).

161. See *id.* art. 12(2)(b).

162. Other parties such as neutral powers and humanitarian agencies may deploy medical workers. See *id.* art. 12(2)(c) and the provisions cross-referenced therein. This is a prime demonstration of the strict regulation of who may do what lawfully.

163. See *id.* art. 12(3).

164. *Id.* art. 12(4).

165. *Id.* art. 13(1).

166. *Id.* art. 13(2).

- c. that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
- d. that the members of the armed forces or other combatants are in the unit for medical reasons.¹⁶⁷

Presumably, the same principle applies to all other categories of civilians accompanying the armed forces. The Protocol provides for a related concept that would disqualify all civilians from the protection accorded to civilians. It states: “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”¹⁶⁸

A cumulative reading of these provisions suggests that there is, indeed, a red line that must not be crossed by anyone claiming civilian status. Although factual disputes as to the applicability of the standard are inevitable, IHL seems to have drawn the line at the performance of any action that could reasonably be interpreted as taking a direct part in hostilities. Crossing that line would not only wipe out all the protections that would otherwise be available to civilians, but also expose them to criminal prosecution.¹⁶⁹ This subject will be discussed in more detail in relation to civilian military contractors in Part IV below.

E. Unlawful Per Se

Towards the end of the legality spectrum are categories that are unlawful per se. Persons classified in these categories are presumed unlawful combatants, and as such are not entitled to any of the benefits of IHL, and may be prosecuted for their conduct.¹⁷⁰ The most notable categories are spies and mercenaries. These categories are discussed in turn below.

1. Spies

Although the definition of the term spy is contained in earlier legal instruments, including the Brussels Declaration of 1874,¹⁷¹ the legal definition of most current importance is contained in articles 29 – 31 of The Hague Regulations and article 46 of Additional Protocol I.

The Hague Regulations provide that a person is considered a spy “when, acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operation of a belligerent, with the intent of communicating it to the hostile party.”¹⁷² The most important factor that makes a person a spy is not the gathering of the information and communication of the same to the enemy, but the manner of the collection. For example, if the same information is obtained without false pretences while wearing a military uniform that would identify the person as belonging to the armed forces of the opposing party, that person is not considered a spy.

167. *Id.*

168. *Id.* art. 51(3).

169. See DINSTEIN, *supra* note 7, at 29-30.

170. *Id.* at 31.

171. See The Brussels Declaration, art. 19, cited in Knut Ipsen, *Combatants and Non-Combatants*, in FLECK, *supra* note 5, at 111.

172. Hague II, *supra* note 98, art. 29.

This principle is also contained in article 46 of Additional Protocol I. It states:

A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.¹⁷³

If the same soldier wears a disguise, penetrates into the enemy territory, and collects information, he would be considered a spy.¹⁷⁴ The same applies to civilians accompanying the armed forces.¹⁷⁵ This classification is important because spies are not only denied prisoner of war status but are also considered criminals and may be prosecuted and punished for their espionage and related crimes.¹⁷⁶

This is yet another clear demonstration of the importance of the identification of the exact status of any individuals involved and affected by situations of armed conflict. Of course, with the advancement of sophisticated military surveillance equipment, the workability of this traditional definition of a spy might be problematic. This issue is discussed in some detail in relation to the military intelligence gathering roles of private military contractors in Part IV below.

2. Mercenaries

The most important unlawful per se category is perhaps mercenaries. Mercenaries are unlawful combatants who are denied combatant and prisoner of war status.¹⁷⁷ The definition of the term mercenary of most current importance is contained in article 47 of Additional Protocol I. It provides that:

A mercenary is a 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 hostilities;

173. Additional Protocol I, *supra* note 3, art. 46(2). The unlawfulness of wearing the enemy's uniform or other forms of clothing for purposes of disguise in military operations has always been a subject of controversy. For a brief discussion of this controversy and the compromise that the existing rules make, see Knut Ipsen, *Combatants and Non-Combatants*, in FLECK, *supra* note 5, at 108 ("It shall be lawful for combatants recognizable as such (by their uniforms, insignia etc.) to participate in raids, acts of sabotage, and other attacks carried out by special forces in the enemy's hinterland or in forward areas. Combatants who commit such acts wearing plain clothes or the uniform of the adversary are liable to be punished. They shall nevertheless have the right to a regular judicial procedure.")

174. See Hague II, *supra* note 98, art. 29. According to Hague II, those who are not considered spies include:

Soldiers and civilians, carrying out their mission openly, entrusted with the delivery of dispatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying dispatches and, generally, of maintaining communications between the different parts of an army or a territory. *Id.*

175. See Knut Ipsen, *Combatants and Noncombatants*, in FLECK, *supra* note 5, at 99.

176. See Hague II, *supra* note 98, arts. 29. See also Additional Protocol I, *supra* note 3, art. 46.

177. See Additional Protocol I, *supra* note 3, art. 47(1) ("A mercenary shall not have a right to be a combatant or a prisoner of war.").

(c) is motivated to take part in the hostilities 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;

(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.¹⁷⁸

Anyone meeting these requirements is considered an unlawful combatant. Mercenaries have always been a disfavored category of fighters. Professor Ipsen suggests that the codification of this particular rule in the Additional Protocol I “can be explained by the crucial and fatal role which mercenaries – especially of European and North American origin – have played in armed conflicts on the African continent.”¹⁷⁹ The exclusion of mercenaries, apart from the practical undesirable roles they have historically played, rests on the fundamental assumption that only disciplined forces of a party to the conflict are authorized to engage in armed conflict with a primary status of lawful combatants. Professor Ipsen neatly summarizes this notion as follows:

First and foremost it is the person belonging to the armed forces of a party to the conflict who has the primary status of combatant. This assignment to an organ constitutes authorization to carry out armed acts causing harm. A simple contract between an individual and a party to the conflict – fighting in exchange for payment – is not sufficient. Thus the rule regarding mercenaries does not amount to an exception but represents a logical consequence of the law: a person who is not a member of the armed forces is not (with the exception of participants in a *levée en masse*) a combatant either.¹⁸⁰

Engaging in harmful conduct for monetary compensation is not authorized and recognized as legitimate conduct under IHL. Persons who meet the above requirements are thus considered to have engaged in criminal enterprise and may be prosecuted for their crimes.¹⁸¹ Commentators note that this is an extremely narrow definition of mercenaries because all six requirements need to be met cumulatively.¹⁸² The definition is so narrow that it promoted a commentator to

178. Additional Protocol I, *supra* note 3, art. 47.

179. See Knut Ipsen, *Combatants and Noncombatants*, in FLECK, *supra* note 5, at 69. (“Because of the prevalence of mercenary activities in post-colonial Africa, in 1972, the Organization of African Unity adopted The African Mercenary Convention.”); OAU Convention for the Elimination of Mercenaries in Africa, *entered into force* Apr. 22, 1985, O.A.U. Doc. CM/433/Rev. L. Annex. 1 (1972). The convention criminalizes different levels of participation in mercenary activities. See, e.g., *id.* art. 1(2). It also creates state responsibility. See, e.g., *id.* art. 5.

180. See Knut Ipsen, *Combatants and Noncombatants*, in FLECK, *supra* note 5, at 69.

181. See, e.g., DINSTEIN, *supra* note 7, at 52.

182. See, e.g., *id.* at 50-52.

suggest “any mercenary who cannot exclude himself from this definition deserves to be shot – and his lawyer with him.”¹⁸³

Perhaps as a result of the narrowness of the definition, in 1989, the United Nations General Assembly adopted an international convention pertaining to mercenaries, which eliminated the active participation requirement of the definition of Protocol I quoted above.¹⁸⁴ This category is discussed in more detail in relation to private military contractors in Part IV below.

F. The Status of Parties in Non-international Armed Conflict

Finally, it is important to note that the same standards by and large apply in non-international armed conflicts. Although advocacy for the application of civilized rules of warfare in civil war situations dates back many centuries,¹⁸⁵ it was not until the mid-twentieth century that international treaties dealing with situations of armed conflict began to provide formal rules applicable in non-international armed conflict.¹⁸⁶ That is not to say that there were not historical instances where customary rules of humanitarian law applied in domestic conflicts. Historically, the principle of recognition of belligerents within a given state often prompted the application of some of the same rules that were applicable in international armed conflict situations.¹⁸⁷ However, a transformative step was taken when Common Article 3 was incorporated into the Geneva Conventions of 1949.¹⁸⁸ That essentially brought conflicts of a non-international nature within the ambit of IHL. Therefore, the same principles discussed in the preceding subsections of Part III now generally apply in non-international armed conflicts.

More important for purposes of this article is the application of some of the same principles for the identification of parties to the conflict. For example, prisoner of war status in an armed conflict, whether it is of an international or non-international nature, is limited to those members of a party to the conflict, which meet the following criteria:

183. See Christopher Weigley, *The Privatization of Violence: New Mercenaries and the State*, 1, available at <http://www.caat.org.uk/publications/government/mercenaries-1999.php> (last visited June 15, 2007) (quoting Geoffrey Best in DAVID SHEARER, PRIVATE ARMIES AND MILITARY INTERVENTION 18 (1998)).

184. See *id.* See also The International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, G.A. Res. 34, at 590, U.N. GAOR, 44th Sess., Supp. No. 43, U.N. Doc. A/44/43 (1989), art. 1 [hereinafter U.N. Convention Against Mercenaries] (omitting the direct participation in hostilities part of the definition of mercenaries under Additional Protocol I, art. 47).

185. Writing in 1758, Vattel, for example, suggested that “it was perfectly clear that the establishment of law of war, those principles of humanity, forbearance, truthfulness, and honor, which we have earlier laid down, should be observed on both sides in a civil war,” ROBERTS & GUELFF, *supra* note 3, at 22 (quoting EMMERICH DE VATTEL, LE DROIT DES GENS: OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS, À LA CONDUITE ET AUX AFFAIRES DE NATIONS ET DES SOUVERAINS 338 (Charles G. Fenwick trans., 1916) (1758)).

186. See ROBERTS & GUELFF, *supra* note 3, at 22.

187. See *id.* at 23.

188. See *id.* at 24; see also the Four Geneva Conventions, *supra* note 3, common art. 3

- 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; and
- d. that of conducting their operations in accordance with the laws and customs of war.¹⁸⁹

As discussed in the previous section, members of the armed forces of a state are ipso facto entitled to combatant status and subsequently prisoner of war status unless of course they try to confuse the enemy. Other members of a party to the conflict should meet all the above requirements cumulatively. This will be discussed more fully in relation to the functions of private military contractors in Part IV below.

IV. PRIVATE MILITARY CONTRACTORS

Part III offered a lengthy discussion of almost all of the possible statuses of individuals and groups under IHL. Some are lawful statuses such as combatants and civilians accompanying them. Others are unlawful statuses such as spies, mercenaries and civilians who engage in combat activities without authorization. Part IV tackles the following question: under which one of the above categories do private military contractors fall? To answer this question and characterize the status of private military contractors under IHL, Part IV discusses the typical and known activities of the private military contractors in a continuum vis-à-vis the various legal statuses discussed above.

A. Definition and Background

On December 11, 2003, BBC World News contained the following report:

A private UK-based military firm says it is looking for an investor to fund an operation to seize indicted former Liberian President Charles Taylor. Mr. Taylor, who has been granted asylum in Nigeria, is wanted by the UN-backed court on war crimes charges. Northbridge Services Group says it has people ready to kidnap Mr. Taylor to claim a \$2m reward allegedly offered by the United States Congress. Washington has said it opposes any violent action to seize Mr. Taylor. "Any potential investors that are interested in going in together in this operation, we would be willing to split the profits," Northbridge Services Group's director Pasquale Dipofi told the BBC's World Today programme.¹⁹⁰

This report is remarkable not only because it is an explicit admission of the privatized use of military force for profit, but also the manner of its reporting makes it seem like any ordinary business transaction.

189. Geneva Convention III, *supra* note 3, art. 4(2).

190. *Military Firm Seeks Taylor Bounty*, BBC NEWS, Dec. 11, 2003, available at <http://news.bbc.co.uk/2/hi/africa/3309203.stm>.

Dr. Peter W. Singer of the Brookings Institute reported that in 1996 he met members of Military Professional Resources Incorporated (MPRI), a Virginia-based private military company, somewhere in Bosnia where the company was conducting training of the Bosnian military.¹⁹¹ He expressed his first impression in the preface of his seminal work, *Corporate Warriors*, in the following terms:

The members of the firm were polite and generally helpful, but the ambiguity between who they were and what they were doing always hung in the air. They were employees of a private company, but were performing tasks inherently military. It just did not settle with the way we tended to understand whether business or warfare.¹⁹²

No authoritative definition of Private Military Firms could be found. Dr. Singer offers a fairly broad definition of these firms as “business organizations that trade in professional services intricately linked to warfare. They are corporate bodies that specialize in the provision of military skills, including combat operations, strategic planning, intelligence, risk assessment, operational support, training and technical skills.”¹⁹³ As a matter of fact, by estimates of the American Bar Association, about 30,000 private contractors now provide various services including security services in Iraq.¹⁹⁴ The following subsections assess the legality of the various functions of these entities vis-à-vis IHL.

B. Functions and Categories

As indicated above, private military contractors undertake a variety of functions. While some of these functions would give them clear lawful status under IHL, some functions would put them in questionable status. Still other functions towards the opposite end of the legality spectrum would put them completely at odds with the law. The following subsections discuss the various functions and possible statuses.

1. Non-combat functions

The continuum begins with purely and uncontrovertibly civilian functions. An excellent demonstration of the various functions performed by private military

191. See *CORPORATE WARRIORS*, *supra* note 23, at vii.

192. *Id.*

193. *Id.* at 8.

194. See Chris Lombardi, *Law Curbs Contractors in Iraq*, 3 A.B.A.J.E-Rep., May 14, 2004, *cited in* Peters, *supra* note 29, at 382 n.59. If reconstruction and oil workers are added, the figure would jump to about 50,000 to 75,000. See Max Boot, Commentary, *The Iraq War's Outsourcing Snafu*, L.A. TIMES, Mar. 31, 2005, at B13 (*cited in id.*). In fact, the New York Times recently reported that up to 126,000 American, Iraqi, and other nationals now work for the U.S. government in Iraq. James Risen, *Back from Iraq, Contractors Face Combat-Related Stress*, N.Y. TIMES, July 5, 2007, at A1. The report also indicated that since the Iraq war began, about 1,000 civilian contractors were killed, and 13,000 of them were injured. *Id.* In fact, they are exposed to the same kinds of danger that military personnel are exposed to, including post traumatic distress disorder after they return home. *Id.* See Steve Fainaru, *Ambush in Iraq Last Fall Left 4 Americans Missing and a String of Questions About Company they Worked for*, WASH. POST, July 29, 2007. One member of the civilian contacts in Iraq described his duties as: “We protect the military. Isn’t that mind-boggling? . . . And I’m taking about escorting soldiers, as well. Isn’t that frightening?” *Id.*

contractors is contained in Lockheed Martin's list of "products" that it offers to customers. The products are listed under thirteen headings: Air Power, Air Traffic & Transportation Management, Distribution Systems, Homeland Security, Information Superiority, Information Technology, Missiles & Missile Defense, Net-Centric Solutions, Space Systems & Technologies, Surveillance, Radar & Fire Control, Technical Support Services, Technology Research, Training & Simulation.¹⁹⁵

One of the subcategories under "Air Power" capability is "combat" capability.¹⁹⁶ Lockheed Martin describes its "combat" capability as follows:

Lockheed Martin's tactical aircraft respond decisively to the evolving and complex demands of modern combat situations. Our aircraft are the most versatile fighters in the world, excelling even in the most demanding of multi-role missions. We have a proven lineage of air power dominance, from the experienced F-16, to the F-22, and F-35 next-generation fighters. These aircraft were born through research and development efforts underscored by a relentless pursuit of new advances in technology and low-cost, innovative manufacturing methods. Through a work ethic dedicated to quality, Lockheed Martin provides unparalleled design, development, production and full systems support of fighter/attack aircraft. For this reason, our fighters dominate the skies of the world, extending strong, enduring international defense partnerships. The next generation of high-performance combat aircraft will continue to push the envelope further - with design concepts that expand the definition of multi-role aircraft and mission flexibility. We develop future technology for implementation today, including stealth capability, precision weapons delivery, battlespace interoperability and systems compatibility. Through these endeavors, Lockheed Martin's fighter aircraft will continue as a dominating force behind national defense and global security.¹⁹⁷

Existing and prospective consumers of these produces include: Air Force, Army, Asia/Pacific, Defense Agencies, Department of Defense, Department of Homeland Security, Greece, India, Italy, Japan, Marine Corps, NASA, Navy, Republic of Korea, Special Operations Command.¹⁹⁸ Although some policy issues may be raised as to the desirability of the involvement of private companies in some of these activities,¹⁹⁹ Lockheed Martin's involvement in the development of

195. Lockheed Martin, Capabilities, *available at* <http://www.lockheedmartin.com/capabilities/> (last visited 5 Feb., 2010).

196. Lockheed Martin, Air Power, *available at* http://www.lockheedmartin.com/capabilities/air_power/index.html (last visited Feb. 5, 2010) [hereinafter Air Power].

197. *Id.*

198. Lockheed Martin, Customers, *available at* <http://www.lockheedmartin.com/customers> (last visited Feb. 5, 2010).

199. In relation to the public-private dilemma, P.W. Singer writes:

The division of the world into public and private spheres is at the center of the long debate over what government's role should be. Ever since the rule by kings

military technology including the advancement of weaponry and the selling of such weaponry to the above listed consumers does not ordinarily trigger the applicability of IHL.²⁰⁰ However, it gets trickier when the provision of such products is accompanied by the provision of services such as training, supply, and maintenance of military equipment in the field. It starts to slowly march into the gray area. The following section discusses such ambiguous functions.

2. Ambiguous functions (intelligence, training, equipment transportation, maintenance, interrogation, base construction, protection of civilians)

Training could be one ambiguous function depending on where and how it is conducted. For example, Lockheed Martin, advertises its training capability as follows:

The customer's need for readiness is our business. Flight crews and maintainers must move from training to the real world without hesitation. To meet this need, Lockheed Martin's end-to-end training solutions provide experience in the live, virtual, and constructive domains. Lockheed Martin offers an integrated approach to delivering total training solutions, creating products that meet specific customer needs. Our flight and maintenance training systems are world leaders in training large, widely dispersed student populations operating diverse fleets of aircraft. Lockheed Martin's proven instructional systems development, systems engineering, and logistics processes are coupled with our corporation's intimate knowledge of current aircraft platforms to ensure a real-world experience in training.²⁰¹

Another well-known civilian military contactor, MPRI, provides the following services: "MPRI personnel supplement Region operations across the entire spectrum of activities to include personnel, training, mobilization, logistics, force protection, airfield operations, transportation operations, food service, ammunition management, engineering, environmental operations and human resources."²⁰²

If a couple of air force military officers from India come to Bethesda, Maryland and receive training as to how to fly and use Lockheed Martin's next generation F-35 and purchase a few of these aircraft and take them with them to India, no recognizable issues of IHL would arise. However, consider the following

was replaced by the bureaucratic state in the seventeenth century, there has been a give-and-take between the public and the private, with the line between the two constantly in flux. In fact, the debate about where this line should fall has been described as one of the "grand dichotomies of western political thought."

CORPORATE WARRIORS, *supra* note 23, at 7.

200. *But see* Richard T. De George, *Non-Combatant Immunity in an Age of High Tech Warfare*, in INTERVENTION, TERRORISM, AND TORTURE, *supra* note 81, at 301-10 (discussing the issue of a possible IHL duty on the part of weapons designers to make weapons smarter with a view to mitigating unnecessary injury and damage).

201. Air Power, *supra* note 196.

202. MPRI, Staff Augmentation, *available at* <http://www.mpri.com/main/recruitingaugmentation.html> (last visited Feb. 5, 2010).

scenario. The training takes place in India close to the Kashmir border. Pakistan shoots down one of the training aircraft and the two states get into a small-scale armed conflict. Assume further that Pakistan captures three occupants of the aircraft that was shot down: two Indian trainees and one Lockheed Martin trainer. Would all of them be considered lawful combatants and as a result entitled to prisoner of war status?

This is not as farfetched as it might sound. Consider the following real story. In 1999, when genocide was looming in Kosovo, NATO forces conducted an air attack against the Milosevic government.²⁰³ These attacks produced thousands of refugees and created humanitarian emergencies.²⁰⁴ Because the involvement of the United States in this conflict was not popular, the administration chose to involve the Texas-based private military contractor Brown & Roots (KBR).²⁰⁵ The company performed the following activities with efficiency: constructed temporary facilities on the ground that housed thousands of displaced persons from Kosovo; ran the supply system for U.S. forces in the area, including transportation of food and other supplies; constructed bases; and maintained vehicles and weaponry.²⁰⁶

Given the circumstances described above, there was a real possibility that Milosevic's forces could have attacked one of the bases and captured some of KBR's personnel while maintaining some of the military equipment or transporting some of the equipment and weaponry. Had this occurred, what would have been their status under IHL? Would they have been entitled to prisoner of war status? Would they have had combatant status or would they have just been persons accompanying the armed forces? Or would they even be considered mercenaries? Because this fact pattern would help demonstrate the ambiguity in the status of these personnel, it is important to test the facts against the rules described in Part III above.

Assume further that some members of the company were armed with weapons for their own protection and used the weapons to kill some members of Milosevic's army before they were captured. The first question that needs to be asked is whether they would be entitled to combatant status. In other words, may they be prosecuted for killing Milosevic's soldiers? As discussed in Part III above, combatant status may only be acquired if the following requirements are cumulatively met: membership to the armed forces of a party to the conflict with identifiable uniforms and emblems, the presence of a chain of command wherein officers are responsible for their subordinates, the existence of internal discipline, and respect for international law relating to warfare.²⁰⁷

203. CORPORATE WARRIORS, *supra* note 23, at 6.

204. *Id.*

205. *Id.* Better known as KBR, it is a leading engineering and construction firm. *See generally* KBR, <http://www.kbr.com/> (last visited June 26, 2007) (describing the KBR "as the largest contractor for the United States Army and a top-ten contractor for the U.S. Department of Defense, it is currently the world's largest defense services provider").

206. *See* CORPORATE WARRIORS, *supra* note 23, at 6.

207. *See* Additional Protocol I, *supra* note 3, art. 43.

The party to the conflict in this case was NATO. All members of the U.S. military would evidently qualify as members of the party to the conflict by virtue of the membership of the U.S. in NATO. Members of KBR were evidently not sworn members of the U.S. military and as such did not qualify as members of the NATO forces, which was one of the only two parties to the conflict; the second being Milosevic's army. If they were not members of a party to the conflict, subject to the chain of command and discipline, then they cannot be considered lawful combatants. The relationship between the firm and the U.S. military is purely contractual. Although the details of the contracts are confidential,²⁰⁸ it is fair to assume that the contract does not require members of the firm to take an oath similar to the one that members of the military take, or otherwise incorporate them as *de jure* members. As will be discussed below, the U.S. had actually negotiated immunity for members of the defense forces as well as contractors operating in Iraq,²⁰⁹ but in the absence of such immunity, they risk exposure to prosecution as unlawful combatants. More particularly because the *lex specialis* in the instant example is IHL, members of KBR may theoretically be prosecuted for killing Milosevic's soldiers. It is important to reemphasize here that killing in combat requires legal authorization. Anyone who kills an enemy soldier without authorization lacks immunity from prosecution.

Could such members of KBR claim the status of civilians or non-combatants accompanying the armed forces and avoid prosecution? To be considered civilians accompanying the armed forces and claim prisoner of war status, they must belong to one of the following categories: medical and religious workers,²¹⁰ civilian members of aircraft crew, war correspondents, supply contractors, or members of labor units.²¹¹ Moreover, persons claiming civilian status must first be authorized to undertake their civilian activities by the party to the conflict and carry an

208. Copies of these kinds of contracts are not publicly available. For a copy of an example of a private military contract outside the U.S., see CORPORATE WARRIORS, note 23, at 245, appendix 2 (providing a copy of the contract between private sector firm, Sandline, and the government of Papua New Guinea). This contract was signed between the now defunct military firm, Sandline International, and the government of Papua New Guinea (PNG). Among the responsibilities undertaken under the contract were to "gather intelligence to support effective deployment and operations; conduct offensive operations in Bougainville in conjunction with PNG . . ." See *id.* at Preamble. The PNG agreed to pay \$36,000,000 for these services. See *id.* at 251, appendix 2, Fees and Payments. Despite allegations of illegality, an international tribunal enforced this contract. See *Sandline Int'l Inc. v. Papua N.G.*, 117 I.L.R. 552 (Arb. Tribunal 1998). For commentary on the nature of the contracts and how they may be used to ensure accountability, see Laura A. Dickinson, *Torture and Contract*, 37 CASE W. RES. J. INT'L L. 267, 273-74 (2006) [hereinafter *Torture and Contract*].

209. See The Coalition Provisional Authority, Order 17 (Revised), Status of the Coalition Provisional Authority, MNF – Iraq, Certain Missions and Personnel in Iraq, Sec. 2, Iraqi Legal Process, available at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf ("Unless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.").

210. See Additional Protocol I, *supra* note 3, art. 43(2). See also Geneva Convention III, *supra* note 3, art. 33.

211. See Geneva Convention III, *supra* note 3, art. 4(A)(4).

identity card similar to the one reproduced in Part III(d) above.²¹² They must properly identify themselves as civilians in that card.²¹³ Whether they could claim immunity as civilians accompanying the armed forces depends not only on their belonging to the above categories but also on whether their activities could be considered as taking direct part in hostilities²¹⁴ or causing harmful acts to the enemy.²¹⁵

Presumably, members of KBR in the instant example could qualify as supply contractors with authorization to function as such in a combat zone. It could also be presumed that they could carry light weapons for their own protection or for the protection of other civilians.²¹⁶ Thus, it is obvious that if they are attacked in the place where they were performing civilian functions, they could use their light weapons to protect themselves. If in doing so they kill enemy soldiers and get captured thereafter, they may be entitled to prisoner of war status and, as such, immunity from prosecution, provided that their conduct does not rise to the level of war crimes.²¹⁷ It may nonetheless be argued that conducting training and maintaining weaponry near combat areas is taking direct part in hostilities which rescinds civilian status under article 51(3) of Additional Protocol I. It could further be argued that even if training and maintenance of weaponry do not qualify as taking direct part in hostilities depending on where and when they take place, these activities could possibly be considered as acts that cause harm to the enemy under the rationale of article 13 of Additional Protocol I.

The two other categories that could raise some ambiguities are mercenaries and spies. In the above example, would members of KBR qualify as mercenaries? Mercenary is a carefully defined legal term. As discussed in Part III(e)(ii) above, the essential requirements include special recruitment for combat, taking a direct part in hostilities for excessive private gain, and alienage.²¹⁸ Under the definition of a mercenary, all of the essential requirements must be met cumulatively.²¹⁹ In other words, if any one of the above requirements is not present, the actors are not considered mercenaries. In the above example, it cannot be said that members of KBR were specifically recruited for combat. As such, they cannot be considered mercenaries. Whether they meet the remaining requirements could be disputed. For example, more facts would be needed to determine the excess in payment or the nationality of each involved individual member of the team. The requirement of whether they took a direct part in hostilities may also be disputed. Although

212. *See id.* 4(A)(4).

213. *See supra* Model Identity Card, reproduced in Part III(D).

214. *See* Additional Protocol I, *supra* note 3, art. 51(3).

215. *See id.* at art. 13.

216. *See id.* at art. 13(2)(a). Although this provision deals with medical personnel, it may reasonably be assumed that the same standards would apply to other civilian contractors.

217. This argument is based on the rules that regulate the situations of medical personnel who are inherently civilian. It appears, however, that the same principles would apply to other civilians. *See* Additional Protocol I, *supra* note 3, art. 13(1)-(2).

218. *See* Additional Protocol, *supra* note 3, art. 47.

219. *See id.*

they do not meet the requirements of mercenary, the ambiguity in their status remains.

The last category that needs to be discussed in this subsection is the spy category. Because intelligence gathering is an important function of private military contractors, it is necessary to understand their status in this regard. For example, Lockheed Martin advertises its intelligence capabilities as follows:

From the depths of the oceans to the far reaches of space, we serve the Department of Defense and the intelligence community with leading-edge intelligence, surveillance and reconnaissance (ISR) systems for maritime, terrestrial, airborne, and space missions. Lockheed Martin is a leader in satellite imagery and information systems, air surveillance, radar, geospatial imagery, mission management, and ground system operations. Our focus is on providing joint and multi-agency organizations with valuable, effective ISR data for a diverse set of missions ranging from precision targeting to geographic mapping.²²⁰

Nothing makes the performance of these activities illegal, even in times of war. However, if the information is gathered under false pretenses, the intelligence gathering would become espionage activity.²²¹ The personnel engaged in the activity would be considered spies and as such unlawful per se. As a matter of law, not even members of the armed forces or combatants are immune from such designation, as long as they collect the intelligence under false pretense.²²²

The traditional way of collecting information under false pretense is usually wearing the enemy's uniforms and infiltrating into enemy held territories.²²³ With the advancement of technology, however, intelligence gathering could be done by civilians sitting in their offices thousands of miles away from the frontlines. For example, a civilian contractor sitting in his office in Alexandria, Virginia could hack into the software of an enemy anywhere and obtain information for the U.S. military. If the hacker obtains the information under a false pretense, he would qualify as a spy.²²⁴ If a "cyber-soldier"²²⁵ does the same, he or she would likewise be considered a spy.²²⁶ Such designation could only have significance if the said

220. See Lockheed Martin, Intelligence, Surveillance & Reconnaissance, http://www.lockheedmartin.com/capabilities/information_superiority/ (last visited June 18, 2007).

221. See Hague II, *supra* note 98, at arts. 29-31; see also Additional Protocol I, *supra* note 3, art. 46.

222. See Hague II, *supra* note 98, at arts. 29-31; Additional Protocol I, *supra* note 3, art. 46; see also *supra* discussion of spies under Part III(E)(1).

223. See, e.g., Additional Protocol I, *supra* note 3, art. 46(2) (providing: "A member of the armed forces of a Party to the conflict who, on behalf of that Party and in the territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.").

224. See Hague II, *supra* note 98, art. 29.

225. This term is borrowed from Professor De George. He provides a brief description of and commentary on computer hacking from the point of view of situations of warfare. See Richard T. De George, *Non-Combatant Immunity in an Age of High Tech Warfare*, in INTERVENTION, TERRORISM, AND TORTURE 301, 310-13 (Steven P. Lee ed., 2006).

226. See Hague II, *supra* note 98, art. 29 ("Soldiers not wearing a disguise who have penetrated

individuals, the civilian or the soldier, fall into the hands of the enemy anytime thereafter. If that happens, however, the law does not treat the two individuals the same way.²²⁷ While the civilian may be prosecuted for the crime of espionage he committed in the past, the soldier is immune from such prosecution as long as he remains a member of the armed forces or rejoins the armed forces after engaging in the said activities of espionage. In other words, a soldier can be prosecuted as a spy only if he is caught in the act or before rejoining his unit.²²⁸ To the contrary, once a civilian is a spy, he is always a spy, and may be prosecuted anytime for any acts of espionage committed anytime regardless of his current status.²²⁹

Because of the foregoing, intelligence gathering is also an area of ambiguity that requires further reflection. Although technology based intelligence gathering would not ordinarily expose civilian contractors to danger, situations where such exposure could ensue is foreseeable. One of the KBR employees captured by Milosevic's army in the example discussed above could easily be an intelligence analyst who had engaged in cyber intelligence gathering.

The status issue becomes even more complicated when the private military contractors get involved to protect civilians from irregular forces in situations where there is no conventional armed conflict. This is similar to the situation in Iraq. For example, some 800 armed members of one of the largest U.S. based security firms, Blackwater, currently guard American diplomats in Iraq.²³⁰ The State Department rules allow these contractors to use deadly force if the civilians they are protecting face "imminent and grave danger."²³¹

Because of the obvious difficulty in identifying the exact course of legal action that needs to be taken in cases where such a standard is not respected, under the seemingly no war, no peace situations, policy makers still remain perplexed. To address the issues of the gap in accountability under these circumstances,

into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies.").

227. *Id.* at arts. 29-31.

228. *Id.*

229. See Additional Protocol I, *supra* note 3, art. 46(4):

A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

It is important to note that the Protocol clearly limits such privilege to members of armed forces. Compare Hague II, *supra* note 98, art. 29 ("A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.").

230. See Eric Schmitt & Thom Shanker, *Pentagon Sees Authority Over Contractors*, N.Y. TIMES, Oct. 17, 2007, www.nytimes.com/2007/10/17/washington/17blackwater.html [hereinafter Schmitt & Shanker]. Blackwater was a subject of great media coverage following the fatal shooting of sixteen Iraqi civilians in Bagdad on September 16, 2007. The company has obtained \$1 billion in U.S. government security contracts since 2001. See Steve Fainaru, *How Blackwater Sniper Fire Felled 3 Iraqi Guards*, WASH. POST, Nov. 8, 2007, at A01 [hereinafter Fainaru].

231. Fainaru, *supra* note 230, at A01. As of this report, it had 867 security guards in Iraq. *Id.*

understandably, various options are being proposed and considered, although as of the writing of this article no concrete measures have been taken. One of the options that is being considered is military supervision of contractors.²³² However, such a proposal cannot address the underlying issue of the applicable law in holding violators accountable.

The legal uncertainty indeed is the following. As discussed above, U.S. military, as well as civilian contractors, are immune from the Iraqi legal process. Moreover, the applicability of the Uniform Code of Military Justice is doubtful because the civilian contractors mostly provide security service to a civilian agency, such as the State Department, much like a security guard provides services for a museum in Atlanta or New York.²³³ Of course, trying civilians in military courts also has its own problems.²³⁴ The best option seems to be the prosecution of civilian contractors under the Military Extraterritorial Jurisdiction Act, which permits the prosecution of civilians accompanying the armed forces.²³⁵ Although this seems to be a better option, it also does not answer the main question this article raises - do military contractors qualify as civilians under IHL? Accordingly, therefore, the ambiguity of the statute remains to be the most serious legal challenge.

3. Combat Functions

The involvement of private military contractors in actual combat is not a rhetorical scenario. In recent decades, they have been involved in conventional inter-state as well as unconventional domestic warfare.²³⁶ This subsection provides examples of real stories where military contractors have played a significant role in conventional and non-conventional warfare and assesses contractors' status in light of IHL.

A devastating war commenced between Eritrea and Ethiopia in May 1998, along the western boundary between the two countries.²³⁷ Within a short time the conventional armed hostilities engulfed almost the entire border between the two

232. See John M. Broder & David Johnston, *U.S. Military Will Supervise Iraq Security Firms*, N.Y. TIMES, Oct. 31, 2007, www.nytimes.com/2007/10/31/washington/31contractor.html (explaining the details of this plan); see also Schmitt & Shanker, *supra* note 230.

233. For example, in 2006, the Uniform Code of Military Justice was amended to cover civilian contracts "in declared wars or contingency operations." But this amendment does not address the issue of whether contractors working for civilian agencies would be covered. See Alissa J. Rubin & Paul von Zielbauer, *Blackwater Case Highlights Legal Uncertainties*, N.Y. TIMES, Oct. 11, 2007, www.nytimes.com/2007/10/11/world/middleeast/11legal.html.

234. See *infra* section IV.

235. See *id.* (citing Scott Horton of Columbia University, a specialist in law of armed conflict).

236. See, CORPORATE WARRIORS, *supra* note 23, at 3-6.

237. See Ethiopia's *Jus Ad Bellum* Claims, Ethiopia-Eritrea Claims Commission paras. 14, 16 (Dec. 19, 2005); see also Eritrea's Western Front Aerial Bombardment and Related Claims, Ethiopia-Eritrea Claims Commission para. 22 (Dec. 19, 2005); Ethiopia's Western Front Claims, Ethiopia-Eritrea Claims Commission para. 25 (Dec. 19, 2005); Ethiopia's Central Front Claims, Ethiopia-Eritrea Claims Commission para. 24 (Apr. 28, 2004); Eritrea's Central Front Claims, Ethiopia-Eritrea Claims Commission para. 30 (Apr. 28, 2004). All of the partial awards cited hereinabove are available at http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited Feb. 10, 2010).

countries.²³⁸ The two parties ceased their hostilities in June of 2000, pursuant to a cessation of hostilities agreement signed in Algiers.²³⁹ During this war an estimated 70,000 people were killed.²⁴⁰ In addition to that, Eritrea captured and interned 1,100 prisoners of war,²⁴¹ including an air force pilot.²⁴² Ethiopia captured and interned 2,600 prisoners of war.²⁴³ All the prisoners were later repatriated to their home countries.²⁴⁴ The prisoners of war taken by each party were nationals of the other, and as such there were no formal claims of involvement of private military contractors.²⁴⁵ However, the story does not end there. What was unique about this African war was the involvement of extremely sophisticated high-tech fighter jets. According to BBC's Patrick Gilkes, in December 1999, while Ethiopia acquired eight Sukhoi 27 fighters, Eritrea acquired eight to ten MiG 29 interceptors.²⁴⁶ Most importantly, Gilkes added that "[n]either side, however, [had] any pilots qualified for the new planes. They [were] being flown by pilots from Russia, Ukraine or Latvia and both [were] using Russian technicians for their maintenance."²⁴⁷ At the time, it was widely understood that the Russian, Ukrainian, or Latvian pilots, mechanics, or advisers were private military contractors,²⁴⁸ rather than officials formally representing their respective governments.²⁴⁹

238. See Ethiopia's *Jus Ad Bellum* Claims, Ethiopia-Eritrea Claims Commission para. 19 (Dec. 19, 2005) available at <http://www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf>.

239. See Agreement on Cessation of Hostilities Between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, Eri.-Eth., June 18, 2000, 85 U.N.T.S. 2138.

240. See, e.g., Xan Rice, *After 70,000 deaths, Eritrea and Ethiopia prepare for war again*, THE TIMES, Dec. 8, 2005, <http://www.timesonline.co.uk/tol/news/world/article754553.ece> (last visited June 19, 2007).

241. See Ethiopia's Prisoners of War Claim, Ethiopia – Eritrea Claims Commission para. 3 (July 1, 2003), available at <http://www.pca-cpa.org/upload/files/ET04.pdf> (last visited June 19, 2007).

242. See Emma Jane Kirby, *Ethiopia, Eritrea to free all PoWs*, BBC NEWS, Aug. 23, 2002, <http://news.bbc.co.uk/2/hi/africa/2212159.stm> (last visited June 19, 2007).

243. See Eritrea's Prisoners of War Claim, Ethiopia – Eritrea Claims Commission para. 3 (July 1, 2003), available at <http://www.pca-cpa.org/upload/files/ER17.pdf> (last visited June 19, 2007).

244. *Id.*

245. *Id.* at para. 1; Ethiopia's Prisoners of War Claim, Ethiopia – Eritrea Claims Commission para. 1 (July 1, 2003), available at <http://www.pca-cpa.org/upload/files/ET04.pdf> (last visited June 19, 2007).

246. See Patrick Gilkes, *World: Africa Analysis: Arms pour in for border war*, BBC NEWS, Mar. 2, 1999, <http://newsvote.bbc.co.uk/1/hi/world/africa/280273.stm> (last visited June 19, 2007).

247. *Id.*

248. See, e.g., CORPORATE WARRIORS, *supra* note 23, at 11 ("In its war with Eritrea, Ethiopia leased a wing of jet fighters from Sukhoi firm, along with the pilots to fly them, the mechanics to maintain them, and the commanders to plan out their attacks.") (citing to numerous sources including: Charles Smith, *Wars and Rumors of War: Russian Mercenaries Flying for Ethiopia: Advisers, Pilots, Artillerymen Engaged in "Large-scale offensives" against Eritrea*, WORLD NET DAILY, (July 18, 2000), available at <http://www.wnd.com/index.php?fa=PAGE.view&pagelId=7158>; Thomas Adams, *The New Mercenaries and the Privatization of Conflict*, PARAMETERS, 103-116 (Summer 1999) available at <http://www.usamhi.army.mil/USAWC/Parameters/99summer/adams.htm>; *Russians Fly for both Sides in Horn of Africa*, LONDON TIMES, (Feb. 19, 1999). Sukhoi is a private Russian company. For the company's profile and holdings philosophy, see Sukhoi, <http://www.sukhoi.org/eng/company/ideology/> (last visited June 19, 2007).

249. Indeed, if they were official representatives of their respective governments, they would have

The involvement of the private contracts in the sale, delivery, and maintenance of the equipment as well as the training and advising away from the conflict zones would not have serious legal consequences. However, once the Sukhoi pilots started flying the aircraft in combat, the legal status becomes problematic. Although reports have indicated that the pilots were involved in actual combat, the truth of these allegations has never been officially recognized by the involved parties. Be that as it may, assuming for the sake of legal argument that the allegations were true, what would have been the legal status of a Sukhoi employee captured by Eritrea after being shot down while flying the Su-27 high-tech fighter jet in combat? Would he have been treated just like one of the 1,100 Ethiopian prisoners of war that Eritrea captured? Would there be a difference in status between a Sukhoi pilot flying an aircraft for Ethiopia, and a pilot belonging to the Ethiopian air force? The same questions could be asked about private contractors that might have flown the MiG-29 fighter jets that Eritrea used against Ethiopia.

The answer to all of these questions is clear. The Sukhoi or MiG-29 pilots would not be entitled to prisoner of war status and may be prosecuted by the detaining party for any death, injury, or damage that they might have caused while flying in combat even if the targets were legitimate military targets. IHL provides no combatant immunity for private contractors under these circumstances.²⁵⁰ In fact, this is a classic example of an unambiguous unlawful combatant status of private military contractors in conventional inter-state armed conflict.

There are several examples of recent involvement of private military contractors in non-international armed conflicts. The following two instances are representative of a much wider role they have played particularly on the African continent.

In 1991, the government of the West African nation of Sierra Leone, a former British colony, found itself cornered by a violent rebellion.²⁵¹ The rebellion, led by a group called the Revolutionary United Front (RUF), brought about untold misery to the civilian population.²⁵² The movement used child soldiers and admittedly used unlawful means of warfare, including the deliberate targeting of civilians for rape and extermination.²⁵³ A particularly horrific signature of the RUF was the malicious amputation of civilians' arms regardless of age and gender.²⁵⁴ Within approximately four years, the RUF gained ground, controlled the economically vital diamond mines, and continued to perpetrate atrocious acts.²⁵⁵ In 1995, the

a legitimate status provided that they respected the laws and customs of warfare. See, e.g., Additional Protocol I, *supra* note 3, art. 47(2)(f) (excepting a person sent on official duty by the government of his home country from the definition of the term mercenary).

250. Additional Protocol I, *supra* note 3, art. 47(2)(f).

251. See CORPORATE WARRIORS, *supra* note 23, at 3.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

RUF began advancing towards the capital city, Freetown.²⁵⁶ The government soldiers began fleeing in disarray and some even joined the RUF.²⁵⁷ As the RUF closed in on the city, the civilian population was completely engulfed in horror. Foreign embassies and international organizations evacuated their personnel and their families, and the situation looked extremely gloomy.²⁵⁸

However, unexpectedly and inexplicably, an unknown and sophisticated elite force equipped with precision air and artillery weapons began pounding the positions of the RUF rebels.²⁵⁹ Immediately followed by mechanized infantry units, this elite force drove the surprised rebels away from Freetown and the mine fields.²⁶⁰ The once powerful rebel forces were obliterated. Within a short period of time, relative peace and security prevailed in Sierra Leone. It was followed by democratic elections and the prosecution of war criminals.²⁶¹ The elite ground forces and pilots that destroyed the rebels and made this possible wore no uniform, carried no insignia and flew no flags.²⁶² They were employees of a South African based private military company called Executive Outcomes.²⁶³

Although this might be an oversimplification of the character and resolution of the predicaments that Sierra Leone faced during its civil war and thereafter,²⁶⁴ it is a good example of the nature of transactions that private military contractors are hired to perform. Because this is a purely combat function, the issue that needs to be considered in this case is whether the members of Executive Outcome were lawful combatants. Their performance was undoubtedly efficient and desirable. However, what was their status under IHL? Did they have lawful combatant status? The answer to this question is simply no because they meet each and every requirement of Additional Protocol I pertaining to mercenaries.²⁶⁵ To reiterate the requirements discussed above, a mercenary is a person who meets the following requirements: special recruitment for armed conflict abroad, taking part in hostilities for pay in excess of what might be paid for a regular soldier, not a national of the party to the conflict, and not sent on official duty by the state of nationality.²⁶⁶

256. *Id.* at 3-4.

257. *Id.*

258. *Id.*

259. *Id.* at 4.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. Of course, the civil conflict in Sierra Leone involved several actors with different motives, and as such, the situation was not as simple as Singer's description would suggest. For proper documentation of the history of the civil war, see Sierra Leone Web, <http://www.sierra-leone.org/history-conflict.html>. For more information related to the civil war and the prosecution of RUF members and other accused of war crimes and crimes against humanity, see The Special Court for Sierra Leone, <http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx>.

265. See Additional Protocol I, *supra* note 3, art. 47.

266. *Id.*

In this case, members of Executive Outcomes were specially recruited to fight in armed conflicts outside of South Africa, presumably for excessive pay.²⁶⁷ They obviously were not sent by the South African government, which in fact disbanded them in 1999 following the passage of a law to that effect.²⁶⁸ Despite the rosy picture that the descriptive paragraph above paints, the negative adverse role that mercenaries play in conflicts around the world is almost universally recognized. Mercenaries complicate matters more rather than help resolve them.²⁶⁹ That is precisely why their activities remain illegal.

A scenario by which the legal status of a fighter affiliated with Executive Outcomes captured by RUF might seem meaningless as he would likely be shot instantly by his captors before the question even arises. However, the legal status of the captured individual would certainly affect the status of those RUF members who captured him when they have to answer to criminal charges. For example, it is not inconceivable that an RUF member who is on trial now before the Special Court for Sierra Leone might defend against charges of murdering a member of a private military contractor by saying that the killing was justified because the civilian contractor was an unlawful combatant. Of course, he would then be asked if the killing was performed pursuant to a death sentence after a proper trial as required by IHL. He may not have a good answer for that, but at least the crime may not be as severe as killing a prisoner of war.

The lawful status of combatants is never unimportant, particularly when there is some sort of post-conflict justice, because only a lawful combatant status justifies the killing of another human being. Obviously, the importance of legal status increases as the level of lawlessness decreases. The following example demonstrates an increased level of importance relating to another African civil war.

Just about the same time when Executive Outcomes was involved in the Sierra Leone conflict, Mobutu Sese Seko, the former ruler of the Democratic Republic of Congo (DRC), then called Zaire, sought assistance from private military contractors to salvage his authority which was being increasingly

267. Executive Outcomes' involvement in several civil conflicts in Africa has been reported. *See* Military Intelligence, Professional Bulletin, <http://www.fas.org/irp/agency/army/tradoc/usaic/mipb/1999-3/brooks.htm>. It advertised its services as: "Military Training, advice and support services. Para-Military Services. Peacekeeping Services. Special Security Services." *See* Executive Outcomes, Mission & Services, <http://web.archive.org/web/19981205202613/www.eo.com/miserv/miserv2.html> (last visited June 19, 2007).

268. Executive Outcomes was dissolved in January 1999 when South Africa enacted the Regulations of Foreign Military Assistance Act. *See* Regulation of Foreign Military Assistance Bill, Bill 54D-97 (GA), available at <http://www.info.gov.za/view/DownloadFileAction?id=71747> [hereinafter Regulation of Foreign Military Assistance Bill].

269. *See, e.g.*, U.N. Comm. on Human Rights, The Right of Peoples to Self-Determination and its Application to Peoples under Colonial or Alien Domination or Foreign Occupation, Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-Determination, U.N. Doc. E/CN.4/1994/23 (Jan. 12, 1994) (providing that mercenaries "tend to increase the violent and cruel nature of specific aspects of the armed conflict in which they are involved").

threatened by rebellion.²⁷⁰ Although Executive Outcomes and MPRI declined his request, as they considered his situation hopeless, another firm known as Geolink got involved in the conflict to assist him.²⁷¹

The leader of the rebellion, Laurent Kabila, finally took over government power, reportedly with some assistance from another private company.²⁷² When Kabila was in turn threatened by a coalition of forces, which included the national militaries of Uganda, Rwanda, and Zimbabwe, he hired Executive Outcomes for military support.²⁷³ His adversaries also hired private military contractors including the South Africa based Stabilco and Avient for air combat support.²⁷⁴

This complex situation demonstrates a number of different scenarios. The situations that could have or might have happened include the following: the capture by Sese Seko forces of one or more of the private personnel aiding Kabila; the capture by national armed forces of the DRC (after Kabila's take over) of Stabilco or Avient personnel fighting on behalf of Uganda, Rwanda, or Zimbabwe; and finally the capture by the national armed forces of any one of the three nations of Executive Outcomes' personnel fighting for Kabila. In all of the above examples, the captors would be sovereign governments with national armed forces who could, if they choose, put the captured on trial for unlawful combatancy. Additionally, in all of these examples, almost invariably, the private military contractors qualify as mercenaries under the narrow definition of article 47 of Protocol I discussed at length above.

In conclusion, it appears that the provision of combat services by private military contractors is almost always illegal. As such, it would put involved personnel at risk of being prosecuted for their participation as well as any injury, death, or damage they might cause, regardless of the legitimacy of the military objectives.

C. Responsibility

The preceding subsections of this part attempted to put the various activities of private military contractors in a legal continuum. The continuum shows that while some activities are perfectly legitimate, others are either ambiguous or outright illegitimate. The discussion in these subsections was limited to the identification of the possibility of prosecution for the illegitimate activities whenever the actors fall into the hands of the governments or other entities against which they fight. The following section looks at the status of private military contractors from the perspective of the states that host, employ, and deploy them.

270. See CORPORATE WARRIORS, *supra* note 23, at 10.

271. *Id.* Singer notes that this company might have been a cover for the French intelligence rather than an independent private firm, citing O'Brien, *Military Advisory Groups and African Security* (does not provide citation). This would, of course, change the entire status analysis pertaining only to this particular entity because if there is government involvement, the status of the personnel involved would be different.

272. *Id.*

273. *Id.* at 11.

274. *Id.*

It also examines the responsibilities of these states under international law, and sets the stage for the concluding analysis.

1. Private Military Contractors' Accountability

Two general forms of accountability could be envisaged: individual criminal responsibility and company civil liability. Both of these options are briefly discussed in turn.

a. Individual Criminal Responsibility

Holding members of private military contractors criminally responsible in the states that host them, and employ their services could be very problematic. A practical example that can demonstrate the difficulty with this regard is the widely publicized Abu Ghraib situation.²⁷⁵

Private military contractors were involved in the abuses along with uniformed U.S. military personnel.²⁷⁶ The abuses clearly constituted criminal acts. While several military personnel involved in the abuses were prosecuted, convicted, and sentenced to up to ten years in prison,²⁷⁷ no criminal prosecution was made against the civilian contractors who were equally responsible for the crimes.²⁷⁸ That is primarily because of the very difficult nature of the status of the private actors under conflict situations.²⁷⁹ The forum to hold them responsible is simply not easily available. Understandably, the military personnel were held accountable before courts-martial. The jurisdiction of the courts-martial did not, however, extend to the trial of private individuals accompanying the armed forces in this case.²⁸⁰ The reason for this is complex, and this article does not attempt to provide a detailed analysis of the jurisprudence in that area.²⁸¹

However, it is important to briefly point out that the U.S. has an elaborate statutory framework for the prosecution in U.S. federal courts of private contractors who commit criminal conduct abroad.²⁸² The most notable statutes are

275. For a comprehensive discussion of the Abu Ghraib situation, *see generally* Major General Antonio Taguba, Article 15-6 Investigation of the 800th Military Police Brigade (2004) *available at* http://www.au.af.mil/au/awc/awcgate/awc-law.htm#abu_ghraib (last visited June 20, 2007).

276. *See also* Joel Brinkley & James Glanz, *Contractors in Sensitive Roles, Unchecked*, N.Y. TIMES, May 7, 2004, at A15.

277. *See* MSNBC, *England Sentenced to 3 Years*, Sept. 28, 2005, *available at* <http://www.msnbc.msn.com/id/9492624/> (last visited June 20, 2007). *See also* CNN, *Sentencing Phase Begins in Abu Ghraib*, May 3, 2005, *available at* <http://www.cnn.com/2005/LAW/05/02/england.plea/index.html> (last visited June 20, 2007); *see also* Eric Schmitt, *Iraq Abuse Trial Is Again Limited to Lower Ranks*, N.Y. TIMES, Mar. 23 2006, at A1 (quoting a military spokesperson as saying a total of 251 military personnel had received varying levels of punishment for prisoner abuse); *see also* Josh White, *Conflicting Portraits of Officer Charged Over Abu Ghraib*, WASH. POST, July 31, 2007, at A03.

278. *See* P.W. Singer, *Outsourcing War*, FOREIGN AFFAIRS, Mar.-Apr. 2005, at 127, *cited in* Peters, *supra* note 29, at 367. Since then, some contractors were prosecuted for contract fraud, which had nothing to do with the abuses. *See id.* at n.1.

279. *See id.* at 126-127 (discussing legal dilemmas).

280. Uniform Code of Military Justice, § 802, art. 2.

281. For a thorough discussion of the jurisdictional issue, *see generally* Peters, *supra* note 29.

282. Jennifer K. Elsea, *Private Security Contractors in Iraq and Afghanistan: Legal Issues*, CONGRESSIONAL RESEARCH SERVICE FOR CONGRESS, Jan. 7, 2010.

the Military Extraterritorial Jurisdiction Act (MFJA),²⁸³ the Special Maritime and Territorial Jurisdiction Act (SMTJ),²⁸⁴ and the War Crimes Act (WCA).²⁸⁵ Therefore, individual criminal responsibility, at least from the perspective of the U.S., could theoretically be pursued in regular federal courts if desired.²⁸⁶ Federal courts do not seem to be convenient forums for practical reasons unrelated to the issue of jurisdiction.²⁸⁷ What would have been the most appropriate and convenient forum, one that has tried the cases of the uniformed personnel, the military court system, is simply not available for cases involving civilian contractors in the absence of a declared war.²⁸⁸ This is another important reason for the proper definition of their status under IHL and the regulation of their conduct under the domestic laws of the states that host them and employ their services.

b. Company Civil Liability

Civil liability is perhaps more complicated than holding wrongdoers criminally responsible. In the U.S., there are limited avenues that victims may explore. One of the possibilities is a civil suit under the Alien Tort Claims Act ("ATCA").²⁸⁹ ATCA grants federal courts jurisdiction over "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."²⁹⁰ There are several seeming obstacles to prevailing in a civil suit against a private military contractor under the ATCA. Three major obstacles can easily be identified.

283. Codified as amended at 18 U.S.C. § 3261-3267 (2000).

284. 18 U.S.C. § 7 (2000).

285. Codified as amended at 18 U.S.C. § 2441 (2000).

286. For example, the SMTJ gives federal courts jurisdiction for conducts that occur outside of the U.S. but in facilities run by the U.S. government. *See* 18 U.S.C. § 7 as amended by USA Patriot Act of 2001, Pub. L. No. 107-56, tit. VIII, § 894, 115 Stat. 272, 377 (2001).

287. For various reasons, including political, this option does not seem to have been considered seriously and pursued as it could have been. In fact, there was only one prosecution related to prisoner abuse by civilian contractors in Iraq or Afghanistan. *See* Jaime Jansen, *Federal Trial Begins for CIA Contractor Charged with Afghan Detainee Abuse*, JURIST LEGAL NEWS AND RESEARCH, Aug. 7, 2006, available at <http://jurist.law.pitt.edu/paperchase/2006/08/federal-trial-begins-for-cia.php> (last visited June 22, 2007). In an interesting departure from previous practice, five Blackwater Guards were charged with fourteen counts of manslaughter on December 8, 2008, for their roles in the Nisoor Square incidents that occurred on September 16, 2007, during which fourteen Iraqi civilians were killed. *See* Ginger Thompson & James Risen, *Plea by Blackwater Guard Helps Indict Others*, N.Y. TIMES, Dec. 8, 2008, available at <http://www.nytimes.com/2008/12/09/washington/09blackwater.html>. This case is likely to raise serious jurisdictional controversy.

288. *See* United States v. Averette, 19 U.S.C.M.A. 363 (1970) (cert. denied.) In *Averette*, the United States Court of Military Appeals held that the term "in times of war" in the Uniform Code of Military Justice, 10 U.S.C. §. 802(a)(10), limits the federal courts' jurisdiction to conduct occurring in declared wars. *See id.* at 365. *See also* Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 248 (1960) (holding that military jurisdiction did not extend to civilian dependents of military personnel in peace time); *see also* Reid v. Covert, 354 U.S. 1, 40-41 (1957) (holding that civilians in times of peace may not be tried by courts-martial).

289. Also called the Alien Tort Statute (ATS) 28 U.S.C. § 1350 (2000).

290. *Id.*

The first obstacle is of course overcoming the Supreme Court's strict interpretation of the substantive limits of the ATCA in *Sosa v. Alvarez-Machain*.²⁹¹ In *Sosa*, the Supreme Court, while recognizing that the ATCA is a jurisdictional statute, raised the standard for the severity of the injury that must be alleged as a violation of "the law of nations."²⁹² The Court held that the nature of the violation must be such that it is universally recognized as seriously injurious.²⁹³ To demonstrate the level of seriousness, the Court borrowed language from several courts of appeals. For example, it quoted the Court of Appeals for the D.C. Circuit for the proposition that section 1350 of the ATCA applies when the violations must be "a handful of heinous actions – each of which violates definable, universal and obligatory norms."²⁹⁴ It also relied on the holding of the Court of Appeals for the Second Circuit, which said that "[f]or purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind."²⁹⁵ Given the strict limitation of the ATCA to *hostis humani generis*, any private action against private military contractors would recognizably be very difficult. There are a few pending cases brought by victims of Abu Ghraib abuses against involved private military companies under the ATCA.²⁹⁶ Given the current debate about the meaning of torture, it remains to be seen in the few cases that are now pending, whether the courts will hold that the abuses met the standards that the Supreme Court set in *Sosa*.

The second obstacle is establishing a government connection. International obligations are often defined in terms of government accountability. For example, under the Convention Against Torture,²⁹⁷ acts of torture may only give rise to liability if they are committed by a public official or at the acquiescence of a public official.²⁹⁸ Consequently, to prevail under ATCA, the claimant must establish that the law of nations has been violated, and prove that there was a nexus between the injury and government conduct.²⁹⁹

Wherever private military contractors are involved, establishing a government nexus could be very difficult. For example, would private contractors hired by the Iraqi Coalition Provisional Authority (CPA) be considered to have been hired by the U.S. government or an Iraqi government? Or was the CPA a government at all? If the CPA is not a government, it would mean that there is no civil liability for private military contractors under the circumstances.

291. *Alvarez v. Sosa*, 504 U.S. 655 (1992).

292. *See id.* at 735.

293. *Id.*

294. *Id.* (quoting *Tel-oren v. Libya Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)).

295. *Id.* (quoting *Filaritiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

296. *See, e.g., Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005); *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55 (D.D.C. 2006).

297. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984). *See also* Foreign Affairs and Restructuring Act of 1998, P.L. 105-277.

298. G.A. Res. 39/46, *supra* note 297, art. 1.

299. 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

These arguments are not hypothetical. For example, in a case against private contractor Custer Battles LLC for fraud under the False Claims Act, a U.S. federal judge set aside a jury verdict holding the company responsible for \$10 million precisely because of the ambiguous nature of the status of the CPA during the initial years of the Iraqi invasion.³⁰⁰ The only issue in this case was the status of the CPA as a government entity and its relations with the U.S.³⁰¹ The government argued that fraudulent bills presented to the CPA could be considered to have been presented to the government of the United States because the CPA was created and financed by the United States to run Iraq and staffed by American personnel.³⁰² However, despite this, the court held that the CPA was an international entity with an ambiguous status but may not be considered a part of the United States government.³⁰³ As such, the fraudulent documents submitted to the CPA cannot be considered to have been submitted to the United States.³⁰⁴ That meant that the private contractor was not held responsible for the fraudulent behavior despite a jury verdict determining the existence of fraudulent activities.³⁰⁵ Because this was the first test case, the ruling obviously rendered the dozens of others that were ready to be filed³⁰⁶ void *ab initio*, at least from the point of view of this particular basis of jurisdiction.

Another example that demonstrates the obstacles that the private-government distinction might create is the D.C. Circuit's June 2006 preliminary decision in *Saleh v. Titan Corp.*³⁰⁷ In *Saleh*, several Iraqi nationals brought an action under the ATCA against the Titan Corporation, a private military contractor which provided interrogation and translation services in Iraq.³⁰⁸ They alleged that Titan's personnel abused the claimants in violation of the law of nations.³⁰⁹ The court essentially held that the claimants did not sufficiently demonstrate the required degree of nexus between the private actors and the government.³¹⁰ In other words, they did not show that they were operating under official capacity or under the color of law.³¹¹ Ironically, throughout history, it is in these types of ambiguous

300. See Jeannie Shawl, *Federal Judge Sets Aside Verdict In Iraq Contract Fraud Case*, JURIST LEGAL NEWS AND RESEARCH, Aug. 20, 2006, available at <http://jurist.law.pitt.edu/paperchase/2006/08/federal-judge-sets-aside-verdict-in.php> [hereinafter Shawl].

301. *Id.*

302. Shawl, *supra* note 300; see also Erik Eckholm, *U.S. Judge Sets Aside Verdict of Corporate Fraud in Iraq on Technical Grounds*, N.Y. TIMES, Aug. 19, 2006, available at http://www.nytimes.com/2006/08/19/world/africa/19iht-web.0819reconstruct.2536456.html?_r=1 [hereinafter Eckholm].

303. Eckholm, *supra* note 302.

304. *Id.*

305. *See id.*

306. *Id.* (reporting that there were dozens of others that were ready to be filed at the time this case was decided).

307. *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55 (2006).

308. *Id.* at 56-57.

309. *See id.*

310. *Id.* at 57.

311. *Id.* at 57-58. (In so holding, the court emphasized that in *Sosa*, the Supreme Court clearly held that lower "federal courts should be extremely cautious about discovering new offenses among the law of nations...") *Id.* at 57-58.

situations that the services of the private military contractors are needed the most.³¹² That is an additional reason why their legal status must be properly defined and their conduct properly regulated.

The third obstacle to the success of civil suits against private military companies is the government contractor defense. The government contractor defense was initially endorsed by the Supreme Court in *Boyle v. United Techs. Corp.*³¹³ The doctrine essentially extends sovereign immunity to private actors performing services under a government contract.³¹⁴ That would evidently create a gap in accountability. A good demonstration of this is the Abu Ghraib situation, where the private military contractors were involved under a government contract.³¹⁵ They have essentially escaped any kind of criminal accountability³¹⁶ for which their military counterparts were punished. This might also invoke sovereign immunity to avoid civil liability under the Boyle government contractor doctrine.³¹⁷ That would be a win-win situation for private actors.

2. State Responsibility

We now know that sixteen of the forty-four incidents at Abu Ghraib were committed by private contractors.³¹⁸ If Iraq were to seek redress under international law, would the United States be responsible for all of the incidents or just the twenty-eight incidents that its own military personnel committed? The answer to this question is not straightforward because some of the same private-government nexus issues discussed in the above subsection arise in almost an identical way. However, this subsection suggests that state responsibility could be established more easily than the private-government nexus in the domestic law context.

The International Law Commission's (ILC) *Draft Articles on Responsibility of States for Internationally Wrongful Acts* provides the following general principle: "Every internationally wrongful act of a State entails the international responsibility of that state."³¹⁹ According to the ILC, two important elements must

312. See, e.g., CORPORATE WARRIORS, *supra* note 23, at 39 ("Private actors, such as free companies, contracted units, military entrepreneurs, and charter companies played key roles in state-building and often served government interests. These organizations also had the tendency to become powers unto themselves, however, and often grew superior in power to local political institutions, particularly in areas of weak governance.").

313. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 514 (1988).

314. See *id.* at 12; see also 28 U.S.C. § 1346(b) (1997).

315. P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B03 [hereinafter *The Contract the Military Needs to Break*].

316. *Id.*

317. Professor Laura Dickinson suggests that because Boyle was a products liability case, in which the contractor followed government specifications relating to design, it could be argued that the doctrine does not extend to the provision of services where such instructions do not exist. Government for Hire, *supra* note 29, at 189. It could also be argued, however, that civilian contractors performing services pursuant to government instructions would also enjoy sovereign immunity. Pending litigation would resolve some of these issues. See, e.g., *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55 (D.D.C. 2006).

318. *The Contract the Military Needs to Break*, *supra* note 315.

319. International Law Commission, *Draft Articles on Responsibility of States for Internationally*

be met cumulatively: a breach of international law and attribution to the state.³²⁰ The existence or non-existence of both elements is determined by international law.³²¹

The most relevant part of the two-part equation is the attribution requirement. The question that needs to be answered is thus, when does the conduct of private military contractors bind the state that employs their services? According to the ILC, the general principle is that the state would be responsible for the actions of its own organs, which includes all three branches of government and their political subdivisions.³²² This principle is simple. To go back to the Abu Ghraib example, the United States would be held responsible for the conduct of its military personnel under this general principle. The ILC articles also make it clear that States may be held responsible for the conduct of private actors if the following requirements are met:

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.³²³

The most important element here seems to be the empowerment of a private or para-statal entity to perform an inherently governmental function. In his commentary on this particular provision, Professor James Crawford offers the following example: “[i]n some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations.”³²⁴ Providing security services in prisons administered by a state outside of the territory would not change the equation.

Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10, art. 1 (2001) [hereinafter ILC]. Reprinted with commentary in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 61 (2002) [hereinafter CRAWFORD]. “Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission*, 2001, vol. II (Part Two). Text reproduced as it appears in the General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.” Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

320. ILC, *supra* note 319, art. 2.

321. *Id.* art. 3.

322. *Id.* art. 4

1. 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. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

323. *Id.* art. 5.

324. See CRAWFORD, *supra* note 319, at 100.

The one argument that may be raised is that the private military firms perform their activities as a matter of contractual obligation, not as a matter of authorization by law.³²⁵ Professor Crawford's commentary suggests that the authorization by law is essential because the private entities bind their states as they are more or less partial government entities themselves. He notes that the primary purpose for the inclusion of these entities is because of the "increasing phenomenon of para-statal entities, which exercise elements of governmental authority in place of state organs."³²⁶

Although state responsibility for contract based private actions may raise these kinds of issues, article 8 of the ILC draft provides a clear rule filling the gaps left by the provisions discussed above. It states: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."³²⁷ As long as "the existence of a real link between the person or group performing the act and the State machinery" is established, the State would be held liable.³²⁸ A contractual relationship between the state and the private entity would obviously establish this link because it would amount to express authorization or ratification.³²⁹

Nonetheless, a state in whose name violations have been committed by private contractors would obviously argue that the authority it had given was exceeded. However, under the ILC articles of state responsibility, the fact that the private entity exceeded the lawful authority does not exonerate the state.³³⁰ Article 7 of the ILC articles provides that: "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."³³¹ This is a self explanatory provision, but again, there is nothing that would prevent the state from holding the private contractor responsible for its excesses and obtain indemnification for any damages that the state may incur as a result of the private contractor's excesses.

It can safely be concluded, therefore, that the conduct of private military contractors could potentially expose the state that employs their services to

325. The civilian almost always gets involved pursuant to contractual arrangements. *See generally* Dickinson, *Torture and Contract*, *supra* note 208.

326. CRAWFORD, *supra* note 319, at 100.

327. ILC, *supra* note 319, art. 8.

328. CRAWFORD, *supra* note 319, at 110.

329. *See* IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS, STATE RESPONSIBILITY*, VOL. I, 160-161:

In certain cases of special need the authorities of a state may supplement their own actions by authorizing operations by private persons or groups designed as 'auxiliaries' or 'militia'. Such persons are not 'regular' or 'formal' elements in the state apparatus but they do in fact act on behalf of the state conferring authority.

330. ILC, *supra* note 319, art. 7.

331. *Id.*

international legal responsibility. Accordingly, that is another important reason for understanding their status and carefully regulating their conduct.

D. Drawing the Line: What may they do, and what must they not do?

As indicated above, not all activities of private military contractors can easily be classified as legal or illegal. Most of the private military contractors perform legitimate activities most of the time. As such, in times of war their legal status fits nicely into the non-combatant designation of IHL. The serious challenge is, however, to circumscribe the scope of their activities within the legal limits. Although private military contractors share some fundamental similarities, it cannot be concluded that they have a unitary status under IHL. In other words, their status depends on the activities they perform at a given time and place.

The most important question that needs to be answered here is thus, where must the line be drawn? Private military contractors that meet the requirements of mercenaries are clearly banned. The problem with that is the extremely narrow definition of Protocol I article 47.³³² As indicated above, the United Nations Mercenary Convention has broadened the definition by eliminating the requirement of taking direct part in hostilities.³³³ According to this Convention, therefore, private military contractors may be considered mercenaries if they recruit personnel for combat and pay them in excess of what a regular soldier would be paid under the same circumstances.³³⁴ This responsibility of the firms attaches because the Convention holds not only the recruited foot-soldiers but also the recruiters and financiers responsible for the same offenses.³³⁵ However, perhaps because of the revisions in the definition of mercenary, this Convention has not been ratified widely.³³⁶ That would mean that in states that did not ratify this Convention, accountability may not attach until actual participation in hostilities resumes. Aside from the ambiguity that results from the application of the two alternative definitions of mercenary, it could safely be concluded that engaging in combat, for pay, in a foreign land, without being a uniformed member of the armed forces of a party to the conflict, remains prohibited. So, there is a clear line.

Moving forward with the continuum, the next stage is the involvement of private military contractors in support services without actually taking part in actual combat. The standard set forth under IHL is that a civilian accompanying the armed forces of a party to the conflict may not take direct part in hostilities³³⁷ or use the civilian status to cause harm to the enemy.³³⁸ These are difficult

332. Additional Protocol I, *supra* note 3, art. 47.

333. See International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, *supra* note 184, art. 1.

334. *Id.*

335. *Id.* at art. 2. ("Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention").

336. See U.N. Treaty Collection, Depository Notifications (CNs) by the Secretary-General, <http://treaties.un.org/Pages/CNs.aspx> (last visited June 25, 2007).

337. See Additional Protocol I, *supra* note 3, art. 51(3).

338. *Id.* at art. 13. As indicated above, this standard is extracted from the rules that govern medical

concepts to define, but unfortunately, under the existing IHL, that is where the line must be drawn. Nonetheless, this line is extremely important because it offers a solid foundation for further regulation.³³⁹

E. Going Forward: Conduct-based Time, Place, and Manner Regulation

The discussion so far has made one important matter clear: the status of private military contractors under IHL depends on what they perform at a given time and place and how they perform the activities. The legal literature and international and domestic legislative initiatives presented thus far, by and large, focus on ways of holding them directly accountable for illegitimate activities they had already performed, or on the ways of regulating the whole private military industry as a single unit through international mechanisms. Although both approaches offer plausible alternatives, they clearly ignore the guidance that already existing norms of IHL provide for future regulation. Precisely because of that, they either treat the industry as a holistic unit or emphasize individual accountability for wrongdoing after its occurrence. These shortcomings would inevitably make the proposals incomplete. Some examples of these approaches are briefly discussed below.

One common proposal is extending courts-martial jurisdiction to private military contractors who engage in misconduct.³⁴⁰ This is a good proposal; however, it does not resolve the underlying problem of unlawful combatancy, because one may only be brought before courts-martial for a crime that had already been committed. That would mean that there would be no penalty for crossing the line drawn by IHL, for example, taking direct part in hostilities until such time that a crime is committed. In other words, there would be no grounds to court-martial a private military contractor who transports ammunition in a combat zone, even if that conduct may be interpreted as taking direct part in hostilities under IHL. Although the mere transportation of the ammunition may be prosecuted as aiding and abetting the enemy while enjoying a civilian status, serious illegality would ensue if the truck is attacked and the driver kills enemy soldiers and gets captured.³⁴¹ A mere participation or even the killing of an enemy soldier is not a conduct that would be prosecuted before the courts-martial of the employing state unless a war crime had been committed. As such, the courts-martial proposal for

units. Although the provision is exclusively dedicated to the regulation of medical units, it is evident that the principle has a broader meaning, particularly when read together with the other provisions of the Protocol dealing with the protection of civilians in armed conflict. *See id.* at art. 67.

339. The ICRC's 2009 interpretive guide on the notion of direct participation in hostilities could be a very useful tool in determining the nature of activities that would cross the line for this purpose. *See* INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/direct-participation-guidance-2009-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf).

340. A notable proponent of this proposal is professor Wm. C. Peters of the United States Military Academy, West Point. *See* Peters, *supra* note 29.

341. And, of course, the driver would raise the issue of self-defense but the very fact that he took direct part in hostilities by transporting weaponry may override the defense. This is, however, a matter for the enemy's adjudication of the details of the case.

private military contractors is limited to holding wrongdoers responsible from the point of view of the employer state after recognizable crimes had been committed. It is an important tool but it does not address the greater need for proper regulation of the conduct of private military contractors with a view to ensuring compliance with international humanitarian norms.

The other notable domestic proposal is a contracts-based proposal.³⁴² Under this proposal, the contract that the private military contractors sign could be used as a tool to regulate their conduct. This is a very good proposal. However, this proposal presents four problems. First, the nature of contracts will always depend on the circumstances, particularly the negotiating powers of the parties at a given time and place.³⁴³ Secondly, because the contracts approach is inherently ad hoc, it cannot possibly bring uniformity and order to the private military industry. Thirdly, since it is not a legal requirement, the contracts will always remain open for re-negotiation. Fourthly, such contracts are almost always confidential and shielded from public scrutiny. That would mean that the industry would be governed by unknown sets of contractual terms.

The second set of proposals envisions regulations of an international nature. For example, Judge Advocate Todd Milliard proposes an international convention establishing a regime of accountability and licensing.³⁴⁴ Similarly, Dr. Singer argues that given the industry's ability to globalize and avoid domestic accountability, a successful regulation must be international in nature.³⁴⁵ He recognizes that banning the provision of military services altogether is not realistic given today's supply and demand environment.³⁴⁶ He then proposes an international mechanism of registration, licensing, and auditing under the United Nations Secretary General's Special Rapporteur on Mercenarism.³⁴⁷ He also proposes that this mechanism be supported by international experts on issues of regulation, evaluation, and codes of conduct.³⁴⁸ According to him, this will help transform the industry into a sanctioned international business industry.³⁴⁹

342. The proponent of this approach is Professor Laura Dickinson of the University of Connecticut. See *Public Law Values in a Privatized World*, *supra* note 26, at 401 (advocating a contract-based approach); see also *Government for Hire*, *supra* note 29, at 199; see also *Torture and Contract*, *supra* note 208, at 273-74.

343. For example, if the government is badly in need of extinguishing a fire at a military base in Kuwait within 24 hours and the only company that can do the job is KBR, the company may strike a deal for additional future contracts in combat zones in Iraq as a condition of accepting the Kuwait project. And if the Iraq project is awarded in exchange for the badly needed Kuwait project, the company may risk being considered as having taken direct part in hostilities depending on what was set ablaze in the Iraqi conflict zone. That would potentially expose KBR personnel to unlawful combatant status. This is, of course, assuming that the adversary itself is a lawful combatant.

344. Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 79-84 (2003) (recognizing the importance of domestic regulation).

345. See *War, Profits, and the Vacuum of Law*, *supra* note 24, at 544.

346. *Id.*

347. *Id.* at 545.

348. *Id.*

349. *Id.* at 545-46.

There have also been legislative initiatives. Two notable examples are the 2002 United Kingdom Green Paper prepared by the order of the House of Commons entitled Private Military Companies Options for Regulations,³⁵⁰ and the 1998 South African Regulation of Foreign Military Assistance Act.³⁵¹ These two initiatives are discussed in turn below.

The U.K. Green Paper contains a somewhat thorough analysis of the private military industry and proposes options for the domestic regulation of the industry.³⁵² The basic proposal assesses the pros and cons of each option. The options include banning military activities abroad altogether,³⁵³ and also banning recruitment for military activities abroad.³⁵⁴ Alternatively, it would establish a licensing regime for military services, which includes registration and notification requirements.³⁵⁵ The final and additional option contained in the Green Paper is self-regulation in the form of voluntary codes of conduct.³⁵⁶ The proposal was written with the following fundamental assumption in mind:

The distinction between combat and non-combat operations is often artificial. The people who fly soldiers and equipment to the battlefield are as much a part of the military operation as those who do the shooting. At one remove the same applies to those who help with maintenance, training, intelligence, planning and organization – each of these can make a vital contribution to the war fighting capability.³⁵⁷

Although this is completely true, the problem with this premise is that it does not seem to have been properly informed by the standards set forth under the existing norms of IHL. As discussed in several sections above, IHL actually makes a distinction between those who fly the aircraft with the authorization to shoot, and civilian crew members of military aircraft who are not authorized to shoot.³⁵⁸ Unlike the assumption made above, their status and treatment is actually distinct. It is only if the civilian members take direct part in hostilities that their

350. BRITISH FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION (2002), available at http://www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_private_militarycompanies [hereinafter BRITISH FOREIGN AND COMMONWEALTH OFFICE]. The Green Paper was prepared by the order of the House of Commons, however, proposals forwarded were not considered by the House as of the writing of this article. FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2002, H.C. 577.

351. Regulation of Foreign Military Assistance Bill, *supra* note 268. South Africa is at the forefront of this regulation primarily because of its history. Some of the prominent military contractors that operated in Africa, and elsewhere, in the post-colonial period had their origins in the apartheid regime. For example, some executives of these firms occupied prominent positions in the Special Forces of the apartheid regime. Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 93-97 (1998).

352. See BRITISH FOREIGN AND COMMONWEALTH OFFICE, *supra* note 350.

353. *Id.* at 22.

354. *Id.* at 23.

355. *Id.* at 24-25.

356. *Id.* at 26.

357. *Id.* at 8.

358. See Geneva Convention III, *supra* note 3, art. 4(A)(4).

civilian status ceases.³⁵⁹ The proposal uses the term “vital contribution”³⁶⁰ which is not a legally significant phrase as far as IHL is concerned. The proper standard is “taking direct part in hostilities.”³⁶¹ The use of different terminology in itself may not be a serious problem but it demonstrates the lack of reliance on the most appropriate and most relevant body of law.

The Green Paper could have been properly informed by the standards set under IHL but it was not. As such, it suffers from that shortcoming. But more importantly, just like all the other proposals discussed above, the theoretical foundation of the proposals is based on the desire to regulate the industry as a holistic unit as opposed to looking at the issue in terms of what conduct may or may not be performed by whom and when. A reliance on the standards set forth by international humanitarian law would have suggested such an approach.

South Africa's approach is more or less the same as the proposed U.K. Green Paper approach, for example, licensing and monitoring of South African private military service providers.³⁶² The Act does not, however, make it abundantly clear that South African private military contractors cannot take direct part in hostilities no matter what the excuses may be.³⁶³ To be fair, the Act provides that mercenaries are banned,³⁶⁴ and that the Ministry of Defense of South Africa may not grant the request for a license if it “would be in conflict with the Republic's obligations in terms of international law.”³⁶⁵ However, it appears that firms may

359. Additional Protocol I, *supra* note 3, art. 51(3)

360. BRITISH FOREIGN AND COMMONWEALTH OFFICE, *supra* note 350, at 8.

361. Additional Protocol I, *supra* note 3, art. 51(3).

362. Regulation of Foreign Military Assistance Bill, *supra* note 268, at Preamble.

363. *See id.* at art. 1(iii): “foreign military assistance” means military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of—

(a) military assistance to a party to the armed conflict by means of—

(i) advice or training;

(ii) personnel, financial, logistical, intelligence or operational support;

(iii) personnel recruitment;

(iv) medical or para-medical services; or

(v) procurement of equipment;

(b) security services for the protection of individuals involved in armed conflict or their property;

(c) any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state;

(d) any other action that has the result of furthering the military interests of a party to the armed conflict.

364. *Id.* at art. 2. The Act defines mercenary activity as “direct participation as a combatant in armed conflict for private gain.” *Id.* at art. 1(iv). It is important to note that “private gain” is a requirement that could easily be masked with allegations of protection of public order or democratic institutions or government. It is also important to note that the requirement of “direct participation” is at odds with the definition of the U.N. Convention Against Mercenaries. *See* UN Convention Against Mercenaries, *supra* note 184, art. 1.

365. Regulation of Foreign Military Assistance Bill, *supra* note 268, art. 7(1)(a). It is important to note here that the manner in which the criteria is stated suggests that combat operations are not outlawed or excluded in their entirety, but somehow regulated through licensing procedures. It is also important to note that South Africa is not a signatory to the O.A.U. Convention for the Elimination of

operate under a lawful license to “do any action that has the result of furthering the military interest of a party to the armed conflict.”³⁶⁶ The fundamental flaw is thus, just like the approaches discussed above, the theoretical foundation is not the standards set by IHL. It also attempts to regulate the industry as a holistic unit. Apparently, the Ministry would issue the license based on paperwork filed according to the requirements. The criteria set forth under article 7(1) are not only very general but also make no reference to IHL in particular,³⁶⁷ which is the most pertinent body of law that must have guided the drafting of the Act.

All of the above discussed proposals, which fairly represent the proposals circulating today, have one remarkable characteristic in common – they attempt to regulate the private military industry as one holistic unit and ignore the valuable guidance offered by IHL. This article proposes a different approach, a time, place, and manner regulation based on the standards provided by IHL. More particularly, it suggests that instead of attempting to regulate the industry as a whole, which is extremely diverse and in everyone’s 401(k) portfolio (to use Dr. Singer’s words),³⁶⁸ compliance could reasonably be attained if the time, place, and manner of their operations are regulated based on the standards already provided by IHL. The application and use of these standards, which are discussed at length in the

Mercenarism in Africa. See Int’l Comm. of the Red Cross, *Convention of the OAU for the Elimination of Mercenarism in Africa*, <http://www.icrc.org/IHL.NSF/WebSign?ReadForm&id=485&ps=S> (last visited June 27, 2007). See Tiyanjana Maluwa, *South Africa and the African Union*, 2 INT’L ORG. L. REV 103, 117-22 (2005) (commenting on South Africa’s lack of ratification).

“Criteria for granting or refusal of authorizations and approvals

7. (1) An authorisation or approval in terms of sections 4 and 5 may not be granted if it would—

- (a) be in conflict with the Republic’s obligations in terms of international law;
- (b) result in the infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered;
- (c) endanger the peace by introducing destabilising military capabilities into the region where the assistance is to be, or is likely to be, rendered or would otherwise contribute to regional instability and would negatively influence the balance of power in such region;
- (d) support or encourage terrorism in any manner;
- (e) contribute to the escalation of regional conflicts;
- (f) prejudice the Republic’s national or international interests;
- (g) be unacceptable for any other reason.

(2) A person whose application for an authorisation or approval in terms of section 4

or 5 has not been granted by the Minister may request the Minister to furnish written reasons for his or her decision.

(3) The Minister shall furnish the reasons referred to in subsection (2) within a reasonable time.” Regulation of Foreign Military Assistance Bill, *supra* note 268, art. 7(1)(a).

366. Regulation of Foreign Military Assistance Bill, *supra* note 268, art. 1(iii) (d). When read with articles 4 and 5, the meaning stated above is indicated.

367. See *id.* at art. 7(1).

368. *War, Profits and the Vacuum of Law*, *supra* note 24, at 522.

previous sections, render illegal certain conduct based on the place, time, and manner of their performance. A valid regulation would therefore follow this already existing guidance.

For instance, the two most important areas where the standards set by IHL, namely, taking direct part in hostilities or causing harm to the enemy, create some ambiguity are in services that involve transportation of military supplies and construction of bases. To take the Iraq situation as a demonstration of issues pertaining to transportation, under the standards of IHL discussed above, it would appear that while a private contractor may transport weapons and ammunition from Maryland to Qatar, it may not transport the same package across the Euphrates River to supply an Infantry Division stationed deep inside Iraq because the latter could reasonably be interpreted as taking direct part in hostilities.³⁶⁹ Proceeding with the same assumptions (because at least theoretically this is true in most other conflicts), if a private military contractor is captured while transporting military equipment, that person would not be entitled to prisoner of war status and may be prosecuted for whatever conduct he or she had performed. If, however, the supply was food, water, and medicine instead of ammunition, IHL protects the driver as a civilian and he must be treated as a prisoner of war and returned unharmed at the conclusion of the hostilities.³⁷⁰

Construction is another area of ambiguity. Going back to the Yugoslavian example, while a private military contractor may build a refugee camp in Macedonia, it cannot lawfully build a military barricade in Srebrenica, which would clearly mean taking direct part in hostilities.

Therefore, to the extent some of the conduct they perform might be interpreted as direct participation in hostilities or causing harm to the enemy, in the interest of ensuring the legality of the activities of private military contractors, states that host them and employ their services must in their domestic laws define the line more clearly and prohibit conduct that would not only expose the firms to liability and the persons serving on the ground to danger but also lead to the host state's international responsibility. The easiest and most appropriate regulation would be a time, place, and manner regulation.

For instance, in the Yugoslavia example discussed above, it may be provided that while a private military contractor may transport supplies including military supplies from Maryland to Bonn, it may not fly the same supplies from Bonn to an airport near Belgrade, where there would be a high risk of becoming involved in an unauthorized conflict. So, instead of prohibiting the transportation of military equipment by private contractors altogether, the regulations may provide for a reasonable limit as to the time, place, and manner of the provision of the services. That would not only avoid situations whereby private personnel would be drawn or

369. DINSTEIN, *supra* note 7, at 27.

370. Although the Iraq situation is used as an example because of its current importance, it is important to note that the nature of the conflict is atypical. Thus, such assumptions need to be made. Of course, the examples make more sense in conventional inter-state conflicts, where both parties consider themselves bound by IHL.

forced into combat activity without lawful authorization, but would also spare the state using their services of international responsibility for violations of IHL. Similarly, reasonable time, place, and manner regulation should also work well for construction services, which is one of the most important services provided by private military contractors. In this respect, the regulation may provide that contractors may not perform construction activities within some miles of active hostilities until such time that the hostilities cease. The details of the regulations would obviously need to be looked into very carefully.

V. CONCLUSION

Private military contractors will continue to complicate the equation relating to international peace and security for the foreseeable future. As their re-emergence is a twenty-first century phenomenon, their status as a unitary entity is not directly defined by international humanitarian law whose marked development preceded the advent of the post-Cold War era proliferation of private military contractors. However, international humanitarian law defines the status of each and every person involved in and affected by warfare. When private military personnel perform war-related activities, whether in the form of the design of precision weaponry from an office in Bethesda, Maryland, or in the form of transporting ammunition in Kosovo, or chasing terrorists in Afghanistan, their status at each given moment and place is well defined under international humanitarian law. Therefore, what could be concluded about the status of private military contractors under international humanitarian law is that it depends on what they do and where, when, and how they do it. That is precisely why attempting to regulate the industry as a whole without seeking guidance from international humanitarian law is often a futile exercise.

This article has attempted to demonstrate the status of military contractors in a continuum. It highlighted not only the two extremes, the perfectly legal activities and clearly illegal activities, but also described the challenges involved in classifying certain activities, and attempted to show where the line must be drawn. As such, states that consider themselves bound by international humanitarian law should regulate the provision of military-related services by private parties using the standards set forth under international humanitarian law. The use of these standards would inevitably require a time, place, and manner regulatory regime.

