

Unaccountable Soldiers: Private Military Companies and the Law of Armed Conflict

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Peter McRae
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Abstract

The use of Private Military Companies (PMCs) has become an increasingly common feature of contemporary armed conflict. Because of their autonomous contractual status, PMCs have presented governments with problems of accountability on several levels, including violations of international human rights and humanitarian law (IHL) standards. This thesis argues that PMCs should be considered to be non-state actors (NSAs), subject to international law from both an International Relations Theory and a Legal Theory perspective. This conclusion is linked to the issue of whether individual PMC employees can be treated as legitimate combatants according to IHL. State practice has not led to a clear understanding of the definition of combatant, a problem which has been compounded by a lack of government policy on the use of PMCs. Using Canadian experience as a case study, the thesis concludes that IHL suggests two options for regularizing the status of PMCs which would both strengthen accountability and uphold the rule of law.

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Abbreviations

AP I: Additional Protocol I to the Geneva Conventions

AP II: Additional Protocol II to the Geneva Conventions

CF: Canadian Forces

CANCAP: Canadian Forces Contractor Augmentation Program

DFAIT: Department of Foreign Affairs and International Trade (Canada)

DND: Department of National Defence (Canada)

IAC: International Armed Conflict

ICJ: International Court of Justice

ICRC: International Committee of the Red Cross

ICTY: International Criminal Tribunal for the Former Yugoslavia

IHL: International Humanitarian Law

ILO: International Labour Organization

ISAF: International Security Assistance Force in Afghanistan

IR theory: International Relations Theory

LOAC: Law of Armed Conflict

NAFTA: North American Free Trade Agreement

NIAC: Non-international Armed Conflict

NGO: Non-governmental Organization

NLM: National Liberation Movement

NSA: Non-state Actor

POW: Prisoner of War

PMC: sometimes expanded to PMSC: Private Military Company or Private Military or Security Company

PRT: Provincial Reconstruction Team (in Afghanistan)

PSC: Private Security Company

UN: United Nations

WTO: World Trade Organization

Introduction

The involvement of “Private Military Companies” (PMCs)¹ in contemporary armed conflict has presented governments with a range of legal, political and financial problems. PMC actions are particularly problematical when they involve violations of legal norms related to human rights and the conduct of hostilities, particularly when such violations affect civilians. Because of their status as independent contractors, however, PMCs are not answerable to the military chain of command, even though they operate in the same environment and often carry out the same tasks as regular soldiers. In the conflicts in Afghanistan and Iraq, they are usually portrayed by the media either as mercenaries or shadowy quasi-military groups, supporting but not controlled by the regular armed forces engaged there. However, they do not operate under the same rules as regular Canadian soldiers, for example. When they are involved in violations of the law of armed conflict or international human rights law, it is unclear as to which law can be used to hold them to account. This is partly because their legal status has been unclear and remains so.

¹ The terms, “Private Military Companies” (PMCs) and “Private Security Companies” (PSCs) are used almost interchangeably in the literature and there is no agreed definition of either. A group of governmental experts convened by the Swiss Federation and the International Committee of the Red Cross (ICRC) to address the issue in 2008 got around the definitional problem by merging the two terms (“military” and “security”) into one:

“Private Military and Security Companies” (PMSC) which are defined as private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.¹

One expert (Andrew Bearpark, “The Future of the Market” in S. Chesterman & C. Lehnardt, eds., *From Mercenaries to Market: the Rise and Regulation of Private Military Companies*, (Oxford, Oxford University Press, 2007) 240 [Chesterman & Lehnardt] suggests that those firms which use the “security” designation are less likely to be directly involved in hostilities. This description, he says, would characterize most UK firms. This distinction does not however seem to be generally applied and for the purposes of this paper, the term “Private Military Companies,” more common in the US literature, will be used.

The most acute of these problems is lack of accountability. The standard position of governments is that PMCs are subject to contract and local, municipal law (and in the case of the US, extraterritorial application of certain US laws). Nevertheless, they have enjoyed a degree of *de facto* and, in some cases, *de jure* immunity in Afghanistan and Iraq. They perform security functions in situations of international armed conflict without, for the most part, being subject to the applicable international legal regime, the law of armed conflict. They are, so to speak, **in** but not **of** that regime. In reality, they operate in a kind of twilight zone: from a legal point of view they are technically private persons (i.e. individuals or corporations), but their actions can have an impact equal to, in some cases greater than, those attributable to agents of government. This is one of several contradictions that the use of PMCs presents to the international community.

The still unresolved question which governments face is: should PMCs, as combatants, be allowed to continue to operate outside the remit of the international law of armed conflict, except insofar as they are deemed to be civilians? If so, appropriate sanctions would be limited to those provided by criminal law. Or, should their participation as combatants in international armed conflicts be reconciled with the relevant provisions of international humanitarian law (IHL)? This paper will advance the second proposition.

In attempting to bring about a possible reconciliation with IHL, we face two interrelated legal issues. The first is the appropriate legal status to be assigned to individual members of PMCs. Are they combatants rather than civilians? And if so, the second issue relates to the identification of the protections and immunities that such a designation confers. But to examine these questions, it is important to take a step back and consider whether PMCs personnel can acquire status by virtue of their membership in a collective entity recognized by international law, which is generally concerned with regulating state conduct. Thus the

broader research question of this thesis is the following: can a PMC, which by definition is an incorporated commercial entity, be considered a subject of international law for the purposes of IHL?

In answering these research queries, the paper first outlines in Chapter 1 the legal challenges brought about by the increasing reliance on PMCs during armed conflict. Chapter 2 then tackles the issue of “subjects of international law” in general, with a focus on non-state actors (NSAs). This leads to a more extensive discussion of the nature of NSAs in terms of both International Relations (IR) and international legal theory (Chapter 3). This review provides a useful background to the subsequent more focused analysis of the legal status of PMCs. Therefore, the paper first examines the reality of NSAs as they interact with other players on the international scene. This is then followed by a survey of the ways international law has responded to this reality and what potential exists for further positive developments in this regard.

Returning to the two basic legal questions raised above, it could be said that, in some ways, the answer to the question whether PMCs are subjects of international law resolves the second one, that is whether their employees are combatants. Yet the link is not conclusive and it is necessary to further examine the question of who qualifies for combatant status under IHL. Indeed, this is a much more confused and ambiguous question than it may initially appear to be. Chapter Four therefore focuses on how the concept of ‘combatant’ has developed historically and how that development has been inadequate in some respects, particularly in view of the lack of any significant state practice.

The analysis concludes that there is no clear definition of the term ‘combatant.’ What is generally understood to be a definition of ‘combatant’ is in fact a set of criteria for determining who qualifies for prisoner of war (POW) status. These criteria have, however, been retrospectively applied to the conduct of hostilities, more specifically, for the purposes of determining which groups are entitled to participate in hostilities. This has resulted in the elaboration of negative concepts such as ‘unlawful’ or ‘enemy’ combatant, which in turn reinforce the notion that combatants must be directly linked to the state through the

mechanism of the POW criteria. However, this paper will argue that when one takes into account the humanitarian rationale underlying the international regulation of armed conflict, the absence of a clear definition of ‘combatants’ does in fact grant states considerable leeway to regularize the status of PMCs within the existing framework of IHL, particularly given the inroads that NSAs have already made in terms of recognition by international law.

Have states used this legal space to address the difficulties created by the uncritical use of PMCs in armed conflict? As outlined in Chapter 5, the response, both multilaterally and nationally has been sporadic and perfunctory. Efforts under UN or ICRC auspices have not gained much attention or support. The Canadian experience is examined in an attempt to document a case of state practice. As described further in the paper, this proved to be a difficult undertaking, since Canada has not addressed the issue in a systematic way. Government documentation indicates that there has been recognition of the problem but no clear idea on what to do about it. No official policy statement has been issued with respect to the legal status of PMCs hired by Canada to operate in conflict situations abroad. The Canadian case thus illustrates the challenges caused by PMCs as well as the options which may be available to meet them.

Chapter six examines one form of state response, namely the introduction into the debate of the concept of ‘unlawful’ or ‘enemy’ combatant. In this connection, the paper will examine the 1951 article by Richard Baxter who was one of the earliest critics of the concept of ‘unlawful’ combatants. He showed how it is possible to expand the legitimate coverage of the combatant classification without necessitating changes to IHL. To do so, however, would require thinking beyond the doctrinaire understanding of the term adopted by governments. Nevertheless, as will be argued in this paper, Baxter’s arguments have been strengthened by recent studies undertaken by the ICRC.

The specific legal issue examined by this thesis is therefore the status of PMCs under IHL. Against that backdrop we will examine the characteristics of PMCs as NSAs. The objective of the thesis is twofold: (i) first to determine the extent to which NSAs can be considered subjects of international law in a situation of armed conflict; (ii) second to determine how

IHL could be interpreted and applied to PMCs. In taking these steps, we will have a legal framework that will provide for accountability on the part of PMCs as well as reinforce the humanitarian objectives of this branch of the law. The continued exclusion of PMCs on the other hand will undermine both those objectives as well as respect for the rule of law.

It is likely that the use of PMCs will continue, if not increase in scope. Governments have strong political, economic and security reasons for doing so. Overall, however, state practice is varied and inconsistent, and the legal ramifications of the approaches adopted have not been comprehensively assessed. The response by governments in the face of problems associated with PMCs, particularly accountability, has been inadequate. The paper will conclude by examining some possible solutions. Whether governments take the opportunity to consider them or not is a question of political will.

A word about the International/Non-international armed conflict debate

The thesis of this paper is based on the presumption that the legal status of PMCs is to be determined within the framework of IHL. If Afghanistan and Iraq are the specific contexts in which the legal ramifications of the use of PMCs are to be examined, we are confronted immediately with the question as to whether or not these are **international** armed conflicts. For the purposes of this paper, it is assumed that they are. In making this assumption, it is not intended to underestimate the importance of the ongoing classification debate. That debate is not, however, the focus of this study. In any case, the purpose of drawing sharp distinctions between international and non-international armed conflicts has long been questioned.

Common Article 3 of the *Geneva Conventions*,² dealing with “armed conflicts not of an

² *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (adopted 12 August 1949, entered into force 21 October, 1950) 75 UNTS 31 [Geneva Convention I]; *Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* (adopted 12 August 1949, entered into force 21 October, 1950) 75 UNTS 85 [Geneva Convention II]; *Geneva Convention III relative to the Treatment of Prisoners of War* (adopted 12 August 1949, entered into force 21 October, 1950) 75 UNTS 135 [Geneva Convention III]; *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949, entered into force 21 October,

international nature” had, to some extent already ‘internationalized’ what were traditionally regarded as ‘internal’ conflicts: the article in four international agreements imposes obligations on states with respect to non-international armed conflicts. In other words, it has breached the barrier which proclaimed that international law could have nothing to do with the internal affairs of states. Moreover, the ICRC, as befits its humanitarian mandate, has always taken a much broader approach to this question than have most states. For example the following definition is quoted with approval in the Commentary on Art. 43 of API:

Material war implies a continuous clash of arms conducted by organized armies which engage the responsibility of governments. It does not presume the condition that the belligerents must be States. The existence of war in the material sense is something to be judged by evidence not of intention, but of the activities of military forces in the field.³

This quotation recalls the requirement for the recognition of a state of belligerency as the basis for the application of IHL. This is however a concept that has almost completely fallen out of use. In addition the idea of a non-international conflict was originally understood to mean essentially civil war. Modern armed conflicts, although they may originate as civil wars in the traditional sense, almost invariably affect the security interests and military involvement of third states as well. The Afghanistan conflict is a good example.

There is a growing volume of academic literature which questions the viability of maintaining the distinction.⁴ This trend is also evident in judicial treatment of the issue.

1950) 75 UNTS 287 [Geneva Convention IV]. The Conventions were updated and developed in 1997 in the form of two additional protocols: *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of International Armed Conflicts* (adopted 8 June 1977 and entered into force 7 December 1978) 1125 UNTS 3 [Additional Protocol I] and *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of Non-International Armed Conflicts* (adopted 8 June 1977 and entered into force 7 December 1978) 1125 UNTS 3 [Additional Protocol II]. The texts of the Conventions and Protocols are also available online on the website of the International Committee of the Red Cross at <http://www.icrc.org/ihl.nsf>). This study assumes the application of the Conventions to the conflicts in Afghanistan and Iraq, where the presence of PMCs has been and continues to be significant [Conventions and Protocols].

³ L. Kotsch, “The Concept of War in Contemporary History and International Law” (thesis), Geneva, 1956, p. 56, quoted by D.W. Bowett, United Nations Forces, London, 1964, p. 498. *ICRC Commentary on Additional Protocol I* at <http://www.icrc.org/ihl.nsf/COM/470-750053?OpenDocument>

⁴ ICRC, *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1971); M. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, New York, Transnational Publishers Inc., 1996); W. Reisman, “Application of Humanitarian Law in Non-International Armed Conflicts: Remarks by W. Michael Reisman” (1991) 85 ASIL Proceedings 83 at 90; I.

Anthony Cullen reminds us that the *Tadic* decision provided four reasons for the extension of IHL to cover situations of insurgency.⁵ Two of these are particularly relevant to this discussion:

Thirdly the large scale nature of civil strife, coupled with the increasing interdependence of States in the world community has made it more and more difficult for third states to remain aloof: the economic, political and ideological interests of third states have brought about direct or indirect involvement of third states in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A state-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.⁶

These considerations are particularly germane to the Afghanistan situation. The legal argument is compelling, even more so when we look at the situation on the ground. Given the involvement of foreign occupying armies, the spillover of the conflict into neighbouring Pakistan, and control by the Taliban of a large swath (if not most of) Afghan territory, it becomes increasingly difficult to maintain that the conflict in Afghanistan is not international.

As a final point, the argument that the Afghan war is a non-international armed conflict paradoxically strengthens the case for the need for PMCs to be held to account with respect international human rights standards which would continue to apply even if IHL did not.

Detter, *The Law of War*, 2d ed. (Cambridge, New York, Cambridge University Press, 2000), 41; G. Aldrich, "The Laws of War on Land," (2000) 94 A.J.I.L. 42; Emily Crawford, "Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts" (2007) 20 Leiden J. Int'l. L. no. 2; Anthony Cullen, "The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)" (2007) 12 Journal Confl. & Sec. L. 419

⁵Anthony Cullen, "The Concept of Non-international armed conflict in International Humanitarian Law," Cambridge Studies in International and Comparative Law (Cambridge, Cambridge University, 2010) 13; ICTY, *Prosecutor v Tadic*, Judgment on appeal, 15 July 1999 (International Criminal Tribunal for the Former YugoslaviaIT-94-1-A, Oxford reports online *Tadic*. Case no.IT-94-1-AR72, para.97, at <http://www.oxfordlawreports.com/>

⁶*Ibid.*

There is of course an argument that both branches of law apply simultaneously, but no government could seriously maintain that **neither** are applicable.

1

The problem

“We cannot win a fight for hearts and minds when we outsource critical missions to unaccountable contractors”⁷

1.1 Introduction

The use of Private Military Companies (PMCs) has become an increasingly common feature of contemporary armed conflict and has received extensive media attention, mainly because of the controversial use of these companies in the wars in Iraq and Afghanistan, but also because of the less-than-constructive role they have played in political/security confrontations in developing countries, particularly in Africa.⁸ For instance, there has been a more or less steady stream of news reports and media commentary on the PMC phenomenon since the beginning of the conflicts in Iraq and Afghanistan. Understandably, attention has focused on the negative aspects of the conduct of these companies, particularly when such conduct involves breaches of human rights standards or the law of armed conflict as it applies to protected persons (civilians and prisoners of war for example). Official Canadian engagement of the services of PMCs is not as pervasive as is the case with the US, nor has it received the same degree of media scrutiny. Nevertheless, it is an issue that confronts Canadian officials and military in Afghanistan, either through direct contractual relationships or through interaction with PMCs in the course of combat situations. The implications for Canada are examined later in this study.⁹

The range of services these companies offer is considerable and includes military training and advisory services, as well as logistics and technical support. In some cases they have

⁷ Senator (as he then was) Barack Obama quoted in C. Hauser, “New Rules for Contractors are Urged by 2 Democrats” *New York Times*, (4 October 2007), online: <http://www.nytimes.com/>

⁸ Abdel-Fatau Musah & J. Kayode Fayemi, eds., *Mercenaries: an African Security Dilemma* (London: Pluto Press, 2000).

⁹ See for example the report by David Pugliese, “When warfare goes Private,” *Ottawa Citizen*, (5 April 2010) 83, online: <http://www.ottawacitizen.com/>

been given responsibilities for interrogation and supervision of detainees, intelligence analysis and close protection of senior diplomatic and military personnel. In Iraq, for example, PMCs “operate and are equipped much like military units.”¹⁰ PMCs can essentially be described as corporations offering security, defence and/or military services to states, international organizations, non-governmental organizations, and private companies and/or armed groups. These services include armed guarding and protection of persons and objects or buildings; maintenance and operation of weapons systems; prisoner detention and interrogation; intelligence, risk assessment and military research analysis; as well as advice to or training of local forces and security personnel.

Private contractors have replaced members of the armed forces in a number of situations ranging from actual participation in hostilities to support of armed forces in prolonged military occupation, security in peace-keeping/peace-enforcing operations, international administration in post-conflict institution building and intelligence gathering. In addition, PMCs have been used and continue to be used by non-state actors, such as NGOs and corporations operating in conflict zones or in territories characterized by insecurity and weak institutional governance. Most recently, armed private contractors have been used to defend maritime commerce against the re-emerging threat of piracy.

The services provided by PMCs thus fall roughly into three categories: (1) military and security assistance, including combat; (2) military advice (consulting and training); and (3) support (including intelligence).¹¹ These are all functions which have been traditionally undertaken by soldiers and personnel of the regular armed forces of a State. Much of the discussion about the status of PMCs, however, revolves around the controversial question of whether or not they are or should be engaged in combat. This has led to a fairly theoretical discussion of the proper functions of a soldier but it will be argued here that the distinction between combat and non-combat roles of the military is to a great extent artificial,

¹⁰ D.P. Ridlon, “Contractors or Illegal Combatants: the Status of Armed Contractors in Iraq” (2008) 62 A.F.L. Rev. 199 at 219.

¹¹ Lindsay Cameron, “Private Military Companies: Their Status under International Humanitarian Law and its impact on their Regulation,” (2006) 88 Int’l Rev. Red Cross 575 [Red Cross Rev.]. The preceding description is a précis of the various elements extracted from authorities quoted in this paper.

particularly in light of the general acceptance of a broad definition of armed forces.¹²

1.2 PMCs in the field: the problem of accountability

The continuing doubts about the role of PMCs in armed conflict situations reflect the underlying unresolved issue of the accountability of these companies for actions which violate international humanitarian law standards. This is a persistent theme of almost all of the media reporting on this question, as illustrated by a random selection of recent New York Times reports.¹³

The most active, and the largest security companies are American, and chief among these has been Blackwater.¹⁴ The following comment in a *New York Times* report summarizes the problem succinctly:

...if a private in the United States military fires on civilians, a clear body of law and a set of procedures exist for the military to use in investigating each incident and deciding if the evidence is sufficient to bring charges. But when private security contractors do the same, it is exceedingly unlikely that they will be called to account. A patchwork of laws that are largely untested, and practical obstacles to building cases in war zones, have all but insulated contractors from accountability.¹⁵

As this comment suggests, the problem can be seen at its starkest in situations in which civilians have been targeted or attacked – a clear violation of International Humanitarian

¹² The view expressed in a UK House of Commons Report cited in Sheehy et al, eds., *The Legal Control of Private Military Corporations* (Palgrave, MacMillan, 2008) at 17 [Sheehy]. See also the discussion in Chapter 4 at 51 below.

¹³ Rod Nordland, "NATO Contractor is sentenced to death in Afghanistan," *New York Times* (27 January 2010); James Risen, "3 Blackwater Guards Called Baghdad Shootings Unjustified" *ibid.* (16 January 2010); James Risen, "Former Blackwater Guards Charged With Murder" *ibid.* (7 January 2010); James Glanz, "Contractors Outnumber U.S. Troops in Afghanistan" *ibid.* (1 September 2009); James Risen, "2005 Use of Gas by Blackwater Leaves Questions," *ibid.* (10 January 2010), online: <http://www.nytimes.com/>

¹⁴ US companies are the focus of Peter Singer's book, *Corporate Warriors: The Rise of the Privatized Military* (Cornell University Press, 2003). See also Jeremy Scahill, *Blackwater: the Rise of the World's Most Powerful Mercenary Army* (New York, Nation Books, 2007). Blackwater changed its name, but not its colours to Xe Services in February, 2009. See Derek Kravitz, "Blackwater Founder Steps Aside," *Washington Post* (2 March 2009) online at <http://www.washingtonpost.com/>

¹⁵ Alissa J. Rubin and Paul von Zielbauer, "Blackwater Case Highlights Legal Uncertainties," *New York Times* (11 October 2007), online: <http://www.nytimes.com/>
<http://www.nytimes.com/2007/09/28/world/middleeast>.

Law (IHL) and in particular the *Fourth Geneva Convention on the Protection of Civilians*, and the two Additional Protocols.¹⁶

International humanitarian law, as codified and developed by a large number of treaties including the four *Geneva Conventions* and their *Additional Protocols*, sets out the normative standards for the protection and treatment of victims of international armed conflicts.¹⁷ The underlying purpose of IHL is to protect persons *hors de combat* as the titles of the *Conventions* suggest. This reflects one of the fundamental principles of humanitarian law, namely, the principle of humanity.¹⁸ In this connection, the *Conventions* distinguish between different categories of actors (the principle of distinction),¹⁹ mainly between combatants and civilians, i.e. those who are entitled to participate in hostilities (combatants) and civilians, those who are not. These distinctions determine in part the lawfulness of actions that may be undertaken in the course of armed conflict. Civilians who engage in hostilities not only lose the protection provided by the *Conventions* and *Protocols*, but are liable to prosecution under domestic and international law for actions which would be lawful if committed by a combatant. In this regard, combatants are sometimes described as having immunity from prosecution except for violations of IHL. This is why the status of PMCs is relevant. Are they civilians or combatants? As will be discussed later on, this is an issue which has generated considerable academic and media commentary in the wake of the wars in Afghanistan and Iraq²⁰.

¹⁶Articles 48 to 79 of *Additional Protocol I*; Articles 2, 4, 5, 6, 13-17 of *Additional Protocol II*, *supra* note 2.

¹⁷*Conventions & Protocols*, *supra*, note 2.

¹⁸ See Robert Kolb & Richard Hyde, *An Introduction to the International law of Armed Conflicts*, (Oxford, Portland: Hart Publishing, 2008) at 45.

¹⁹ *Ibid.* at 46.

²⁰ A number of recent publications have explored the significant policy and legal ramifications of the expanding role of PMCs in modern warfare. Among them are: Simon Chesterman & Chia Lehnardt, *supra* note 1; Simon Chesterman & Angelina Fisher eds., *Private Security, Public Order* (Oxford: Oxford University Press, 2009); Benedict Sheehy et al. eds., *supra* note 12. For a good discussion of the legal problems caused by the phenomenon in the USA see Andrew Finkelman, "Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits against Military Contractors," (2009) 34 *Brook. J. Int'l. L.* 395.

Peter Singer referred to the "scant treatment the subject has received in the analytical literature in "War, Profits and the Vacuum of Law: Private Military Firms and International law" (2004) 42 *Colum. J. Transnat'l L.* 523. A mere three years later in *From Mercenaries to Market*, Chesterman & Lehnardt, *supra* note 1 we find a 15 page bibliography, although with very few entries predating 2003.

1.3 US Experience

The government with the most extensive experience in hiring PMCs is, not surprisingly, the USA. Several official studies have assessed the US experience. These include reports prepared by the Congressional Budget Office, the Government Accountability Office (GAO), the Department of Defence's Joint Personnel Status Report, the Commission on Wartime Contracting in Iraq and Afghanistan, and the US Special Inspector General for Iraq Reconstruction.²¹ One report summarizes associated problems as including insufficient contract oversight and management; lack of planning and interagency coordination in the use of contractors; insufficient training and experience on the part of military officers dealing with contracts; and overspending.²² This has led to abuses at various levels, which are seen as undermining the US counter-insurgency efforts in Afghanistan and Iraq.²³

A Congressional Research Services (CRS) study notes that, as of March 2010, there were 95,461 contractor personnel in Iraq compared to approximately 95,900 uniformed personnel in-country. Over 12% of the contractor contingent performs security functions.²⁴ Another commentator states flatly that some of these contractors "have been involved in combat."²⁵ In Afghanistan, the contrasting figures are even more striking: 112,092 Department of Defense contractors compared to 79,100 uniforms, i.e. 58% (as of March 2010), although no breakdown of the type of services has been officially provided. The problems resulting from the use of PMCs have also been documented in numerous media reports. These include salary discrimination as compared to regular troops; a separate chain of command from the military, often originating from outside the field of operations; misuse of funds; difficulties in identifying the responsible government agency; inflated financial requirements and so on.²⁶

²¹ These reports are cited in Congressional Research Service (CRS) report by Jennifer K. Elsea, "*Private Security Contractors in Iraq and Afghanistan: Legal Issues*" (January 2008) CRS 7-5700 R40991, online:www.crs.gov.

²² CRS, Moshe Schwartz, *Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis*" Congressional Research Service (July 2010) 7-5700 R40764, online at www.crs.gov.

²³ *Ibid.* at 3-4.

²⁴ *Ibid.* at 7.

²⁵ Major Shane Gifford, "The Armed Private Military Company and the Canadian Forces: the Next Step in Contractor Support," 11 *Canadian Army Journal*, (Spring 2008) 79 at 89.

²⁶ See for example "Behind the Afghan Embassy Scandal" *Time Magazine* (11 September 2009), online at www.time.com/time/magazine.

1.4 Canadian experience

Information on the Canadian experience is not as extensive as that of the US, nor is it as readily available. Canadian government publications nowhere acknowledge the use of PMCs as giving rise to any problems. One Canadian military observer, writing in his personal capacity, gives a generally positive assessment of the use of PMCs who, in his view, have been instrumental in assisting the Canadian military to “accomplish its mission” in Afghanistan.²⁷ Despite the fact that this author acknowledges a lack of policy with respect to the status of PMCs,²⁸ he largely ignores the legal issues and basically urges closer integration of PMCs into the Canadian Forces, by enrolling them in the reserves, for example.

A study of Canadian employment of PMCs discusses a number of Canadian companies offering security services as well as some examples of companies hired by Canada.²⁹ According to this account, these companies have provided logistical and aviation-related services to the Canadian forces in Afghanistan, as well as construction and “management” of Canadian military installations in that country.

The most comprehensive account of the use of PMCs in Afghanistan provided so far by the Canadian government was in response to a question from Ottawa Centre MP Paul Dewar in November 2010.³⁰ Dewar’s questions, which were addressed to the Ministers of International Cooperation, Foreign Affairs and International Trade (DFAIT) and National Defence (DND), were as follows: “With regard to Canada’s operations in Afghanistan: (a) what is the cost of private security (i) in total (ii) for every year since 2006 to the present (b) for each year since 2006 to the present; what are the names of the private security firms hired by Canada; what is the value of each contract awarded to each company and what is the nature

²⁷ *Gifford, supra* note 25 at 90.

²⁸ “inability to define the status of contractors as non-combatants under international law, *Ibid.* at 88.

²⁹ David Antonyshyn et al. “Beyond the Law? The Regulation of Canadian Private Military and Security Companies Operating Abroad,” (2009) PRIV-WAR Report, National Report Series <http://priv-war.eu/> European Institute [Antonyshyn].

³⁰ House of Commons, *Order/Address of the House of Commons, Inquiry of Ministry* (November 2010). These documents could not be located on the websites of either the Parliament of Canada or the Library of Parliament. Thus it was not possible to give a more precise citation for these documents which are identified here as provided by Mr. Dewar.

of the services provided under each contract and (c) what rules and policies apply to the government's contracting practices with regard to the hiring of private security firms in Afghanistan." The Minister of International Cooperation reported that the Agency held no documents relevant to the inquiry. DFAIT attested that it spent a total of \$10,395m with the amount increasing annually over the five year period. As to the nature of the services, these were declared to be related to "defensive security" and consisted of "protection of Canada's diplomatic premises, personnel and activities, as well as consulting services."

DND provided the most detailed response to Dewar's questions and, not surprisingly, spent the most money, a total of \$30,714,867 over the five years. Total expenditures for the two departments for hiring private security firms would therefore be around \$41 million. This may not be an excessive figure in comparison to the overall cost of the war to the government,³¹ but in terms of the importance of the tasks assigned to these companies, it would account for a significant proportion of operational expenses.

The services provided related to "static security," "force protection," "personnel protection for the Governor of Kandahar" and "Provincial security." These broad and somewhat vague descriptions do not shed much light on what the PMCs actually did from an operational point of view. It can be presumed however that "force protection" and security for the Governor would be in response to hostile forces ("the enemy," in ordinary military parlance). The extent to which this involved actual engagement with enemy combatants cannot of course be determined from the government's documentation.

With respect to Dewar's third question on "rules and policies" that apply to contracting practices, the two Ministers simply referred to government regulations on contracting in general. The question of the legal status of PMCs under the law of war was not addressed, nor had it been asked. The legal implications of Canadian practice with respect to the use of

³¹ Estimated by the Parliamentary Budget Officer for fiscal years 2001 to 2008 to be billion \$10.7, Office of the Parliamentary Budget Officer, *Fiscal Impact of the Canadian Mission in Afghanistan*, (October 2008) online: http://www.parl.gc.ca/pbo-dpb/documents/Afghanistan_Fiscal_Impact_FINAL_E_WEB.pdf.

PMCs will be discussed in Chapter 5, *infra*. At this point it is safe to say that the Government's policy in this regard is unclear at best.³²

One tragic incident, however, illustrated how Canadian forces can be affected by the conduct of PMCs even if they are not contracted by Canada. The death of a Canadian soldier in Afghanistan in 2008 was initially attributed to PMC fire.³³ This version of events was subsequently disavowed by Canadian authorities:

DND has closed the door completely on the death of Master Cpl. Josh Roberts but it is unlikely this case will disappear because of the concerns the young soldier's family has. As you may recall, Master Cpl. Roberts was killed in August during a battle involving insurgents. Afghan private security contractors working for Compass Integrated Security Solutions were also on the battlefield at the time. The Canadian Forces National Investigation Service looked into the incident but determined that, while the Afghan mercenaries had been present, they were not responsible for the soldier's death. The NIS has stated insurgents killed Master Cpl. Roberts, a conclusion they based on witness statements and other evidence military police have declined to discuss.³⁴

Commenting to the media shortly after Roberts' death, the senior Canadian soldier in Afghanistan at the time, Brig. General Denis Thompson summed up DND's approach to hiring PMCs: "Without private security firms, it would be impossible to achieve what we're achieving here... We just don't have the numbers to do everything... As an example, they secure some of our bases. Canadian troops couldn't do their job without the help of private security firms."³⁵ This comment appears to be the most authoritative so far issued by DND.

A more general background assessment by David Perry explains that personnel reductions in the 1990's and a persistently high operational tempo have forced the Canadian military to increasingly rely on commercial support options for operations abroad.³⁶ Perry predicts that

³² See discussion in Chapter 5 "Governments' Response to the PMC Question" at p. 66 below.

³³ Drew Brown, "Death of Canadian soldier highlights chaotic security situation in southern Afghanistan" *Stars and Stripes* Mideast edition, (August 11, 2008) <http://www.stripes.com/news/death-of-canadian-soldier-highlights-chaotic-security-situation-in-southern-afghanistan-1.81857>

³⁴ Dave Pugliese, "The Questions Surrounding the Death of Master Cpl. Josh Roberts in Afghanistan" *Ottawa Citizen* (4 February 2009), online at <http://communities.canada.com/OTTAWACITIZEN/blogs/defencewatch/archive/2009/02/04/the-questions-surrounding-the-death-of-master-cpl-josh-roberts-in-afghanistan.aspx>

³⁵ "Video shows soldiers confronting contractors over Canadian's death," *CBC News* (August 11, 2008) online at <http://www.cbc.ca/news/world/story/2008/08/11/afghanistan-death.html>

³⁶ David Perry, "Contractors in Kandahar, eh? Canada's 'Real' Commitment to Afghanistan" (Summer 2007), 9 *Journal of Military and Strategic Studies*, No.4, online at <http://www.jmss.org/jmss/index.php/jmss/issue/view/15>.

while the Canadian Forces' use of privately provided logistics functions has remained modest to date, the Canadian military will continue to accelerate the rate at which it relies on non-military support options. He does not however address the issue of the legal status of PMCs in the operational context, nor does he refer to the existence of, or need for policy development on the issue.

1.5 A Problem of Legal Principle

As is evident from this brief survey, the involvement of PMCs in armed conflict raises a host of legal issues. This paper will examine them from the perspective of PMCs as non-state actors (NSAs), subject to international law. This statement may perhaps be seen as prejudging the main issue to some extent, by suggesting that NSAs are *de jure* subjects of international law. This is an assumption that is well-founded in international law theory and jurisprudence, as will be discussed in Chapter 2. The more difficult question, clearly, is the nature of whatever legal capacity or personality NSAs may be deemed to possess. Of course NSAs can play a role on the international stage without any formal capacity recognized in law. This is the perspective of international relations (IR) theory, as outlined in Chapter 4, which does not concern itself with questions of legal status or capacity. From this perspective, NSAs are by default defined, if not created, by municipal law. In the case of Private Military Companies (PMCs), this would mean that their rights and obligations are determined by the contracts which (mainly) governments have concluded with them and also, probably, by domestic regulations related to licensing and incorporation. In this sense, their status is viewed as equivalent to individual persons. Nevertheless, International Humanitarian Law (IHL) constitutes the legal context in which PMCS operate and it seems important to find a way to reconcile the presence of PMCs in armed conflict with the rules that govern such conflicts.

The Subjects of International Law

2.1 Traditional Doctrine

The time-honoured principle that states are the exclusive subjects of international law would seem to definitively dispose of the question of the legal status of PMCs. Since PMCs are not states, they can, by default, only be viewed as subjects of municipal law as it applies to individuals or corporations. Their standing under international law should therefore correspond to the limited recognition that other private entities enjoy.

It does not require a very extensive knowledge of international law, however, to observe that, as a result of this restriction, the international legal architecture does not fully reflect the complexity of modern international relations. That limitation is the first problem we face in this inquiry and it has both theoretical and practical ramifications. The tendency of international law towards artificiality is particularly striking when we examine the variety of participants or entities which are active on the international scene. These entities (for example, various types of intergovernmental organizations, corporations, NGOs, insurgents, liberation movements and so on) interact on a more or less continuous basis with states and consequently have an impact on the rights and interests of states. They can in turn be critically affected, for good or ill, by the conduct of those same states. These are more or less organized entities and have acquired a degree of legal capacity, if only in a limited sense, either internationally or municipally.³⁷

³⁷ We should not lose sight of the fact, however, that there are certain groups within the population whose particular claims and rights have not received the same level of legal recognition: women and children in armed conflict situations, for example. These are NSAs whose human rights have been violated, sometimes on a massive scale, in a way that has not been adequately taken account of by the international normative system. From a legal theory perspective, they present similar problems of inadequate formal recognition, but this aspect of the problem will not be addressed in this paper.

Nevertheless, international law is generally regarded, certainly by states themselves, as a normative system governing only state-to-state relations: states are the primary, if not exclusive subjects of international law.³⁸ The following statement of the principle summarizes the traditional position: “since the law of nations is based on the common consent of states, states are the principal subjects of international law. This means that the law of nations is primarily a law for the international conduct of states, and not of their citizens. As a rule, the subjects of the rights and duties arising from the law of nations are states solely and exclusively.”³⁹ This articulation of the principle is not significantly different from the formulation contained in the first edition of Oppenheim’s seminal 1905 work and still represents the prevailing view among scholars and most Legal Advisers of the world’s foreign ministries.

There are many reasons, perhaps more political than legal in nature, as to why this should be so. The post-colonial history of the twentieth century supplies us with plenty of examples as to why recognition of the status of a state is such a coveted goal which, once attained, is ruthlessly defended by newly emerging nations.⁴⁰ Nevertheless, it is clear that an unqualified statement that “states are the exclusive subjects of international law” is too limited in the light of the dynamic nature of legal systems in general. Even Oppenheim/Lauterpacht concedes that there are “limitations to that principle.”⁴¹ Of course, to admit that non-state entities have an impact on the conduct of states in the international sphere is not the same thing as saying that those entities should be accorded rights and privileges under the governing legal framework; yet a system which formally and categorically excludes such critical actors runs the risk of becoming irrelevant.

³⁸Martin Shaw, “Subjects of International Law “ in *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008) at 195 [Shaw]. In note 1, Shaw surveys the main sources of the classical international law doctrine on this question.

³⁹H. Lauterpacht, ed., *International Law: A Treatise by L. Oppenheim*, 8th ed. (London: Longmans, 1955) at 19. [Lauterpacht/Oppenheim].

⁴⁰This is an issue that is still very much alive in many parts of the developing world. For a perspective on Africa see Lars Buur & Helene Maria Kyed, *State Recognition and Democratization in Sub-Saharan Africa: a New Dawn for Traditional Authorities?* (New York: Palgrave Macmillan, 2007) and O. C. Okafor, “After martyrdom: international law, sub-state groups, and the construction of legitimate statehood in Africa” (Spring 2000) 41 *Harv. Int’l L. J.* no. 2 at 503.

⁴¹ *Oppenheim/Lauterpacht, supra* note 39 at 19.

2.2 Limited Recognition of Non-state Actors

To attribute a narrowly doctrinaire view to the classical international law authorities, however, would misrepresent their positions to some degree. *Oppenheim*, for example, acknowledges that states may treat other entities as endowed with international rights and duties and, to that limited extent, can recognize them as subjects of international law.⁴² The logic of this concession to reality is that non-state entities may, in a derivative or dependent sense, possess a measure of legal personality that can be recognized in international law. In this connection, *Oppenheim* refers to the ground-breaking decision of the International Court of Justice (ICJ) in the *UN Reparations Case* in which the Court noted that: “throughout its history, the development of international law has been influenced by the requirements of international life...[and that] the progressive increase in the collective activities of states has already given rise to instances of actions upon the international plane by certain entities which are not states.”⁴³ Once the focus of the analysis is shifted from the definition or criteria as to what constitutes a state to that of “rights and duties” (i.e. capacity) attributable to any actor, the door is open to a consideration of which other entities on the international stage can be accorded recognition as possessors of limited international personality. The status of private military companies active in contemporary international armed conflict is a question which lends itself to such an assessment.

The inadequacy of the narrow “state-centric” view of what kind of entity can be recognized as a subject of international law, is, perhaps surprisingly, a view fairly widely held including in the standard general international law texts. O’Connell, for example, while re-stating the classic position, acknowledges that it is too simplistic, and, again citing the *Reparations Case*, argues that a more realistic test is “capacity,” (as already suggested in the preceding discussion), although in his view this seems limited to a subject’s capacity to maintain its rights by bringing international claims.⁴⁴ Starke makes a similar point in asserting that the “primacy” of states in international law does not imply that “no other entities” can be

⁴² *Ibid.*

⁴³ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949], ICJ Rep 178 [Reparation].

⁴⁴ D.P. O’Connell, *International Law*, (Dobbs Ferry, NY: Stevens and Sons Limited, 1964) at 89.

recognized within the international legal system⁴⁵ and refers specifically to International Humanitarian Law (IHL) as a field where the “interests and needs of individuals and non-state entities” has been recognized.⁴⁶ The role of PMCs in international armed conflict would seem to be particularly relevant in this connection.

Brownlie points out that the identification of a subject of international law through its capacity to bring international claims, for example, results in a circular definition in that such capacity is dependent on the existence of a legal person.⁴⁷ He suggests that this approach does not get us past the state-centric limitation. In citing examples of special types of legal personality (insurgents, liberation movements, legal constructions, etc.),⁴⁸ he advances the analysis significantly, although he links the question of capacity to the condition of “autonomy” (i.e. from a state). “Capacity,” is a fairly inexact attribute, and it may not adequately reflect the complexity and variety of the relationships between NSAs and states.⁴⁹ Nevertheless, Brownlie’s acknowledgement that certain entities may possess legal personality “for particular purposes”⁵⁰ broadens the legal perspective to include actions that are not limited to those carried out by the representatives of states. It is worth remembering that the first edition of his work on international law principles appeared in 1966; therefore the idea is not exactly new.

2.3 Later Scholarly Developments in International Law

More recent general international law texts have reinforced this functional approach.⁵¹ Shaw, for example, does not depart much from the standard ‘capacity-to-bring-claims criterion, but he usefully points out that personality may be manifested in many forms and

⁴⁵ J.G. Starke, *Introduction to International Law*, 10th ed. (London, Butterworth’s, 1989,) at 58 [Starke].

⁴⁶ *Ibid.* at 68.

⁴⁷ Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford, New York: Oxford University Press, 2008) at 57 [Brownlie].

⁴⁸ *Ibid.*, at 64.

⁴⁹ For an extensive account of the range of NSA/state relations in armed conflict situations see especially Christopher Harding, “The Role of Non-state Actors in International Conflict: Legal Identity, Delinquency and Political Representation” [Harding] in Ustinia Dolgopol and Judith Gardam, eds., *The Challenge of Conflict: International Law Responds* (Leiden, Boston: Martin Nijhoff Publishers, 2006) at 547.

⁵⁰ Brownlie, *supra* note 47 at 67.

⁵¹ Shaw, *supra*, note 38; Malcolm Evans, *International Law*, (Oxford; Oxford University Press, 2003) at 205 [Evans].

can be inferred from practice, as well as from some forms of community acceptance. He also cites IHL as an area which reflects increased recognition of the participation of different non-state actors.⁵² In this connection, he characterizes national liberation movements (NLMs) in particular as “governments in waiting.” Such groups often achieve a degree of legal recognition well before they attain any kind of organizational structure analogous to that of states.⁵³

Transnational corporations on the other hand are, in Shaw’s view, only “possible *candidates* for international personality.”⁵⁴ He develops his argument by noting that the objective factual and legal criteria used to characterize an entity as a state can be modified or limited to establish “qualified personality” and goes on to say that “personality may be acquired by a combination of treaty provisions and recognition or acquiescence by other international persons.”⁵⁵ This proposition suggests the possibility of a more flexible approach to determining when and how the attribution of legal personality can be established. His analysis does not move far from the basic categories of “quasi-states” or “states-in-waiting,” to use his own terminology, however.⁵⁶

A classic example of a NSA which does not fit the “state-in-waiting” mould, but which has nonetheless received universal recognition of legal capacity, is the International Committee of the Red Cross (ICRC). A recent decision of the International Criminal Tribunal for the Former Yugoslavia has underlined the relevance of this status to contemporary armed conflicts.⁵⁷ The decision was in response to a motion by the prosecution seeking to compel a former employee of the ICRC to give evidence of facts that came to his knowledge by virtue

⁵² *Shaw, supra* note 38 at 197. He is not the only authority to single out the important contribution of IHL in this regard. See also Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) at 2 [Clapham].

⁵³ *Shaw, ibid.* at 245.

⁵⁴ *Ibid.* at 249, [emphasis added].

⁵⁵ *Ibid.* at 261.

⁵⁶ He does cite however the “qualified” personality of the International Committee of the Red Cross (ICRC) as an example of an NSA outside of the “quasi-state” category, given its capacity to enter into certain kinds of international agreements. *Ibid.* at 261.

⁵⁷ *Prosecutor v. Blagoje Simic et al., ex parte confidential*. Trial Chamber Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, (27 July 1999) International Criminal Tribunal for the Former Yugoslavia Trial Chamber, online at <http://www.icty.org/x/cases/simic/tdec/en/90727EV59549.htm>.

of his employment with the international agency.

The Tribunal concluded that personnel of the ICRC could not be so compelled. The Tribunal's reasoning is grounded in the special status granted by States to the ICRC in several IHL treaties. The Tribunal stated that: "It is widely acknowledged that the ICRC, an independent humanitarian organization enjoys a special status in international law, based on the mandate conferred upon it by the international community. The Trial Chamber notes that the functions and tasks of the ICRC are directly derived from international law, that is, the Geneva Conventions and Additional Protocols." The tribunal therefore concluded that by formally and legally granting the ICRC a humanitarian role in armed conflicts, and as a result accepting the principles under which the ICRC operates, namely, impartiality, neutrality and confidentiality, States party to the conventions are correspondingly obligated to accept the ICRC's right to non-disclosure of information.⁵⁸

The decision fits squarely within the criteria referred to by Shaw, above, that is the combination of treaty provisions and acceptance or acquiescence by other international persons. This conclusion is reflected in the statement from the ICRC itself on its website:

The ICRC, like any intergovernmental organization, is recognized as having an "international legal personality" or status of its own. It enjoys working facilities (privileges and immunities) comparable to those of the United Nations, its agencies, and other intergovernmental organizations. Examples of these facilities include exemption from taxes and customs duties, inviolability of premises and documents, and immunity from judicial process... Several domestic and international tribunals have ruled on the ICRC's judicial immunity and testimonial privileges. Recently, the International Criminal Tribunal for the former Yugoslavia (ICTY) distinguished the ICRC from NGOs by citing its international legal mandate and status, including its right to decline to testify. The rules of procedure and evidence of the newly established International Criminal Court also reflect the position of the more than one hundred states that drafted the document, that the ICRC enjoys testimonial immunity.⁵⁹

Shaw's analysis could be extended by arguing that objective criteria could be linked to the particular context of armed conflict, as it is with the ICRC, involving participation of a particular type of NSA (PMCs), for a particular purpose (assisting in the military effort in an

⁵⁸*Ibid.* para. 73.

⁵⁹*ICRC Website*: <http://www.icrc.org/eng/resources/documents/misc/5w9fjy.htm>.

autonomous or semi-autonomous capacity). This line of reasoning may be applied more broadly in the light of the underlying rationale of IHL: the preservation of international stability and the broadest possible extension of humanitarian protection. “Not to accept some form of qualified personality in this area might be to free such entities from having to comply with such rules and that clearly would affect community requirements.”⁶⁰ This assertion accurately encapsulates the challenge posed by the participation of NSAs, particularly PMCs, in armed conflict. Shaw goes on to say that “international personality thus centres, not so much on the capacity of the entity as such to possess international rights and duties, as upon the actual attribution of rights and/or duties on the international plane as determined by a variety of factors ranging from claims made to prescribed functions.”⁶¹ This pragmatic approach widens the scope for possible identification of a variety of legally recognized NSAs as subjects of international law.

In acknowledging that NSAs may possess some degree of legal personality or capacity, most commentators draw a parallel with the acquisition of certain limited rights accorded to the individual person on the international level, primarily in the fields of IHL and international human rights law.⁶² PMCs, on the other hand, are more likely to be the perpetrators of violations of such rights, which is not, of course, to say that they cannot also be victims in some circumstances.⁶³ The universality of human rights law has been used to justify the proposition that NSAs are bound by human rights obligations.⁶⁴ The scope for recognized legal capacity in this very limited sense does not of course preclude the possibility of broadening the capacity of NSAs in terms of both rights and obligations, to be accorded rights as combatants under IHL, for example.

It is important to note, as suggested above, that in most commentaries, the status of the non-state actor is to a great extent determined by its relation to the state. As discussed earlier,

⁶⁰Shaw, *supra*, note 38, at 262.

⁶¹*Ibid.* at 264.

⁶²Brownlie, *supra* note 47 at 64; Starke, *supra* note 45 at 58; Clapham, *supra*, note 52 at 2.

⁶³See e.g. reports on the atrocious treatment of the remains of Blackwater personnel in Fallujah: “Frontline: private warriors: contractors: the high-risk contracting business” PBS at <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/contractors/highrisk.html>.

⁶⁴ See discussion Chapter 3.2 below at 44 on UN resolutions that have called on NSAs to abide by human rights, as well as IHL obligations in situations of armed conflict.

Oppenheim/Lauterpacht saw this status in terms of a derivative or dependent relationship.⁶⁵ More sophisticated analysis, however, persuasively argues that the taxonomy can be a bit more nuanced, by looking at NSAs generically, both in terms of their relationship to the state as well as their positions on a kind of perceived moral axis of “delinquent” or “benign” orientation.⁶⁶ In a helpful schematic presentation, which he describes as “Deconstructing the State-centred Paradigm,” Christopher Harding divides the range of NSAs into four categories: (i) Infra-state actors; (ii) Proto-state actors; (iii) Supra-state actors and (iv) Extra-state actors.⁶⁷ The first three are seen, in differing ways, as being associated with the existing “state paradigm” and do not seek to challenge it.⁶⁸ PMCs could theoretically be placed in the “infra-state” category were it not for the fact that most governments take pains to ensure that they are clearly positioned on the outside of any formal bureaucratic or military structure. The fourth category, on the other hand, presents “a challenge to the representative authority of the state in international activity.”⁶⁹ This last category can be further subdivided according to the “benign” or “delinquent” orientation of the organization in question. This approach will be taken up more fully later in this paper in a more theoretical discussion of how the range of various types of NSAs can be accommodated in international law terms, in particular where NSAs can be positioned in Harding’s framework.

The foregoing discussion was intended to outline the main elements of the answer to the question: which actors are the subjects of international law? An interesting preliminary conclusion that can be drawn from this discussion is that even “traditional” international law authorities do not stake their positions on the four-square assumption that international legal personality is confined exclusively to states. In other words, traditional statements cannot be used definitively to argue that there is no basis in international law for recognizing the status of NSAs, although any recognition is limited to carefully circumscribed circumstances. In that sense, more recent theoretical scholarship related to the status of NSAs does not really represent a radical departure from the position articulated in what may be regarded as even the most conservative general international law texts. These texts, it could be said, have left

⁶⁵ *Oppenheim/Lauterpacht*, *supra* note 39 and see Brownlie’s reference to “autonomy,” *supra* note 47.

⁶⁶ *Harding*, *supra* note 49 at 547.

⁶⁷ *Ibid.* at 552.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* at 553.

the door open to development of broader understandings and applications of the law in this area, in response to the *UN Reparations Case*'s "requirements of international life."⁷⁰

In conclusion, the answer to the question of "who or what, are the subjects of international law?" may not be as cut and dried as might have been initially assumed. Criticism of international law for artificiality in this regard, must be tempered by recognition that commentators and authorities have long struggled with the need to adapt the law to the "requirements of international life." It seems clear that the current understanding of international law does not provide a satisfactory response to the problems presented by PMCs as a prominent contemporary example of NSAs.

As Harding points out, "To confer on the state a monopoly of international action is misleading on two counts."⁷¹ First, NSAs whose actions are politically or militarily significant will be legally significant as well. Second the primacy accorded to the state often obscures the real locus of responsibility. The concept of responsibility (or accountability) is one which traditionally has been considered an essential attribute of state sovereignty. This traditional perspective, however, is frequently expressed in ways that do not necessarily exclude NSAs, at least in principle. A recent example was the message from the President of the United States rejecting the Additional *Protocol I* to the *Geneva Conventions* on the grounds that its provisions recognizing national liberation movements "undermine the principle that the rights and duties of international law attach principally to entities that have those elements of sovereignty that allow them to be held accountable for their actions, and the resources to fulfill their obligations."⁷² If accountability and resources are to be the criteria, many NSAs would be in a position to meet them.

The reality of international life no longer corresponds to the classic law of nations, which now seems in many ways irrelevant to the dynamics of most contemporary conflicts. In fact,

⁷⁰ See *Reparations*, *supra* note 43.

⁷¹ *Harding*, *supra* note 49 at 551.

⁷² "A Message from the President of the United States regarding Protocol II Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-international Armed Conflicts", in Sassoli, M. and A. Bouvier, *How does the law protect in War? Cases Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 2nd edition (Geneva: ICRC, 2006) at 603 [Sassoli].

NSAs have historically had a significant impact on how war was waged. As early as the *Hague Regulations*, undefined entities designated as “militias” and “volunteer corps” were recognized as subjects of the law of war: they were to be considered to be “combatants” although not explicitly described as such. The *Regulations* also gave the status of “belligerents” to civilian populations which “spontaneously take up arms” against an invader.⁷³ Later under the *Geneva Conventions* the category of recognized NSAs was extended to include resistance fighters and, later yet, with the adoption of *Additional Protocol I*, national liberation movements. In other words, IHL has a history of granting status or legal personality to NSAs. The issue is no longer contentious, at least from a theoretical point of view. What it has meant in practical terms, however, is another question: state practice in this regard is sketchy. What remains to be seen is how state practice in an IHL context will respond to newly emerging NSAs such as PMCs.

⁷³ *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*. the Hague, 18 October 1907. On ICRC Website: <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>.

3

International Relations and International Law: Comparative Theories on Non-State Actors Part 1: International Relations (IR) Theory

3.1.1 Introduction

“...some NGOs and corporations in actuality have a very significant international presence and reach and may have some specific role in the development or resolution of conflicts”⁷⁴

International legal theory on NSAs has evolved beyond the limited scope discussed in Chapter 2. This evolution undoubtedly reflects changes in the international environment in the latter part of the twentieth century. In the context of modern armed conflict in particular, the impact of non-state actors is at least as critical as that of states themselves. Before reviewing more recent developments in legal theory in response to the expanding role of NSAs, it may be useful to look more closely at perspectives from another discipline. In this connection, some international relations theorists have developed an analytical framework which is broader than that of international law. They describe a context in which it is useful to consider possible future legal developments.

International relations (IR) theory elaborates a realistic assessment of all significant players on the international stage, regardless of how they may be categorized in a formal legal sense. It can thus be viewed as a method, to use the title of one study, of “connecting governance to the global realm”.⁷⁵ The term ‘global realm’ can perhaps also be understood as another way of saying ‘global reality.’ In a review of recent developments in IR theory, Jack Snyder explains that there have been three dominant approaches: realism, liberalism, and an updated form of idealism known as constructivism. “Realism focuses on the shifting distribution of power among states. Liberalism highlights the rising number of democracies and the

⁷⁴ Victoria Lennox, “Conceptualising Global Governance in International Relations,” (3 October 2008) International Relations, website <http://www.e-ir.info/> [Lennox].

⁷⁵ *Ibid.*

turbulence of democratic transitions. Idealism illuminates the changing norms of sovereignty, human rights, and international justice, as well as the increased potency of religious ideas in politics.”⁷⁶ These dominant theoretical approaches are discussed in a more explicit way by Robert Jervis in the context of armed conflict in “Theories of War in an Era of Leading Power Peace.”⁷⁷ Jervis’s study is a good example of a state-centred realist approach.

Although the focus of each of these paradigms is quite different, what they have in common is an attempt to identify the conceptual motors which drive the dynamics of international relations, as well as the assumptions on which foreign policy is based. Within this diverse range, the realist focus attaches overwhelming importance to the role of states, as do most international legal theorists. Others view states as one, albeit powerful, category among a range of actors. The role of NSAs can, in fact, be taken into account, to a greater or lesser degree, in any of these approaches.

In her review of the theoretical literature, Lennox, using terminology slightly different from that of Snyder, points out that,

although particular theoretical paradigms within IR emphasize specific characteristics of global governance, no single paradigm has been capable of capturing the complexity of global governance. Resultantly, the conceptualization of global governance requires a combination of particular aspects of realism, institutionalism, constructivism, and pluralism. Although independently these theoretical paradigms are deficient, together they go a long way in explaining power, order, norms and change in the world order.⁷⁸

In examining global governance, Lennox identifies the main factors which challenge state-centric, realist assumptions: globalisation, in an economic context, and global governance at the political level. Within this broader context, Alston enumerates the following subsidiary factors: privatization of government functions across the board; capital mobilization and foreign investment flows; trade liberalization; the expanding horizons of multilateral institutions; expansion of civil society and the changing nature of armed conflicts. In

⁷⁶ Jack Snyder, “One World, Rival Theories,” 145 *Foreign Policy* (Nov/Dec 2004) at 4, online at <http://www.foreignpolicy.com/>

⁷⁷ (March, 2002) Vol. 96 *American Political Science Review* at 1.

⁷⁸ Lennox, *supra* note 74.

addition, he views feminist legal theory as significant in focusing on the artificiality of the legal framework's public (government)/private (NSAs) divide, thereby opening up the conceptual framework.⁷⁹ Cumulatively, these factors have, *inter alia*, created the conditions which have allowed for greater potential for action by NSAs.

Lennox concludes that, although each of the theoretical paradigms (realist, institutionalist, constructivist and pluralist) has shortcomings, they all make a contribution to our understanding of how the dynamics of international relations work. For example, although the constructivist and pluralist approaches allow for a greater role for non-state actors, she notes that, at the same time, they tend to downplay the significance of the state and overlook "the asymmetrical distribution of power and elitism in the international system."⁸⁰ Her approach is, as a result, one which recognizes that "in the global order, actors not derived from governments are performing governance functions"⁸¹ but is also one which does not ignore the continuing importance of the role of the state. This is an approach which is compatible with a legal analysis of the significance of NSAs, such as PMCs, in their interaction with states. On the basis of this more inclusive perspective then, the perceptions of IR theorists reviewed here have been included not because of their particular theoretical orientations, but rather because they have attempted, in varying degrees and from different viewpoints, to evaluate the impact of NSAs on the conduct of international relations.

3.1.2 Approach taken in this Section

In exploring alternatives to the state-centric focus, some legal theorists have developed an approach not dissimilar to the IR evaluation outlined in the reference to Lennox's approach. In providing a broader, 'big picture' conceptual framework against which international relations can be analyzed, IR theorists have managed to account for the role of NSAs with

⁷⁹ Philip Alston, ed., *Non-State Actors and Human Rights*, (Oxford: Oxford University Press, 2005) at 19 [Alston].

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

less difficulty than their legal counterparts. It should be noted, however, that the broader perspective tends to be employed by feminist legal theorists. For example, as Judith Gardam puts it: “viewing the world and its peoples as a number of separate, non-connected autonomous units prevents the law of armed conflict being applied on the basis of the magnitude of the dispute.”⁸² This approach is strikingly different from one based on, for example, formalistic IHL criteria – such as whether the conflict is international or non-international. Gardam’s term “magnitude” could easily be replaced by concepts such as “intensity”, “gravity”, “scope” and so on. Her criticism is that the traditional view, which is prevalent among international law practitioners and scholars, is not able to provide an adequate legal account for the complexity of contemporary international life, in particular in the context of armed conflict. This approach, while fairly rare among lawyers, echoes that of international relations theory, which starts with an assessment of empirical factors, rather than legal constructs, in recognizing the critical role of private actors.

The following discussion will draw on the writings of a variety of IR theorists who have assessed the significance of NSAs, using interrelated criteria to identify them and to illustrate their capacity to influence or exercise power.

3.1.3 NSAs in International Relations Theory

NSAs are not new. Although the importance and power of the state evolved over the centuries to the point where it came to occupy a primary position in the political world by the twentieth century, the course of history has been altered as much by other (non-state) actors. In earlier periods of history, the nation state was not a well-established institution.⁸³ The management of international relations could not, therefore, have been organized purely on

⁸² Judith G. Gardam, “The Law of Armed Conflict: a Feminist Perspective” in Kathleen Mahoney and Paul Mahoney, eds. *Human Rights in the Twenty-first Century: A Global Challenge*, (Dordrecht, The Netherlands: Martinus Nijhoff, 1993) at 419

⁸³ See Fred Halliday, “The Romance of Non-state Actors” in Daphne Josselin & William Wallace eds. *Non-State Actors in World Politics* (New York: Palgrave Houndmills, 2001), at 22 [Josselin & Wallace]. For the role of private military groups throughout history, see James Cockayne, “The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law”, (September 2006) 88 Int’l. Rev. Red Cross, No.863, at 462.

the premise that the only players which counted were states. In contemporary international law terms, however, this remains the prevailing view, despite the fact that the governing political philosophy of most western industrialized democracies by the turn of the 21st century was that “all that was not the state was now to be encouraged, and what voluntary or private sector organizations could do, the state should not do.”⁸⁴ Given this philosophy, the policies of Prime Minister Thatcher and President Reagan could thus be seen as strengthening the roles of NSAs as much as the efforts of NGOs and transnational corporations themselves.

A system of international law based almost exclusively on the relations between states will therefore inevitably ignore or discount the relevance of non-state actors to a great extent. As Cutler suggests, “Westphalian-inspired notions of state-centricity, positivist international law and public definitions of authority are incapable of capturing the significance of NSAs, like TNCs and individuals, informal normative structures, and private economic power in the global political economy.”⁸⁵ IR theorists reflect this perspective and show us that contemporary international reality encompasses the interaction of a variety of actors at the international level:

[with the] emergence of actors and institutions above and below the state, such as Multinational Economic Institutions (MEI) (e.g. International Monetary Fund and World Trade Organisation), Global Social Movements (GSM), as well as international law regimes, power – the ability to affect actors’ perceptions, intentions, or actions – is no longer specific to states, in that it has become increasingly diffused throughout the global system with the emergence of new centers and authorities beyond the state. The architecture of the global order is one of anarchy, not as the realist would have it as a constant state of war, but rather as an ordered system that is intersubjectively and ideationally constructed by a multiplicity of actors and interests. Global governance constitutes this order, and is a layered and complex system of independent and interdependent ideas, interests, institutions, actors, movements, and relations that perform governance functions. Within global governance, states remain active and critical actors in the global order;

⁸⁴ Halliday, *ibid.* at 25.

⁸⁵ Cutler, A.C. “Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy” in Review of International Studies quoted in Bas Arts, “*Non-State Actors in Global Governance: Three Faces of Power*”, (Bonn: Max-Planck Projektgruppe: Recht der Gemeinschaftsgüter, 2003) 133 [Bas Arts].

nevertheless, their position is not as dominant as it once was and their role will continue to change over time.⁸⁶

The impact of the decentralization of the international system need not necessarily be seen as detrimental to effective global governance. Globalization may be stimulating new forms of accountability for non-state actors, leading to a new global polity which increasingly finds a place for international law. “The state is not disappearing; it is disaggregating into separate, functionally distinct parts. These parts – courts, regulatory agencies, executives and even legislatures – are networking with their counterparts abroad, creating a dense web of relations that constitute a new governmental order.”⁸⁷ The range of the component parts of the state would of course include the military, and the “web of relations” also encompasses partnerships between government agencies and PMCs. The impact of this process of disaggregation on the application of international law to NSAs will be discussed below.

3.1.4 Criteria for identifying NSAs

Both legal and IR theory are concerned with characteristics or criteria that qualify certain entities as NSAs. In general terms, the *Max Planck* study defines Non-state Actors as “all those actors that are not (representative of) states, yet operate at the international level and are potentially relevant to international relations.”⁸⁸ This definition could hardly be more general, although the author goes on to enumerate five categories that meet it: (i) intergovernmental organizations; (ii) international non-governmental organizations; (iii) transnational corporations; (iv) epistemic communities (networks of experts, think tanks etc); and (v) a fifth, unspecified group which contains just about everything else (liberation movements, terrorist groups, guerrilla organizations).

Bas Arts suggests that, in order to be effective, the NSA concerned should be presumed to have reached what amounts to a “critical mass” or to have achieved a certain profile in

⁸⁶ *Lennox, supra* note 74.

⁸⁷ Anne-Marie Slaughter quoted in *Clapham, supra* note 52 at 16.

⁸⁸ *Bas Arts supra* note 79 at 5.

political and organizational terms. The same condition exists under IHL when it provides recognition for NSA by requiring “the presence of these non-state actors with a certain level of organizational capacity.”⁸⁹ *Bas Arts* identifies more specific indicators such as: size; a substantial constituency; a transnational dimension; access to political arenas; and a “consequential” effect on international politics.⁹⁰ These indicators, although they do not have any authority as legal criteria, are not unrelated to the international law prerequisites for statehood such as the control of territory, and other factors.⁹¹ We have already noted that even in the standard international law texts, acceptance of the idea that the category of subjects of international law may not be limited to states.⁹²

3.1.5 NSAs and power

In addition to criteria for the identification of NSAs, IR theory analyzes their impact in terms of an ability to exercise power. One approach identifies several manifestations of power from dispositional (i.e. power over resources) to power over decision-making. The important thing to remember in this regard is that it is not only states which exercise power in these different forms. NSAs can also control resources and influence decision- and rule-making. The economic and political power wielded by transnational corporations, for example, is a fact of contemporary international life. PMCs also have a degree of economic clout but their impact is more important in the area of decision-making (particularly in a strategic or security sense) and the balance of power in armed conflict situations. As already mentioned, IR theory also assesses NSAs from the perspective of the relationship to the state which is, as noted, a factor in how they are able to exercise power. This relationship can be positioned on an autonomous/dependent axis.

⁸⁹ William A. Schabas, "Theoretical and International framework: Punishment of non-state actors in non-international armed conflict" (2003) 26 *Fordham Int'l. L.J.* at 907.

⁹⁰ *Bas Arts supra* note 85 at 5.

⁹¹ See for example, “Criteria for Statehood” in John H. Currie, *Public International Law*, 2nd ed. (Toronto: Irwin Law Inc. 2008) at 23.

⁹² In Chapter 2, “Subjects of International Law” above at 17.

3.1.6 The ‘autonomous/dependent’ dichotomy

PMCs can be categorized, in terms of function and structure, as transnational corporations, although they have similarities with insurgent or paramilitary groups, as well as with NGOs. Bas Arts points out that “governments are structurally dependent on other (private) entities for the income and public goods they strive for, e.g. taxes, social welfare, economic growth, jobs, environmental quality, infrastructure etc.”⁹³ Interestingly enough, the foregoing list does not include a security-related component, but there is no reason to exclude it, particularly in light of the privatization of many aspects of governmental security responsibilities: security at airports, for example, to say nothing of the role of NSAs in contemporary armed conflict.

While the criteria discussed above were developed primarily in a domestic context, their application can easily be extended to the international level. This approach is premised on a degree of autonomy from the state. This consideration represents an interesting convergence of view between IR and international legal theory as discussed above.⁹⁴ In the case of PMCs, it could be argued that the dependency relationship is to some extent reversed; it is the security company that is dependent on the state to ensure that it has a *raison d’être* and a reliable source of revenue. It may be more accurate in this case, therefore, to describe the relationship as one of mutual dependency (or co-dependency) since the influence works both ways. It should also be noted that the dependency factor is not as relevant to other types of NSAs (insurgents for example, where the relationship with the state is in fact antagonistic). NGOs and transnational corporations (TNCs) however, “though different in many ways, have enough characteristics in common to make an integrative political power analysis legitimate.”⁹⁵ “Integrative” is understood here to mean the inclusion of NSAs in a comprehensive analysis of how various actors, including PMCs, influence or participate in the exercise of power in any given social or community setting. This approach is accepted in social science and international relations theory, but is largely absent from the international law analysis.

⁹³ *Bas Arts, supra* note 85 at 7.

⁹⁴ See reference to Brownlie’s discussion *supra* note 47.

⁹⁵ *Bas Arts, supra* note 85 at 7.

As discussed above, a key criterion which IR theory provides is the relationship to the state, which can range from one of autonomy to co- (or even complete) dependency. *Josselin and Wallace* set out indicators which include autonomy from central government funding and control; operating or participating in transboundary networks; and acting in ways that effect political outcomes.⁹⁶ This, more nuanced understanding of autonomy suggests that an NSA may be independent of government structure, but may enjoy a very close relationship nonetheless. This final point – *affecting political outcomes* – is of major importance and will be addressed more fully below.

3.1.7 Affecting political outcomes

Although an inexact criterion, the impact on political outcomes is a factor which will determine, to a large extent, how the significance of NSAs can be measured in the broader picture. Thus, for the purposes of this paper, it has already been suggested that unqualified autonomy should not be considered as a defining characteristic of an NSA (even states cannot act completely autonomously). This approach accords with Harding’s view.⁹⁷ The NSA must however possess enough autonomy to be able to have an independent influence on decisions and events. It is in this general sense that *Bas Arts* refers to the actions of NSAs as being “relevant to international relations.”⁹⁸ The degree of relevance will depend on structural and functional factors related to the role and impact of the organization⁹⁹ and these will, in turn, determine whether or not NSAs are granted access by governments and international organizations to political arenas, both national and international. In this connection, it is important to note, as Halliday reminds us,¹⁰⁰ that we need not always see NSAs as challengers to, but instead often as supporters of the status quo of the political/legal system. Overall, however, he and other IR theorists see the influence of NSAs primarily in terms of the development and shaping of policy and decision-making, rather than as

⁹⁶ *Josselin & Wallace, supra* note 83 at 3.

⁹⁷ *Harding, supra* note 49.

⁹⁸ See *Bas Arts, supra* note 85 at 5.

⁹⁹ *Ibid.* at 4.

¹⁰⁰ *Josselin & Wallace, supra* note 83 at 15.

responsible and accountable actors at the international level. This perspective is shaped by a tendency in IR theory to see the role of NSAs mainly in benign terms. It should be pointed out, however, that the role of PMCs is so well integrated into the military structure that they influence decision-making as part of the process.

The social science or IR policy approach generally views NSAs as organizations which have a role in policy development or ‘framing the discourse.’ Most of the contributions in the *Josselin and Wallace* collection, for example, fall into this category. Typical of this approach is the Ariel Colonomos essay “Non-state Actors as Moral Entrepreneurs: a Transnational Perspective on Ethics Networks.”¹⁰¹ In the humanitarian law field, however, ‘framing the discourse’ is less important than the question of how norms are implemented or applied, particularly in terms of the scope of application of rules intended to protect victims of armed conflict or to hold violators accountable for their actions. PMCs, for example, are not active in promoting their interests with governments in terms of lobbying for particular kinds of regulation or accountability. Their preferences in this regard lean toward self-promotion and self-regulation.¹⁰² This is probably true of all corporations which benefit from privatization: “most corporations and business-oriented NGOs favoured self-regulation and were successful in their opposition to international regulation.”¹⁰³ Some observers also see this approach as the best option for states.¹⁰⁴ Interestingly enough, the legal and policy implications of the involvement of NSAs in the privatization process have received little attention in the social policy studies of NSAs.

¹⁰¹ *Josselin & Wallace supra* n. 83 at 76

¹⁰² Andrew Bearpark, “The future of the market” in *Chesterman & Lehnardt, supra* note 1 at 251.

¹⁰³ *Josselin & Wallace, supra* note 83 at 35.

¹⁰⁴ Michael Cottier, “Elements for Contracting and Regulating Private Security and Military Companies” in *Red Cross Rev. supra* note 11 at 637.

3.1.8 Impact of NSAs

The impact of NSAs is assessed in IR theory according to their objectives and fields of expertise. In general terms, however, one comprehensive study has concluded that NSAs matter because of their impact in three ways: (1) their knowledge and expertise which can assist states in dealing with a variety of problems; (2) their influence on political discourse and agenda-setting, law- and decision-making and implementation; (3) their participation in political and institutional arrangements in the international system.¹⁰⁵

The Bas Arts study demonstrates, among other things, how NSAs have become more institutionalized as part of the international policy-making process.¹⁰⁶ A common theme in IR theory is that it is wrong to assume that because NSAs are not as important as states, they are irrelevant to the functioning of the international system.¹⁰⁷ Empirical evaluations of NSA impact in the Bas Art study were conducted on the following: the impact of NSAs in the development of foreign policy;¹⁰⁸ the influence of trade unions on decision-making at the World Trade Organization (WTO) and the International Labour Organization (ILO);¹⁰⁹ the influence of NGOs on the environmental provisions in the *North American Free Trade Agreement* (NAFTA) and the *Framework Convention on Climate Change*;¹¹⁰ the role of NGOs in the construction of civil society in the countries of the ‘South,’¹¹¹ and the effect of organized crime on the international system.¹¹²

Somewhat surprisingly, IR theorists rarely address the question of NSAs and armed conflict.¹¹³ The sections on empirical studies in *Josselin and Wallace* for example, do not

¹⁰⁵ Bas Arts et al eds., *Non-state Actors in International Relations* (Aldershot: Ashgate Publishing, 2001) at 3 [Bas Arts et al.].

¹⁰⁶ *Ibid.* at 41

¹⁰⁷ This issue is summed up in the title of one chapter, “The Relevance of being Important or the Importance of Being Relevant? State and Non-state actors in International Relations Theory,” *ibid.* at 79.

¹⁰⁸ *Ibid.* Chapter 8 at 127.

¹⁰⁹ *Ibid.*, Chapter 10 at 161.

¹¹⁰ *Ibid.* Chapters 11 at 177 and Chapter 13 at 211.

¹¹¹ *Ibid.* Chapter 15 at 247.

¹¹² *Ibid.* Chapter 17 at 279.

¹¹³ Although there is a discussion of “Early Warning by NGOs in Conflict Areas,” *ibid.* Chapter 16 at 263.

deal with armed conflict situations, other than peripherally.¹¹⁴ IR analysis is nonetheless relevant, despite its emphasis on policy-making. This emphasis is perhaps not surprising given that that process is of more intellectual interest to IR theorists than the subject of how legal and policy norms function in practice.

There is a marked difference between the social science and legal approaches. The social scientists show less interest in how NSAs acquire legitimacy or recognition as actors within a particular normative structure, than they do in how they function empirically and how their impact on the system can be measured. For the lawyer, the issue of interest is how should NSAs, or groups who are impacted by or impact the conduct of an armed conflict, have their claims or interests recognized so that their concerns, roles and status are seen as a legitimate part of the system (e.g. PMCs; women). The other side of this coin, of course, is how they can be held accountable for their actions. One of the distinguishing features of PMCs, which does not apply so much to other NSAs, particularly NGOs, is that they are often accused of usurping governmental functions.¹¹⁵ Not only that, but the charge is sometimes made that their involvement undermines the state's monopoly over the use of force and possibly even the democratic process itself.

3.1.9 Summary

Reviewing the foregoing brief survey of IR theory on NSAs we can conclude that:

- (i) There is no agreed definition of what an NSA is, certainly not in any legal sense.

¹¹⁴ See Part III: "Non-state actors in International Arenas" and Part IV: "International Civil Society," in *Josselin & Wallace, supra* note 83 at 161 and 229 respectively.

¹¹⁵ *Sheehy, supra* note 12 adopts this highly critical approach. See also W.P. Nagan, "The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors and the Constitutive Process" (2008) 60 *Me. L. Rev.* at 429; S. Gul, "The Secretary will deny Knowledge of Your Actions: the Use of Private Military Contractors and the Implications for State and Political Accountability" (Summer 2006) 10 *Lewis and Clark Law Review* No. 2 at 287; Martha Minow, "Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism and Democracy" (September 2005) 46 *B.C.L. Rev.* no.5 at 989; J.D. Michaels, "Beyond Accountability: the Constitutional, Democratic and Strategic Problems with Privatizing War" (Fall 2004) 82 *Wash. U.L.Q.* no. 3 at 1001.

- (ii) A number of criteria and categories have been proposed by IR theorists to identify NSAs. Some general definitions have been offered.
- (iii) Attempts at definition generally end up being lists (of common characteristics, types of activities engaged in, contexts etc.). Nevertheless they are useful in scoping out a realistic picture of what the world of NSAs and their impact actually look like.
- (iv) The picture presented by IR theory constitutes a useful starting point for an examination of the legal implications of their participation in the international system.

Even though the term ‘NSA’ is generic and could mean simply any actor which is not a state, NSA theory adduces a number of criteria which must be met in order to identify NSAs whose impact in the international arena can be measured. Among these criteria are relevance to international relations; organizational profile and capacity; impact on political (in the case of PMCs we could say military) outcomes; influence on decision-making; access to political arenas and relationship with the state on the “autonomy/dependence” axis. PMCs meet all these criteria.

In their analysis of the actual role and significance of NSAs, IR theorists implicitly raise the issue of how these entities should fit into the international normative structure (i.e. the international legal system). This is the point at which our analysis moves from IR to legal theory. When it comes to the regulation of the activities of NSAs, the social scientists do not have a lot to say. Nevertheless, by calling for a realistic understanding of the dynamics of international relations involving input by a number of NSAs, many of which sometimes have a greater impact on the course of events than states, the IR theorists have implicitly challenged their legal counterparts to take account of this reality. The next part will outline the legal response to this challenge.

3.2

International Relations and International Law: Comparative Theories on Non-State Actors **Part 2: Legal Theory**

3.2.1 Introduction

Many of the problems related to the governance of NSAs, particularly PMCs as a prominent example, come from their exclusion, for the most part, from the ambit of international law. The principal branch of law which does apply to them, contract law as part of municipal law, is generally viewed as inadequate from the point of view of accountability.¹¹⁶

What happens when the actions of significant players are largely excluded from the application of relevant international law? Feminist legal theory, as noted by Alston,¹¹⁷ contends that limiting the conduct that victimizes women to what is considered to be the “private” sphere, results in an unbalanced and discriminatory system in which the law takes account of only part of social reality, which is in fact a comprehensive and interrelated whole.¹¹⁸ In *International Law: Modern Feminist Approaches*, Doris Buss outlines “the ways in which the discipline’s doctrine manoeuvres positions on women’s inequalities outside international law’s remit.”¹¹⁹ For feminist theory, the critical scenario is one of victimization of women, not normally the context in which PMCs operate. Nevertheless, the principle is

¹¹⁶ See the growing volume of literature devoted to the issue of whether or not PMCs operate in a legal vacuum: “Editorial”(2006), in 88 Int’l Rev. Red Cross, No.863, *Private Military Companies*, which states categorically that “there are no legal gaps...private companies do not operate in a legal vacuum.” or James Cockayne in the same volume: “The global reorganization of legitimate violence: military entrepreneurs and the private face of international humanitarian law.” Cockayne argues that “there is not so much a “vacuum” as a “patchwork” of international regulation.” at 477. See also *Sheehy*, *supra* note 12 where he maintains that basically there is a vacuum because of the corporate veil which shields PMCs from accountability. See also *Antonyshyn*, *supra* note 29 at 33.

¹¹⁷ *Alston*, *supra* note 79 at 19.

¹¹⁸ See Catherine McKinnon’s discussion of the differential treatment of rape and torture in “On Torture: A Feminist Perspective on Human Rights” in Kathleen Mahoney and Paul Mahoney, eds., *Human Rights in the Twenty-first Century: a Global Challenge* (Dordrecht Martinus Nijhoff, 1993) at 21.

¹¹⁹ Doris Buss & Ambrina Manji, eds. *International Law: Modern Feminist Approaches*, (Oxford, Portland, Or.: Hart, 2005) at 5.

the same: PMCs function *de facto* outside the application of the categories of IHL. They are in a kind of grey zone in which they are not entitled to the protection (and obligations) of combatants, but they are rarely treated as civilians, in terms of the accountability for actions which violate the rules of the law of war. Thus the legal regime governing the conduct of PMCs seems to be viewed in theory as essentially private in nature i.e. limited to the terms of the applicable contract. Consequently, PMCs have also been positioned outside of international law's reach. Nevertheless, both IR and legal theory have progressed to the stage where "the traditional view of what belongs to the public sphere and what to the private has to be questioned."¹²⁰

Just as feminist legal analysis argues that the legal protection for women is short-changed by the private/public law divide, PMCs are, conversely, shielded from the effective operation of international humanitarian and human rights law. "Even where states are willing and, in principle, able to monitor the activities of PMCs, the private nature of PMCs provides them with means of protection from scrutiny not available to public actors, such as arguments of privacy and client confidentiality. Issues of extraterritorial jurisdiction compound the problem."¹²¹ The tendency of international law to ignore the actions of non-state actors in armed conflict has had the result of, on the one hand, increasing the vulnerability of one group (women) while providing a kind of *de facto* (in the case of Iraq, however, during one period, *de jure*) impunity to another (PMCs). IR theorists underline the drawbacks of this approach. If the analysts who claim that state power is in retreat are correct,¹²² then the exclusionary nature of a system based on the rights and obligations of states will not meet the requirements of the contemporary international system. It is thus impossible to achieve an equitable balance in a system which ignores the realities of NSAs.¹²³

The longer the anomalous position that PMCs occupy persists, the more IHL, and international law generally, is undermined and abuses go unaccounted for. If inadequate

¹²⁰ *Bas Arts et al.*, *supra* note 1005 at 101.

¹²¹ *Chesterman & Lehnardt*, *supra* note 1 at 156.

¹²² As argued, for example, in *Josselin & Wallace* *supra* note 83 at 20.

¹²³ *Harding*, *supra* note 49 at 547.

attention is paid to the questionable activities of NSAs from a legal perspective, the long-term consequences cannot but be negative:

Empirically speaking... non-state actors impacting human rights do not only encompass members of the idealized “civil society.” They also include the Mafia, Russian or American, gangs trafficking in women and/or drugs, sweatshop operators, pressure groups pro and contra the environment, etc. In fact, they, and not primarily the nation-state, may be oppressors worse than the state, the traditional target of human rights law.... As many have recognized, the next frontier of human rights law is abuse of private power.¹²⁴

Corporations have amassed considerable power and influence on the international stage, while legally occupying a position similar to that of private persons. They escape the political and legal accountability required of governments, while at the same time shaping policy and the outcome of events, and, in the specific case of PMCs, wielding quasi-military force, largely outside of the system of control that restrains regular armed forces.¹²⁵ They are neither employed by, nor included as members of the armed forces of the state. Normally they do not form part of the military command structure, nor are they viewed as legal agents of governments.

The foregoing discussion outlines the difficulties, primarily in terms of accountability, arising from the exclusion of NSAs from the application of international law. International law, in both theory and practice, is, however, beginning to address this challenge.

3.2.2 Developments in International Legal Theory

As already noted in the first part of this chapter, IR theorists tend not to deal directly with the normative implications of the anomalous position of NSAs. Coker’s approach is typical:¹²⁶

¹²⁴ Siegfried Wiessner, “Non-State Actors and Their Impact on International Human Rights Law “ Association of American Law Schools, Outline for AALS Workshop on Human Rights Alexandria, Virginia, October 26-28, 2000 at www.Workshop%20on%20Human%20Rights.webarchive.

¹²⁵ See discussion in *Sheehy supra* n.12 at 55 and accompanying text.

¹²⁶ Christopher Coker, “Outsourcing War” in *Josselin & Wallace supra* note 83 at 189.

NSAs are a manifestation of certain trends (e.g. privatization) which will grow in importance up to the point at which it is even possible to envisage the United States declaring war “on a corporation that was guilty of armed aggression.”¹²⁷ Despite identifying the problem, however, Coker does not address the normative ramifications of the scenario he presents.

The differences between IR and legal theory are not, in principle, that great. In fact, there is considerable overlap. Some international law commentators take an approach that is conceptually close to that of IR theorists. Harding, for example, constructs a schematic survey of NSAs that divides them into “infra-state” (i.e. components of government) and “proto-state” (i.e. groups aspiring to governmental status) such as national liberation movements.¹²⁸ Neither infra- or proto-state actors seek to challenge the state-centric paradigm: they may in fact wish to support and reinforce it. But it is also possible to imagine entities, such as PMCs, which fit somewhere in between these categories. These could be called “auxiliary,” “associate” or “ancillary” state actors, somewhere along the “dependency” spectrum which was discussed earlier in this chapter.¹²⁹

On the basis of the foregoing discussion, the status of PMCs under international humanitarian and human rights law can be approached from three angles:

1. By placing them in one of the existing categories (or subcategories) of combatants under IHL. This approach, and its limitations, is discussed in the next chapter.
2. By viewing them from an international human rights law perspective according to which they would be considered to have obligations, regardless of their formal status, to respect international human rights standards. State practice, particularly at the UN, lends some support to this approach.
3. By combining the two previous categories into one in which human rights law and IHL operate concomitantly in an armed conflict scenario.

If the case can be made that PMCs are required to observe human rights requirements, it is difficult to argue that they do not also have obligations under IHL. In this context, the two

¹²⁷ *Ibid.* at 191.

¹²⁸ *Harding, supra* note 49 at 552.

¹²⁹ See *Part I*, above at 27 and following.

sets of requirements would be mutually reinforcing. It has already been pointed out that IHL provides a precedent for human rights law by its recognition of NSAs.¹³⁰ Correspondingly, human rights law brings an additional dimension of particular relevance to NSAs under IHL.

As discussed above,¹³¹ Brownlie has maintained that, despite the traditional definition of “subjects of international law,” not all legal actors need to possess the same degree of legal capacity. Harding points out¹³² that this “relative character of legal personality” is especially significant in the international context. This is particularly relevant to armed conflict situations where the range of actors is wide and varied. The role that PMCs play, for example, places expectations on them at the international and, in the case of the US at least, national levels. Harding argues persuasively that recognition of legal personality is an important precondition for the effective implementation of a system of accountability.¹³³

Clapham, Alston and others have extended the discussion beyond the traditional position which limits liability for human rights violations to government officials or agents.¹³⁴ In the traditional view, accountability for violations committed by contracted paramilitary groups could only be realized through the mechanism of the doctrine of state responsibility.¹³⁵

According to Nigel Rodley, while governments have obligations to respect human rights, no such international duty is imposed on individuals or groups beyond the requirement to “promote” human rights.¹³⁶ This static, state-centric approach to human rights is at odds even with the limited way in which international law has traditionally treated NSAs, going back at least to the *UN Reparations*¹³⁷ case. It ignores the issue of the nature of the responsibility or accountability of the group itself or how, in an armed conflict situation, it should be categorized from the point of view of rights and duties, as compared to rights and duties of the state. Indeed, in some armed conflict situations, private military groups may be more

¹³⁰ Clapham, *supra* note 52 at 2.

¹³¹ In Chapter 2 on “Subjects of International Law” above at 20.

¹³² Harding *supra* note 49 at 555.

¹³³ *Ibid.* at 555 and following.

¹³⁴ The traditional position is articulated by Nigel Rodley in “Can Armed Opposition Groups Violate Human Rights?” in *Mahoney & Mahoney, supra* note 114 at 297.

¹³⁵ *Ibid.* at 298.

¹³⁶ *Ibid.* at 311.

¹³⁷ See *supra* note 43 in Ch.2 on “Subjects of International Law.”

powerful than the armed forces of governments. In such situations it seems arbitrary to apply different legal standards to each.

There has been a gradual recognition of an expectation that NSAs have obligations to abide by international human rights standards. Clapham notes, for example, that UN Resolutions have expressed concern that terrorists “violate basic human rights,”¹³⁸ clearly indicating that not only states can be the objects of criticism in international fora. In this regard, reference should be made to the *UN Commission on Human Right Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.¹³⁹ The guidelines include the following injunction: “In cases where a person, a legal person or other entity is found liable for reparation of a victim, such a party should provide reparation to the victim or compensate the state if the State has already provided reparation to the victim.”¹⁴⁰ In other words, entities other than states are considered to have obligations to make reparations at the international level. Another example is the approval of the International Security Assistance Force in Afghanistan (ISAF) mandate by the Security Council which called for “compliance with international humanitarian and human rights law and for all appropriate measures to be taken to ensure the protection of civilians.”¹⁴¹ No distinctions are made among the parties which are the subject of this injunction and indeed, there are references to the Taliban and Al Qaeda in the same paragraph.

Harding¹⁴² has shown how entities which the international community is reluctant to treat as subjects of international law have been called upon to comply with international human rights standards. As he notes, a legally significant and common source for this practice is UN Security Council Resolutions relating to “factions,” “entities” and “regimes” such as the Taliban and UNITA (in Angola), the Revolutionary United Front in Sierra Leone, the Khmer Rouge and even Al Qaeda. This has become common UN and, one might by extension say

¹³⁸ Clapham, *supra* note 52 at 38.

¹³⁹ UN Doc.E/CN.4/RES/2005/35 of 19 April 2005.

¹⁴⁰ *Ibid.*, annex para. 15.

¹⁴¹ UNSC Res. 1833, “The situation in Afganistan” (S/RES/1833, September 22, 2008), online at http://www.un.org/Docs/sc/unsc_resolutions08.htm.

¹⁴² Harding, *supra* note 49 at 561.

“state” practice, regardless of “established formal legal categories.”¹⁴³ Clapham adduces the concrete example of the UN Human Rights Commission’s condemnations of breaches of international humanitarian law by paramilitary groups in Colombia.¹⁴⁴ Non-state actors have also been held accountable in domestic US judicial decisions for international human rights violations as they have by international tribunals.¹⁴⁵

It is not unreasonable, therefore, to envisage an international system in which NSAs are considered subjects of international law for the purposes of the same human rights obligations that attach to states. As Clapham concludes: “The liability of non-state actors is already admitted. . . Humanitarian law now knows no conceptual barrier to imposing duties on non-state actors.”¹⁴⁶ It is doubtful that this view is shared by many governments and there are of course limits to how far the international community is prepared to go in this direction. Nevertheless, a process of thinking along these lines has started. This functional approach does not, however, fully “legitimize” NSAs as part of the international legal system and it must be acknowledged that the question of the proper jurisdiction to enforce these obligations remains open. However, in addition to scholarly commentary, the functional argument has been given a more specific application by the ICRC in connection with respect to the classification of some participants in armed conflict as combatants for some purposes and for specific periods of time.¹⁴⁷

¹⁴³ *Ibid.* at 562.

¹⁴⁴ *Clapham, supra* note 52 at 49 note 87.

¹⁴⁵ *Ibid.* at 55. Allegations of human rights violations have been the focus of litigation at both the international and domestic (US) levels. In the US civil cases, the basis for the claim is frequently domestic tort law. See *Haidar Muhsin Saleh et al v. Titan Corporation, CACI International Inc. and Technology Inc.* (United States Court of Appeals for the District of Columbia Circuit decided 11 December 2009 Available online at <http://ccrjustice.org>, Center for Constitutional Rights); *Sosa v. Alvarez Machain* 124 S. Ct 2739 (2004) and *Jama v. Esmor*, Civ. No.97-3093 (DRD) [448]. See also criminal prosecution of Blackwater employees in *United States of America v. Paul A. Slough et al. Criminal Action 08-0360 (RMU)* US District Court, District of Columbia online at: www.dcd.uscourts.gov. At the international level see: the ICJ case concerning Military and Paramilitary Activities in and against Nicaragua: *Nicaragua v United States*, Judgment (Merits), 27 June 1986, ICJ Reports 1986, Oxford Reports on International Law online at <http://www.oxfordlawreports.com> Oxford reports online; *Prosecutor v Tadic, Judgment*, ICTY Appeals Chamber, (15 July 1999), IT-94-1-A, Oxford reports online. In a more recent case, the ICJ applied both the law of armed conflict and human rights law to the situation in the occupied Palestinian territories: *Legal consequences of the construction of a wall in the occupied Palestinian territory* (Advisory Opinion) [2004] ICJ Rep 136 paras 89-113.

¹⁴⁶ *Clapham, supra* note 52 at 73.

¹⁴⁷ See Chapter 6 below at 84.

The third perspective outlined above is based on the presumption that “human rights law is not peacetime law.”¹⁴⁸ This proposition runs counter to the traditional position that IHL is a “derogation from the normal regime of human rights”¹⁴⁹ but recent developments such as the *Turku Declaration on Minimum Humanitarian Standards*¹⁵⁰ and the *ICJ Nuclear Weapons* opinion interlinked them as two sets of principles simultaneously applicable in all conflict situations.¹⁵¹ For this reason, one observer goes so far as to argue that customary human rights law should have been included in the ICRC Study on Customary International Humanitarian Law.¹⁵²

3.2.3 Human Rights Theory and IHL

The arguments adduced in human rights theory are compatible with traditional minimal recognition of NSAs as subjects of international law.¹⁵³ It should be recalled that the discussion of IR theory demonstrates persuasively that NSAs are critical players on the international stage. Clapham argues that “some of the obligations found in public international law and traditionally applied to states also apply to non-state actors.”¹⁵⁴ This does not mean, however, that states and NSAs are equivalent, not the least because the problem of jurisdiction over PMCs remains unresolved. Nevertheless, “lack of international jurisdiction to try a corporation does not mean that the corporation is under no international

¹⁴⁸ Françoise Hampson in Elizabeth Wilmshurst & Susan Breau, eds., *Perspectives on the ICRC Study on Customary International Humanitarian Law*, (Cambridge, New York: Cambridge University Press, 2007) at 64 [Wilmshurst & Breau].

¹⁴⁹ Roberta Arnold & Noelle Quenivet, eds., *International Humanitarian Law and Human Rights Law: towards a new Merger in International Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2008) at 8 [Arnold & Quenivet].

¹⁵⁰ The Nordic governments submitted the Declaration in 1995 to the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities of UN Commission on Human Rights. It was subsequently referred to the Commission; included in the report of the UN Secretary General prepared pursuant to the UN Commission on Human Rights resolution 1995/29, UN Document E/CN.4.1996/80, 28 November 1995.

¹⁵¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. at 226.

¹⁵² Wilmshurst & Breau, *supra* note 148 at 65.

¹⁵³ See Chapter 2, above at 19.

¹⁵⁴ Clapham, *supra* note 52 at 28.

legal obligations. Nor does it mean that we are somehow precluded from speaking about corporations breaking international law.”¹⁵⁵

It should be noted that human rights theory has not been extended to assert an unqualified designation of NSAs as subjects of international law. Instead, the approach is basically functional: to the extent of their participation in an armed conflict, certain human rights obligations arise. Exactly the same considerations apply to their status under IHL. Their corporate identity cannot be said to exist for human rights purposes but not for IHL. As legal theory in the human rights field points to accountability of private groups, a parallel argument can be made for the application of IHL. In a sense there is a convergence of developments in the two fields. Legal theory thus mirrors the IR analysis on the role of NSAs. Clapham concludes that the onus is now on the naysayers: “The burden would now seem to be on those who claim that states are the sole bearers of human rights obligations under international law to explain away the obvious emergence onto the international scene of a variety of actors with sufficient international personality and capacity to be subject to duties under international law.”¹⁵⁶

The Roberta Arnold & Noelle Quenivet¹⁵⁷ study provides us with a useful concluding summary for legal developments in this area. As noted, NSAs have already received a limited degree of recognition under IHL.¹⁵⁸ At the same time, there has also been a trend towards requiring NSAs to respect human rights obligations in conflict situations. There has thus been a kind of convergence of application of these two branches of international law: “The protection of human rights conventions does not cease in the case of armed conflicts.”¹⁵⁹

The *European Convention on Human Rights* has been used to protect victims of armed conflict in situations of civil strife.¹⁶⁰ This normally occurs in conflicts which are described

¹⁵⁵ *Ibid.* at 31.

¹⁵⁶ *Ibid.* at 82.

¹⁵⁷ *Arnold & Quenivet, supra* note 149.

¹⁵⁸ See *supra* note 52.

¹⁵⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [July 2004] I.C. J. Rep. 163 at para. 106.

¹⁶⁰ *Arnold and Quenivet supra* note 149 at 35.

as “non-international.” Given the convergence referred to above, it could well be asked whether the international/non-international distinction serves any useful purpose, particularly in light of the overall humanitarian objective of both IHL and human rights law. The aim of both is not to promote the sovereignty of the state but to protect victims of armed conflict. If the argument is made that IHL does not apply in these conflicts, a stronger case can be made in favour of the application of human rights law, especially when no derogation was claimed as, for example by Russia in Chechnya.¹⁶¹

3.2.4 Summary of the Discussion so far

The role of NSAs has been reviewed from a number of theoretical standpoints: IR and feminist theory, as well as international legal theory in general and human rights theory in particular. IR theory asserts that NSAs are critical participants in the international arena, interacting continuously with governments – sometimes against and sometimes for them. In some situations their impact on the course of events, especially in armed conflict, is as great as or greater than that of states. Governments have recognized this reality in pragmatic and political ways, if not always in legal terms. The ill-defined relationship between states and PMCs is a good contemporary example of the kind of confusion that results from this disconnect.

It is clear that the limited recognition accorded to NSAs by international law does not correspond to the reality of their impact on the conduct of international relations. In criticizing the status quo, feminist legal theory notably shares the broader perspective adopted by IR theorists and demonstrates the importance of taking account of the “big picture” i.e. which actors has the legal framework effectively excluded or undervalued? Or, put another way, where does the law fall short?

¹⁶¹ *Ibid.* at 36.

In relation to PMCs, we have already noted that IHL has taken limited account of the reality of NSAs in exceptional cases (e.g. militias, resistance movements). Human rights theory, by contrast, has shown that there is an unacknowledged but definite trend to position NSAs in a broader normative framework (e.g. as is done in UN resolutions for example). Although the argument is based on human rights law, in fact both human rights and IHL are invoked in making the case. In the view of some commentators, there is a convergence of HR and IHL in this regard. This process of convergence will undoubtedly continue, regardless of what happens in terms of formal development of IHL. There are those who argue, of course, that there is no need to develop IHL to address the question of PMC accountability because in its present state it is adequate to deal with the problem. This puts the onus on governments to show how this is possible and, where it is not, to make the adjustments necessary to ensure that the legal response is relevant and adequate. The following chapters will discuss the capacity of IHL for such adjustments.

4

Who is a combatant?

“...the concept of combatant as a regular army soldier has lost most of its meaning.”¹⁶²

4.1 The Hague Regulations

The earliest developments in the law of armed conflict were based on the assumption that in a war between two or more states, those who were legitimately entitled to take up arms were the armed forces of those states. Thus “armed forces” was not a term which required definition. Individual members of the armed forces were combatants, another term which was treated as self-evident. The rules of armed conflict therefore were to be applied to armies.

It is generally accepted by IHL experts that the first international attempt at defining combatants was included in the *International Declaration concerning the laws and Customs of War* adopted in Brussels in 1874.¹⁶³ Even more recent studies assert without question that the process of definition began with that international document.¹⁶⁴ Despite this consensus, the Brussels Declaration did not in fact define “combatants,” other than to say that they are members of the armed forces.

Under the heading “Who should be recognized as belligerent combatants and non-combatants,” the Declaration simply states in Article 9 that:

the laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1. That they be commanded by a person responsible for his subordinates; 2. That they have a fixed distinctive emblem recognizable at a distance; 3. That they carry arms

¹⁶²Marco Odello, “Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law” in *Arnold & Quenivet, supra* note 149 at 16.

¹⁶³ See L.C. Green, *The Contemporary Law of Armed Conflict* 2nd ed. (Manchester: Manchester University Press, 2000) at 102; Dieter Fleck, *The Handbook of Humanitarian law in Armed Conflicts* (Oxford: Oxford University Press, 1995) at 67; Ingrid Detter, *The Law of War*, 2d. (Cambridge University Press, 2000) at 139; *Sassoli, supra* note 72 at 122.

¹⁶⁴ Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (Oxford: Oxford University Press, 2010) at 15.

openly; and 4. That they conduct their operations in accordance with the laws and customs of war. In countries where militia constitute the army, or form part of it, they are included under the denomination army.¹⁶⁵

Art. 11 then adds, somewhat ambiguously, that “The armed forces of the belligerent parties may consist of combatants *and non-combatants*. In case of capture by the enemy, both shall enjoy the rights of prisoners of war.”¹⁶⁶ Thus it can be easily seen that the so-called definition is, in fact, just a statement with conditions added to qualify fighting groups that do not constitute regular armies. The four conditions referred to, with some modifications, became enshrined in the law of armed conflict and are as close to a definition of combatant as the law ever came. In terms of application, however, these conditions are provisions of the law which are fairly marginal.

The Brussels Declaration formed the basis of the definition of combatant which was incorporated into Articles 1 and 3 of *the Regulations annexed to the Hague Convention (II) with Respect to the Laws and Customs of War on Land* of 1899 and 1907.¹⁶⁷ In a later development, the Brussels/Hague provisions were incorporated into the 1949 *Third Geneva Convention on Prisoners of War*, in order to establish the qualifications required to receive prisoner of war treatment.

Because there is no definition of combatant as such, it has always been difficult to say whether **only** members of the armed forces are to be considered combatants. This problem is compounded by the fact that the *Hague* definition provides that the armed forces can include “non-combatants,” with both categories being entitled to prisoner of war status. In other words, in the *Hague* formulation, the term “armed forces” is not limited to those officially engaged in combat.¹⁶⁸ This provision of the *Regulations* implies that militias are part of the “armed forces” even though they are not to be considered part of the army, unless the two terms are interchangeable.

¹⁶⁵ On *ICRC Website*: <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>.

¹⁶⁶ *Ibid.* [emphasis added].

¹⁶⁷ *Ibid.* and see also *Green, supra* note 163 at 107.

¹⁶⁸ Significantly, the combatant/non-combatant reference was not included in the language of the *Third Convention*.

To sum up, the *Hague Regulations* did not define the concept of combatant and left it up to each state to decide which members of its armed forces were combatants and which were not. As Detter suggests, “the criteria for establishing combatant status are still vague and difficult to apply in practice. There is no doubt that there is still confusion as to who is a combatant and who is a civilian as a result of the lack of stringent criteria for qualification as a combatant.”¹⁶⁹ Moreover, there seems to be no disagreement among experts that the law did not stipulate how combatant status was to be specifically linked to any particular privileged treatment.

The fact that other types of ‘fighter’ (or ‘combatant,’ in the non-technical sense of the word) would be involved in armed conflict led inevitably to the elaboration of qualifications like ‘unlawful,’ ‘unqualified’ or ‘unprivileged.’ This has opened up a controversial field of debate, most recently in connection with the wars in Afghanistan and Iraq, as will be discussed below. How such ‘unqualified’ fighters should be treated has been a contentious question from the earliest stages of the law of armed conflict and, over time, has explained the inclusion of additional groups into the combatant category. To illustrate that this is a controversy of long-standing, Green quotes Wheaton’s comment that non-combatants are “all those not in military service...but if they make forcible resistance, or violate the mild rules of modern warfare, give military information to their friends or obstruct the forces in possession, they are liable to be treated as combatants.”¹⁷⁰

4.2 The Geneva Conventions¹⁷¹

The word ‘combatant’ does not appear in the *Geneva Conventions*. However those provisions from the *Hague Regulations* generally assumed to have constituted the ‘definition’ of combatants are incorporated in Article 4 of the *Third Convention* to specifically identify actors who qualify as prisoners of war. The *Third Convention relative to*

¹⁶⁹ Detter, *supra* note 163 at 135.

¹⁷⁰ Wheaton, *Elements of International Law*” (1986), ed. Dana (1866), s. 346, note 168 (ed. Carnegie 936). Green comments that today they are more likely to be treated as unlawful combatants, even though “it is not strictly correct to describe them as “unlawful combatants” since they are non-combatants unlawfully taking part in combat”. Green, *supra* note 163 at 104 note 13.

¹⁷¹ *supra* note 3

the treatment of prisoners of war did not however affect the *Hague* provisions on combatant status.¹⁷² The most that can be said for the convention is that it clarified the law, which previously, under *the Hague Regulations*, had stated simply that members of the “armed forces” were entitled to prisoner of war status. Under the *Third Convention* this was broadened to include not only militias and volunteer corps who met the traditional conditions (a logical extension), but also the *levee en masse*; persons “accompanying” the armed forces (presumably the “non-combatant” members of the Hague rules); technical crews and persons “belonging to the armed forces of an occupied country”.¹⁷³

The provisions on prisoner of war status are generally held to constitute the definition of combatant. The *ICRC Commentary on the Conventions* provides a useful overview on how this happened. The *ICRC Commentary on the Third Geneva Convention*¹⁷⁴ asserts that the “key”¹⁷⁵ provisions on the definition of combatants are to be found in Article 4 whose history is traced back to *the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex*. The understanding of the meaning (if not definition) of “combatants” is therefore established partly by reference to the provisions on the entitlement to prisoner of war status (Art. 4A of *Convention III*) and partly through the provisions distinguishing combatants from civilians in the *Fourth Convention*. Interestingly enough, the Convention most closely linked to situations of actual combat (*Convention I on the Treatment of the Wounded and Sick in the Field*) does not make any contribution to our understanding of the definition of combatants. As Pictet points out,¹⁷⁶ those to whom the *First Convention* was to apply (in its Article 13) were precisely those entitled to be treated as prisoners of war. So we are back to Article 4A of the *Third Convention* which is not incorporated by reference, but simply repeated verbatim in Article 13 of the *First Convention*. Therefore, as Pictet notes, it “adds nothing substantial” to the First Convention and its value is “purely theoretical.”¹⁷⁷

¹⁷² *Wilmshurst & Breau, supra* note 148 at 101.

¹⁷³ Article 4, *Third Geneva Convention, supra* note 2.

¹⁷⁴ Pictet, Jean ed. *Commentary on III Geneva Convention relative to the treatment of prisoners of war*, Pictet, Jean ed., (Geneva: ICRC, 1958) and *Commentary on IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (ICRC Geneva: ICRC, 1958).

¹⁷⁵ *Commentary on Third Convention, ibid.* at 49.

¹⁷⁶ *Ibid.* at 144.

¹⁷⁷ *Ibid.*

To paraphrase his assessment, it could be said that: those covered by the first two conventions (assumed to be members of the armed forces, or “combatants”) are those to whom Prisoner of War status is accorded. This status is defined, in part, in the *Third Convention* by reference to the *Hague Regulations* definition of “armies”, “militias” and “volunteer corps” and partly by distinguishing combatants from civilians. Thus the rights and obligations of combatants are mostly asserted indirectly, through the provisions that deal with the treatment of prisoners of war and through some provisions about the conduct of hostilities. For instance, civilians cannot be made the object of direct attack; conversely, combatants can be. So rather than have provisions that first define combatant, and then set out specifically the rights and obligations of those individuals under IHL, we have to read the Conventions together to understand the scope of the protections and immunities of a combatant. This is essentially the approach taken by the ICRC as explained in the commentary on Art. 43 of Additional Protocol I: “In the Third Convention, which deals only with the protection of prisoners of war, and not with the conduct of hostilities, this combatant status is not explicitly affirmed, but it is implicitly included in the recognition of prisoner-of-war status in the event of capture.”¹⁷⁸ Accordingly, the now generally held view is thus to consider the criteria for prisoner-of-war status as the definition of combatant, when they are in fact two different concepts.

4.3 The Subcategories

The *ICRC Commentary* confirms the general understanding that combatants are members of the armed forces, as identified in the *Hague Regulations*. At the same time, as stated above, there was always an assumption on the part of most commentators, perhaps starting with Pictet, that those members of the armed forces who were to be considered to be protected persons comprised **more than** the regular members of the armed forces as such. Thus, since the earliest codification of IHL, states have successively extended the combatant privilege to: participants in a *levee en masse*; militias and volunteer corps (*Hague Convention IV*

¹⁷⁸*ICRC Commentary on Art. 43 of Additional Protocol I*, *supra* note 3 and *ICRC Website* <http://www.icrc.org/ihl.nsf/COM/470-750053?OpenDocument>.

Regulations, 1890 and 1907);¹⁷⁹ organized resistance movements (*Geneva Conventions I-III, 1949*);¹⁸⁰ and qualified national liberation movements (*Additional Protocol I, 1977*).¹⁸¹

Private military groups would seem to fit logically into one of the sub-categories in Article 4A.2 of the Third Convention (militias, etc). That position has been advocated by a number of commentators.¹⁸² Despite the logic of this assumption, scant attention has been paid to this provision on “sub-categories” of combatants in the *ICRC Commentary*, and state practice in this regard is even scarcer. The *Canadian Military Manual*, for example, states that: “If a party to a conflict incorporates paramilitary or armed law enforcement agencies into its armed forces, it must inform other parties to the conflict of this fact. These forces are then considered lawful combatants.”¹⁸³ Although this looks like a relatively straightforward approach, there is no indication in the Commentary if, or how, it has ever been applied. To further indicate the limited relevance of the sub-categories, the *ICRC Commentary* confirms that they did not feature significantly in the negotiations of the 1949 Conventions: “It had been proposed that the mention of militias or volunteer corps forming part of the armed forces should be deleted as these were covered by the expression “armed forces... Strictly speaking it was probably not essential.”¹⁸⁴

What is the understanding, according to state practice, of the categories of subsidiary entities linked to Armed Forces, such as "militias, volunteer corps, paramilitary groups etc." as enumerated in Art. 4A. 2. of the *Third Convention*? There is almost no jurisprudence. As illustrated by the Canadian experience¹⁸⁵ commentary and state practice do not help much either in articulating a practical understanding of this provision. A *de facto* distinction can be made between groups that can be integrated into the armed forces and those that may be

¹⁷⁹ Articles 1 and 2 of the *Regulations*, *supra* note 73.

¹⁸⁰ Article 4A.2 of the *Third Geneva Convention*, *supra* note 2.

¹⁸¹ Article 1 (4) of *Additional Protocol I*, *supra* note 2.

¹⁸² See discussion below at 60.

¹⁸³ Department of National Defence, 307. PARAMILITARY OR ARMED LAW ENFORCEMENT AGENCIES in Canadian Forces, *The Law of Armed Conflict at the Tactical and Operational Levels, Joint Doctrine Manual 2003*, online at <http://www.cda-acd.forces.gc.ca/cfm/cdmfc/doc/LOACatOperationalandTacticalLevels.pdf>.

¹⁸⁴ *ICRC Commentary on Third Geneva Convention*, *supra* note 174 at 51. As it turned out, the reference was retained.

¹⁸⁵ *Supra* note 183.

considered combatants in their own right, such as liberation movements or insurgents. As noted above, even in the case of those who can be integrated, in reflecting on the negotiating history, Pictet does not seem to think these provisions are of much importance.

In maintaining a separate reference to “militias,” the framers of the *Geneva Conventions* were obviously not anticipating the role that PMCs would play by the end of the century, but they were probably attempting to make an allowance for some type of ‘para-military’ combat units which could support the regular armed forces. However, in light of the experience of WWII, it is clear that what was on the minds of the Geneva negotiators was not so much militias, as resistance or guerrilla groups. Thus, almost the entire commentary on these articles on ‘sub-categories’ of combatants in the *Third Geneva Convention* is devoted to the status of ‘partisans’ and “organized resistance movements,” as if the reference to the other categories (militias etc.) was of no significance or had been sufficiently dealt with in the rather cursory, almost dismissive, reference in the commentary on Article 4A. As noted by one eminent authority: “The Geneva Conference of 1949 was well aware of the problem implicit in the existence of guerilla and partisan warfare and seemed to be under the impression that it had dealt with it in a satisfactory fashion.”¹⁸⁶

4.4 Additional Protocol I

The ICRC Commentary on the *Additional Protocols* does not add much to our understanding of how the meaning and scope of the concept of ‘combatants’ has evolved. However, the Additional Protocol I, in Article 43, does specify that combatants have the right to participate directly in hostilities and are explicitly entitled, under art. 44, to prisoner-of-war status, even if they have committed violations of the law of war.¹⁸⁷ The reference to the right to

¹⁸⁶Richard R. Baxter, “So-called “unprivileged belligerency: spies, guerrillas and saboteurs” (1951) 28 *Brit. Y.B.Int’l L.* 338 at 623.

¹⁸⁷*Additional Protocol I relating to the Protection of Victims of International Armed Conflicts 1977*, 1125 UNTS 31, CRC Treaty Website <http://www.icrc.org/ihl>: Art 43. Armed forces :

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

participate directly in hostilities is perhaps the most significant development in the law on combatant status since the adoption of the *Hague Conventions*.¹⁸⁸ In addition to the prisoner-of-war criteria, this reference represents the second major element in our understanding of the term and underlines the importance of the distinction between civilians and combatants. In essence, it constitutes the basis for the immunity of combatants for actions which, if committed by civilians, would be violations of the law. As outlined in the Commentary to *Additional Protocol I*:

... the combatants' privilege ... provides immunity from the application of municipal law prohibitions against homicides, wounding and maiming, or capturing persons and destruction of property, so long as these acts are done as acts of war and do not transgress the restraints of the rules of international law applicable in armed conflict. Those who enjoy the combatant's privilege are also legitimate targets for the adversary's attacks until they become *hors de combat* or prisoners of war. The essence of prisoner of war status under the Third Convention is the obligation imposed on a Detaining Power to respect the privilege of combatants who have

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. Art 44. Combatants and prisoners of war 1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war. 2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4 3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c). 4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed. 5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities. 6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention. 7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict. 8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters

¹⁸⁸ See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004).

fallen into its power.¹⁸⁹

The ICRC commentary notes,¹⁹⁰ that, although mentioned, combatant status is not defined. Art. 43 of the Protocol contains a tautological definition at best: “The armed forces of a Party to a conflict consist of all organized armed forces,” although the provision does contain qualifications related to a command structure, discipline and compliance with the law of armed conflict. “Armed forces” are also equated to “combatants,” a term that, as noted, remains undefined. Art. 44 requires that combatants are to be given prisoner of war status in the event of capture. The threshold for recognition under this provision appears to be considerably lower than the previous standard established by the *Hague Regulations*: it simply obliges combatants to distinguish themselves from civilians without specifying how. The Article goes on to qualify this standard even further, by acknowledging cases where “an armed combatant cannot so distinguish himself” and therefore has merely to carry his arms openly “during each military engagement.” These legal developments in the *Protocol* have not really provided a clearer understanding of the basic term. The concept of “subsidiary” armed forces (militias etc.) has been more or less ignored in the *Protocol*. Moreover, because some countries with significant involvement in contemporary armed conflict (the USA and Israel, for example) have not accepted *Additional Protocol I*, there may be, in effect, currently two different standards of what constitutes lawful combatancy.

Art 43, paragraph 3 of *Protocol I* also provides for the possibility of incorporating militias, etc. into the regular armed forces, presumably so that they can benefit from combatant status. With respect to the question of how such a process for integration should work, however, substantive guidance for states is minimal: Art 43(3). [*with editorial insertions italicized*] Armed Forces: “Whenever [*implying states may decide when*] a state incorporates [*no stipulated procedure for how*] a paramilitary [*undefined*] or armed law enforcement agency into its armed forces, it shall notify the other parties to the conflict.”¹⁹¹ Despite these ambiguities, the ICRC Commentary provides no interpretation of this provision or explanation of how it could be implemented in practice.

¹⁸⁹ ICRC Commentary on the Additional Protocols, *supra* note 3 at 515.

¹⁹⁰ *Ibid.*

¹⁹¹ *Additional Protocol I*, *supra* note 2.

4.5 Applicability of the law on combatants to PMCs

If we reject the argument that PMCs are simply armed civilians potentially acting in contravention of IHL, how should the law of the Conventions and Protocols apply to them? Obviously the *Geneva Conventions* did not contemplate a future combatant role for military contractors whose existence had not been anticipated at the time that the *Conventions* were negotiated. The fact of the matter is that a certain degree of elasticity had been built into the understanding of combatant, even if inadvertently. PMCs are now active in numerous combat support roles, and have filled gaps in or supplemented responsibilities of the armed forces. Most commentators seem to agree that “the fact that a contractor is not technically a combatant under applicable international principles does not obscure the reality: theoretical distinctions no longer mirror the conditions of insurgent warfare and the critical role that contractors have played.”¹⁹²

It seems therefore that there is potential for states to resolve the challenge of PMCs by integrating them into the armed forces. As has already been pointed out, however, there is no jurisprudence or state practice that provides precedents for such an approach. Nevertheless, the recognition of the potential for this “residual” category of “quasi-combatants” remains. This interpretation receives some support from Article 127 of the Third Convention which states “any military or *other authorities*...[with] responsibilities for prisoners of war... must possess texts [of the Geneva Conventions]” (emphasis added). “Other authorities” could conceivably include private military personnel contracted for specific responsibilities, but there is no reference to the term in the brief ICRC commentary on this article, nor was any reference found for recent application of this provision to PMCs.

It also seems unlikely that PMCs can be placed in the category of “civilians accompanying the armed forces”, such as “civilian members of military aircraft crews, war correspondents,

¹⁹² See A. Finkelman. “Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits against Military Contractors,” (2009) 34 *Brook. J. Intl. L.* no. 2 at 431. See also US Congressional Investigations Immunity under Coalition Provisional Authority Order No.17 CPA/ORD/27 *4(3) (June17, 2004).

supply contractors, members of labour units or of services responsible for the welfare of the armed forces”¹⁹³. Even if PMCs are considered to be civilians, they are usually carrying weapons and undertaking combat-related functions. If they are nevertheless to be treated as civilians, “legally speaking they fall into the same grey area as the unlawful combatants detained at Guantanamo Bay.”¹⁹⁴

Although the ‘militia-integration’ mechanism may arguably provide an entrée into the *Convention* regime for PMCs, the “partisan” or “resistance fighter” category clearly does not, because the concept of partisan implicitly introduces issues of political loyalty which do not, *prima facie*, apply to PMCs. The assumptions regarding “loyalty” and “allegiance” of partisan or guerrilla groups have clearly affected the current thinking on the legitimacy of PMCs. This view is reflected in some contemporary writing on the status of PMCs. One commentator for example, discusses the importance of “sacrifice” (for country) as an element in the motivation of a regular soldier.¹⁹⁵ Although this is a proposition of dubious psychological validity, it is probably true that it is not among the factors which normally motivate PMCs. The lack of loyalty is used as a reason for questioning the reliability of PMCs, whose sole or, at least main, motivation is assumed to be personal gain.¹⁹⁶ This is presumably one of the factors that distinguish them from regular soldiers.

Although concern about the status of partisans/irregulars, etc. was undoubtedly real at the time of the negotiation of the Conventions, in terms of subsequent practical application, it has not had much impact, given the difficulties in meeting the requirements of Art. 4A of the *Third Convention*. In practice, therefore, almost all irregulars fall outside the test laid down by the *Hague Regulations* and the *Third Geneva Convention*. This, ironically, is not the case with PMCs who come very close to meeting the conditions established by the *Hague Regulations*, namely responsible command; emblem; carrying arms openly; observing the

¹⁹³ Art.4A (4) of the *Third Convention*, *supra*, note 2.

¹⁹⁴ Peter Singer, “The Private Military Industry and Iraq: What we have learned and where to next?” Policy paper (Geneva: Geneva Centre for the Democratic Control of Armed Forces, November 2004) at 12.

¹⁹⁵ M. Taussig-Rubbo, “Outsourcing sacrifice: the Labor of Private Military Companies,” 21 *Yale J. L. & Human.* (Winter 2009) at 101.

¹⁹⁶ *Nagan*, *supra* note 115. Nagan’s article takes an adamantly negative view in principle on the use of PMCs which he views as undermining not only government control of military force and but even the democratic process itself.

laws of war. One contemporary commentator does not see any difficulties in principle standing in the way of the compliance of PMCs with these conditions.¹⁹⁷ The potential for resolving the question of the status of PMCs within the existing framework of the law of war thus seems very much available. Moreover, if the term “persons belonging to a party” under Art 4 of the *Third Convention* requirements for prisoner-of-war is given a broad definition,¹⁹⁸ the case for assimilating PMCs to the armed forces is even stronger.

Turning to other possibly relevant categories, as one commentator notes, “neither *Additional Protocol I* [in its provision on mercenaries] nor the *Mercenaries Convention* are applicable and do not address the contemporary military company.”¹⁹⁹ Gifford goes on to add that, in light of scholarly criticism, there is “little hope for any significant change in this legal vacuum in the near future.”²⁰⁰ In his view the best bet for future accountability is for national regulation.

In light of the uncertainty around the status of PMCs, one commentator has simply proposed that PMCs should be considered to be “part-time” combatants: “thus, the contractors’ personnel can be considered members of the armed forces of the hiring state under Article 3 of the *Fourth Convention* and Article 91 of *Additional Protocol I* for the duration of the contract and the armed conflict.”²⁰¹ The same solution is proposed by Avril McDonald²⁰² who asks whether PMCs should not be considered to be combatants during their participation in the conflict. In her view, there are only two realistic solutions: (i) complete avoidance of the use of civilian contractors or (ii) legal recognition of them as combatants. It seems unlikely that state practice will follow this common-sense advice, however.

¹⁹⁷ Ridlon, *supra* note 10 at 232.

¹⁹⁸ As in the comment that it means “in essence... all persons who fight on behalf of a party.” J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, vol.1 Rules and vol.2 Practice* (Cambridge: Cambridge University Press, 2005), at 15. [ICRC Study]

¹⁹⁹ Gifford, *supra* note 25 at 90.

²⁰⁰ *Ibid.*

²⁰¹ Carsten Hoppe, “Passing the Buck: State Responsibility for Private Military Companies” (2008) 19 E.J.I.L. No. 5 at 100.

²⁰² In “Ghosts in the Machine: Some Legal Issues Concerning US Military Contractors in Iraq” in Michael Schmitt and Jelena Pejic, eds. *International Law of Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (Leiden: Martinus Nijhoff, 2007) at 380.

4.6 The ICRC study on customary humanitarian law²⁰³

The study has codified its conclusions on customary law in a series of ‘rules’. Although there is no single rule in the study on combatant status, it does outline in several rules significant legal developments since the adoption of the *Additional Protocols*, most importantly by including “all organized groups under the command responsible to a party” as falling within the scope of the term combatant. In essence, in the view of the ICRC, this comes down to “all persons who fight on behalf of a party.”²⁰⁴

The study points out that one of the requirements for incorporation of militias into the regular armed forces is “formal notification” and the Canadian Military Manual is quoted as evidence of the only example of state practice to this effect.²⁰⁵ The study claims that the process of incorporation is now “generally applied,”²⁰⁶ but the practice section of the Study (Vol. II) acknowledges that no state practice was identified with respect to the following key issues: definitions of “combatants”, “armed forces” or “civilians”; the process of incorporation of militias into armed forces and the immunity of civilians before they undertake “direct participation in hostilities” (again an undefined term). In other words, although humanitarian law provides a way to regularize the status of militias and “other armed groups,” states have not availed themselves of it. As already seen, it still remains an option advocated by some commentators.²⁰⁷ It has also been argued that, although it is “questionable” as to whether the provisions of Art. 4A. 2 are applicable to PMCs, they could meet its requirements in certain circumstances.²⁰⁸ At most, one can argue that the field seems to be open for development, if there is sufficient political will to move in this direction.²⁰⁹

²⁰³ *ICRC Study*, *supra* note 198.

²⁰⁴ *Ibid.* at 15.

²⁰⁵ *Ibid.* at 689.

²⁰⁶ *Ibid.* Vol I, at 13

²⁰⁷ See also Lindsay Cameron, “Private Military Companies: Their Status under International Humanitarian Law and its Impact on their Regulation” (2006) 88 *Int’l Rev. Red Cross* *supra* note 11 at 595.

²⁰⁸ *Ridlon*, *supra* note 10 at 219.

²⁰⁹ Rules 106-109 of the *ICRC Study* *supra*, note 198, Vol.II. at 15 provide some rudimentary requirements for militias.

4.7 Conclusion

As noted, there is no agreed mechanism or process for determining whether militias have fulfilled the criteria set out in Art 4 of the *Third Convention*, nor is there any recorded practice of a state availing itself of the “incorporation” procedure set out in Article 43 of the *First Protocol*. Moreover, the Convention is silent on the legal status of these groups *before* their fulfillment of the conditions has been recognized. Presumably, up until that point, they are to be considered as civilians, although clearly “civilians with a difference,” in that they would have been carrying out military or quasi-military activities or responsibilities. What is of interest here is that this provision could in theory be implemented to regularize the status of PMCs in the view of many commentators.²¹⁰ In one assessment, current US Military doctrine “presupposes that to form an effective component of the armed forces, contractors must be incorporated into the military’s command and control structures.”²¹¹ Finkelman has reviewed the operational reasons as to why this integration is desirable and necessary.²¹² This conclusion would seem to be obvious, if it were not for the fact that there is no official record of incorporation having ever been officially carried out. Nevertheless, in practice, the operations of PMCs are often indistinguishable from those of the regular armed forces and this is a trend that is likely to continue, despite the problems resulting from the different status and operational methods of regular forces and PMCs. Indeed, it has long been recognized that the ramifications of these differences cause problems:

By leaving corporations open to litigation for incidents arising out of the performance of government contracts, individual contracted actors might fail to commit fully to particular military engagements. This danger increases when considering the threat posed to military members facing hostile fire alongside civilian counterparts – a common event in the War on Terror. During combat, all parties must operate as a single unit. Contractors, fearing potential liability for actions taken during the fog of war, might fail to engage fully in enemy combat.

²¹⁰ See Hoppe, *supra* note 201.

²¹¹ Finkelman, *supra* note 20 at 450.

²¹² *Ibid.* at 452.

Doing so presents life-threatening dangers to the military components relying on them for support.²¹³

This assessment, written from a professional military perspective ostensibly sympathetic to the use of PMCs, clearly accepts the reality of their combat roles as being equivalent to that of the regular soldier.

To summarize, the scholarly, official and even judicial treatment of the concept of combatant has been inconsistent at best. In their discussion of the issue, most commentators seem to jump almost immediately to a consideration of the qualifications for prisoner-of-war status under the *Third Geneva Convention* as the definition of combatant. Other provisions, particularly those related to the “subcategories” seem to be viewed as of limited or even no relevance.

²¹³Aaron L. Jackson, “Civilian Soldiers: Expanding the Government Contractor Defense to Reflect the New Corporate Role in Warfare,” (2009) 63 A. F. L. Rev. at 220.

5

Governments' Responses to the PMC Question

5.1 Introduction

The discussion in this chapter will change course from the predominantly theoretical approach of the preceding sections to an examination of how governments have in fact responded to the legal and other challenges arising from the employment of PMCs. It is not possible to present a lengthy exposition in this regard, so the analysis will concentrate primarily on the Canadian and US experiences. In any case, the number of states with relevant experience is rather limited.²¹⁴ Moreover, very few governments have articulated public policy positions on the subject, despite the prevalence of the practice. This reticence is probably an indication of a certain reluctance to broach the subject, but of course we cannot venture too far in interpreting silence. As discussed below, limited multilateral exercises have been undertaken under the auspices of the UN and the Red Cross. These have been relatively low profile processes but they reveal a certain level of concern within the international community. It is too early to say whether they will lead to meaningful political or legal developments.

In the first Chapter, we touched briefly on the experience of the US and Canadian governments with respect to the employment of PMCs. The issue in the US, in particular, has been addressed in congressional hearings and has been the subject of extensive research and commentary.²¹⁵ The UK has addressed the policy and legal implications in a modest *Green Paper*.²¹⁶ Comparatively speaking, the Canadian Government, despite the use of PMCs in Afghanistan, has not engaged in any similar systematic public or parliamentary discussion, although some responses to media inquiries are on record. One can deduce from these

²¹⁴The hiring of mercenaries as practiced by some developing countries is not covered by this study on the grounds that PMCs cannot be legally so designated, despite many similarities in practice. See discussion below at 67.

²¹⁵ See for example *Elsea, supra* note 21 and *Schwartz, supra*, note 22.

²¹⁶ HC 577 Private Military Companies: Options for Regulation 2001-02 The Stationers Office February 2002

limited responses and a few articles written by military lawyers²¹⁷ that the Canadian position comes down to the simple assertion that, by default, employees of PMCs are civilians. This understanding accords with the position of most states, summarized as follows:

States which use [PMCs] do not consider them members of the armed forces or even civilian employees of the military. Instead they tend to regard them as contracted labour for which neither they nor any of their agents bear any responsibility.²¹⁸

This stance, while undoubtedly widely held, would not of course absolve a government in international law terms of responsibility for actions undertaken on its behalf. At the same time, it underscores the importance to governments of autonomy as a characteristic feature of NSAs, as discussed in both IR and legal theory.²¹⁹ It also illustrates the dilemma faced by governments in defining their relationships with PMCs. On the one hand, the more PMCs are controlled by a state, the more likely they are to be seen as its agents, or indeed *de facto* members of its armed forces and therefore combatants.²²⁰ On the other hand, the more the state distances itself from the PMC the more likely the latter is to exhibit the autonomy required of a NSA, with corresponding expectations related to separate rights and obligations under international law.

5.2 The Multilateral Response

It is probably fair to say that the response of the international community to the challenges presented by PMCs has been muted. The legal developments concerning the related problem of mercenaries²²¹ essentially reflected the concerns of developing countries, particularly

²¹⁷ Gifford, *supra* note 25; Christopher Spearing, "The Changing Forms of Utility and Force: the Impact of International Security Privatisation on Canada" (Spring 2009); LXIV International Journal, No.2 and Antonyshyn, *supra* note 29.

²¹⁸ Avril MacDonald, "Ghosts in the Machine" in Schmitt and Pejic, *supra* note 202 at 398.

²¹⁹ See discussion in Chapter 3 above at 33.

²²⁰ This was essentially the approach taken by the US Court which dealt with the prosecution of Blackwater employees discussed in the section on US experience below at 71. This was also the conclusion of the tribunal with respect to paramilitary groups linked at many levels to the government of Serbia. See Tadic decision, *supra* note 5.

²²¹ Art. 47 *Additional Protocol I*, *supra* note 2 and Art.1 *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, 4 December 1989 the *Mercenaries Convention* at <http://www.icrc.org/ihl.nsf/FULL/530?OpenDocument>.

those in Africa. It has never been seriously contended that PMCs are caught by the *Mercenaries Convention* or Article 47 of *Additional Protocol I*, mainly because of a cumulative set of conditions that generally do not apply to their situations.²²² In addition, some countries, such as the US, do not regard mercenaries as an illegal, or even an illegitimate, category of combatant.²²³ Nevertheless, a UN Working group on the use of mercenaries was created by the UN Commission on Human Rights in 2005.²²⁴ It concluded that some PMCs were engaged in “new forms of mercenarism.”²²⁵

The ineffectiveness of the mercenary regime is probably the main reason why the Working Group initiated a separate exercise on the PMC issue. This Working Group, in which no western government participated, produced a draft *International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies*.²²⁶

The draft instrument essentially calls for extensive national regulation of PMCs and criminalizes their activities in a way which recalls the provisions of the *Mercenaries Convention*²²⁷ upon which it was undoubtedly based. The text of the draft Convention is contained in an annex to the “*Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*”²²⁸ tabled at the 15th session of the UN Human Rights Council. In addition to requirements for the regulation and licensing of PMCs, the draft reaffirms state responsibility for the actions of PMCs and requires states to make participation of PMCs in hostilities illegal.²²⁹ More generally, it prohibits the “outsourcing” of inherently governmental functions, such as security. The future of this instrument is of course difficult to predict, but it is unlikely to gain much traction with governments, at least not among western states.

²²² *Ibid.* Art. 47 *Additional Protocol I*, and Art.1, *Mercenaries Convention*.

²²³ *ICRC Study supra* note 198 at 391 and 394.

²²⁴ UNCHR Res. 2005/2.

²²⁵ Press Release United Nations of 6 November 2006 available at <http://www2.ohchr.org/English/issues/mercenaries/index.htm>

²²⁶ At <http://mgimo.ru/files/121626/draft/pdf>.

²²⁷ “At its most recent meeting in Geneva, the Human Rights Council decided to establish an intergovernmental open-ended Working Group to consider the possibility of drawing up a new convention to regulate, monitor and ensure accountability of the activities of private security and military companies.”

<http://www.ohchr.org/EN/NewsEvents/Pages/PrivateMilitaryandSecurity.aspx> 2011/3/17

²²⁸ A/HRC/15/25 2 July 2010 <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf>

²²⁹ *Ibid.* draft Article 8(1).

In a separate process and in response to the impact of the participation of PMCs on the implementation of IHL, the ICRC organized meetings of experts from 17 countries, including Canada, from January 2006 to September 2008 to draw up recommendations on the subject. The result was the so-called “Montreux Document,”²³⁰ the main recommendations of which were: greater national regulation and stricter conditions for licensing, (including a requirement for training); commitment to prosecution for violations of IHL and prevention of PMCs from participating in combat.²³¹

The Montreux Document appears not to have been formally adopted as official policy by any government, even though essentially it does nothing more than reaffirm the status quo. The sole public statement regarding the Canadian government’s view was made by the Ambassador to the United Nations on June 26, 2009 when he said that:

Finally, the Government of Canada is pleased to see a reference to the *Montreux Document on Pertinent International Legal Obligations and Good Practices of States Related to Operations of Private Military and Security Companies in Situations of Armed Conflict*. Canada was pleased to participate in this process leading to a non-binding document intended to clarify international law as it pertains to private military and security companies. The compendium of good practices is an important guide for member states in their relations with private security providers. We urge Member States to support this and advocate on behalf of this document.²³²

This could hardly be described as a ringing endorsement. It characterizes the Document as a set of good practices which should serve as a guide, although evidence of those good practices has never been publicly presented in any comprehensive way. It may be inferred from the statement that Canada does not see any pressing need to address the problem of PMCs in a systematic way, certainly not one which would require any serious examination of

²³⁰ “Governments acknowledge duty to control private military and security companies” ICRC Press Release <http://www.icrc.org/eng/resources/documents/feature/montreux-document-feature-170908.htm>.

²³¹ For a comprehensive account of the negotiations and a summary of the modest achievements of the document see James Cockayne, “Regulating Private Military and Security Companies: the Content, Negotiation, Weaknesses and Promises of the Montreux Document,” (2009) J. Confl. & Sec. L. at 401.

²³² Statement by His Excellency John McNee, Ambassador and Permanent Representative of Canada to the United Nations, to the United Nations Security Council Open Debate on Protection of Civilians in Armed Conflict, New York, June 26, 2009 at http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/security_council-conseil_securite/06262009_civilianprotection-protectiondescivils.aspx?lang=eng.

the legal context in which they operate. This conclusion is reinforced by a general comment from another Canadian source to the effect that Canada supports the “articulation of non-legally binding standards,” presumably such as those embodied in the Montreux document.²³³

5.3 USA

The US experience has generated considerable controversy. In addition to the, mainly negative, media coverage, it has been the subject of extensive congressional attention. The involvement of PMCs in armed conflict has also given rise to litigation. Indeed, there has been a growing volume of tortious claims against PMCs and at least one criminal prosecution in US Courts. These trials, however, illustrated the limitations of litigation as a mechanism for establishing accountability for PMCs, since there have been so few of them in relation to the numbers of contractors operating in Afghanistan and Iraq. The leading cases have been mainly limited to supply contracts, but now, increasingly, the ‘government defence contract’ immunity argument is being invoked in disputes arising out of contracts for services as well as those provided by PMCs, for example.²³⁴ These cases “demonstrate that private military contractors, when facing civil claims arising from their actions in support of US military missions in Iraq and Afghanistan, have attempted to employ defenses generally available to the federal government itself: through the doctrines of sovereign immunity or interference with “a unique federal interest.”²³⁵ The one example of criminal prosecution so far²³⁶ resulted, in December 2009, in the acquittal on technical evidentiary grounds²³⁷ of five Blackwater employees accused of manslaughter in the killing of several Iraqi civilians. The case was reopened on appeal in April 2011.²³⁸

²³³ *Antonyshyn, supra* note 29 at 5.

²³⁴ See *Jackson, supra* note 213 at 211.

²³⁵ *Finkelman, supra* note 20 at 415.

²³⁶ *United States of America v. Paul A. Slough et al. Criminal Action 08-0360 (RMU)*, US District Court, District of Columbia online at: www.dcd.uscourts.gov.

²³⁷ “Federal judge dismisses charges against indicted Blackwater guards” (1 January 2010), Jurist Legal News and Research website online at <http://jurist.law.pitt.edu/paperchase/2010/01/federal-judge-dismisses-charges-against.php>

²³⁸ “US appeals court reopens Iraq Blackwater case” <http://www.middle-east-online.com/english/?id=45755>

Other cases relating to tortious claims indicate that US Courts are sympathetic to claims of immunity or “federal preemption.” *Haidar Muhsin Saleh et al. Appellants v. Titan Corporation, CACI International Inc. and Technology Inc.*²³⁹ involved an appeal against the dismissal of claims brought by Iraqi nationals against Titan and CACI private military companies that provided interrogation and interpretation services to the US government at the Abu Ghraib prison during the Iraq war. The Court dismissed claims under the *Alien Tort Statute* as being federally preempted. The Court concluded that the Titan employees were “soldiers in all but name.” The key finding however was the following conclusion, “We think the district judge properly focused on the chain and degree of integration that in fact existed between the military and both contractors' employees, rather than the contract terms.” This statement neatly encapsulates the dilemma governments face in trying to rationalize the status of PMCs: if they operate under military supervision they are likely to be treated as soldiers (and thereby benefit from immunity); if they are autonomous, they move closer to a position of independent legal status. It is difficult to see how they can occupy some kind of middle ground in between these two possibilities.

Juli Schwartz points out that the purpose of invoking the federal preemption or federal interests doctrine in the *Saleh* case, and others that she cites, is probably to eliminate tort claims from the battlefield, rather than address the status of PMCs under IHL. Nevertheless the effect is to treat PMCs in a way that is equivalent to combatant status under international law, without explicitly saying so.²⁴⁰

Despite this unsettled political and judicial history, the official position of the United States on the status of PMCs is apparently quite straightforward. The Congressional Research Service summarizes it as follows:

Contractors working for the US military, the State Department, or other government agencies during contingency operations in Iraq and Afghanistan are non-combatants who have no combat immunity under international law if they engage in hostilities,

²³⁹ *Haidar Muhsin Saleh et al v. Titan Corporation, CACI International Inc. and Technology Inc* United States Court of Appeals for the District of Columbia Circuit decided 11 September 2009. Available online at <http://ccrjustice.org> (Center for Constitutional Rights)

²⁴⁰ Juli Schwartz, “Saleh v. Titan Corporation: The Alien Tort Claims Act: More Bark than Bite? Procedural Limitations and the Future of ATCA Litigation against Corporate Contractors” (2006) 37 Rutgers L. J. at 867.

and whose conduct may be attributable to the United States. Contractors who commit crimes in Iraq or Afghanistan are subject to U.S. prosecution under criminal statutes that apply extraterritorially or within the special maritime and territorial jurisdiction of the United States or by means of the *Military Extraterritorial Jurisdiction Act* (MEJA).²⁴¹

This is a curious and somewhat ambiguous statement. While it declares that PMCs are non-combatants, it does not explicitly say that they are civilians. They are subject to US but not, explicitly, local law.²⁴² The statement also recognizes that the principle of state responsibility may come into play. This places the PMCs in a grey zone: they are armed and engaged in military action, even though, technically, it would seem that the US Government considers them to be civilians. There is no clear picture as to what legal norms govern their behaviour and issues of accountability are to be dealt with by means of criminal prosecution in US Courts. As they are considered to play an essentially supportive role, they should not be involved in combat. The ICRC Commentary points out, however, that many military personnel are engaged in supportive roles and are still considered to be members of the armed forces:

In fact, in any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. These include auxiliary services, administrative services, the military legal service and others. Whether they actually engage in firing weapons is not important.²⁴³

PMCs however are armed and do engage in hostilities. So their activity is more closely related to combat than is the case with the categories listed in the above comment from the *Commentary*. To maintain that the latter are combatants and the former are not when all are working under the same organizational umbrella is to draw a totally artificial and untenable distinction. The ICRC position once again underlines the flexibility, if not fluidity of IHL categories.

²⁴¹ *Elsea, supra* note 21 at 1.

²⁴² This was the *de jure* status of PMCs in Iraq.

²⁴³ *ICRC Commentary on Additional Protocol I, supra* note 3.

5.4 Canada

Canadian experience with PMCs while extensive, as we have seen,²⁴⁴ bears no comparison to that of the United States in terms either of magnitude or complexity. It is nonetheless significant in Canadian terms: involvement in the Afghanistan conflict is the largest Canadian military engagement since the Korean War. Involvement of PMCs has played a large part in the Canadian war effort, yet that experience does not seem to have prompted the Government into articulating a policy on the legal ramifications of that role. The lack of policy is not, however without practical consequences and potential legal difficulties.

What kinds of problems can Canadian authorities face when their paths cross with PMCs in Afghanistan? Canada has not had to deal with the high profile scandals and litigation that the US has encountered. This may be because this kind of difficulty has not arisen for Canada. It should be recalled also that Canadian employment of PMCs has not been the focus of significant media scrutiny.

One incident involving Canadian troops and PMCs in Afghanistan has, however, received extensive media coverage. This case related to the death of Master Corporal Josh Roberts.²⁴⁵ Media accounts reported that the circumstances surrounding his death were chaotic in a situation involving the Canadian and US military as well as employees of a PMC and insurgents. Fire from the employees of a private security firm was initially suspected of having caused the fatality, but the subsequent DND inquiry avoided providing full answers to the many questions that the incident raised, including those of the family of the late corporal. In a brief press release, the Department simply noted that, “Security personnel from a private security firm, *Compass Integrated Security Solutions*, not employed by the Department of National Defence, were present in the area at the time of the incident, but the investigation concluded that they were not responsible for Master Corporal Roberts’ death.”²⁴⁶ Without presenting the evidence upon which the conclusion was based, the investigation reportedly stated that “his death was the result of insurgent fire.”²⁴⁷

²⁴⁴ See *Chapter 1* above.

²⁴⁵ *Brown, supra* note 33 and *Pugliese, supra* note 34.

²⁴⁶ DND Press Release, “*Investigation into soldier’s death concluded*” NR 08.071 - September 13, 2008 at

Two years after his death, it is unlikely that a more comprehensive and detailed account of what actually happened to Cpl. Roberts will emerge. According to one media report,

DND has closed the door completely on the death of Master Cpl. Josh Roberts, but it is unlikely this case will disappear because of the concerns the young soldier's family has. As you may recall, Master Cpl. Roberts was killed in August during a battle involving insurgents. Afghan private security contractors working for Compass Integrated Security Solutions were also on the battlefield at the time. The Canadian Forces National Investigation Service looked into the incident but determined that, while the Afghan mercenaries had been present, they were not responsible for the soldier's death. The NIS has stated insurgents killed Master Cpl. Roberts, a conclusion they based on witness statements and other evidence military police have declined to discuss.²⁴⁸

Nevertheless, the incident illustrates how the involvement of PMCs in armed conflict can raise issues for the Canadian authorities, regardless of their policy and practice on hiring them. This was not, apparently, a case of a PMC hired by Canada. Regardless of who contracted the PMC services, however, the fact of the matter is that interventionist foreign military forces are often required to deal with them, sometimes in deadly circumstances. The more important question is, however, on what legal basis?

In more general terms, Canadian media reported on the tabling of documents in Parliament in February, 2011 purportedly providing the first comprehensive picture of the Canadian use of private contractors in Afghanistan. One story read: "Canada spent more than \$41 million on hired guns in Afghanistan over four years, much of it going to security companies slammed by the U.S. Senate for having warlords on the payroll."²⁴⁹ Indeed, records show that the Department of Foreign Affairs paid nearly \$8 million to ArmorGroup Securities Ltd. This firm was recently cited in a U.S. Senate investigation as relying on Afghan warlords who in

<http://www.forces.gc.ca/site/mobil/news-nouvelles-eng.asp?id=2778>.

²⁴⁷ *Ibid.*

²⁴⁸ Dave Pugliese, "The Questions Surrounding the Death of Master Cpl. Josh Roberts in Afganistan" *Ottawa Citizen* (4 February 2009) at <http://communities.canada.com/OTTAWA/CITIZEN/blogs/defencewatch/archive/2009/02/04/the-questions-surrounding-the-death-of-master-cpl-josh-roberts-in-afghanistan.aspx>.

²⁴⁹ "Afghan hired guns bill tops \$41M: Warlord paid \$2.5M since 2008 to guard base: documents" Last Updated: Sunday, February 6, 2011 | 1:32 PM ET The Canadian Press. <http://www.cbc.ca/news/world/story/2011/02/06/afghan-mercenaries.html>.

2007 were engaged in "murder, kidnapping, bribery and anti-Coalition activities."²⁵⁰

ArmorGroup, which has since been taken over by G4S Risk Management, provided security at the Canadian embassy in Kabul in addition to guarding diplomats. According to the reports, another company, Tundra SCA, provided security for Canadian military forward operating bases and has been paid more than \$5.3 million. Because of security concerns, the documents do not give detailed information on all aspects of PMC activities, although it was claimed that more than \$3.4 million went to Blue Hackle a Washington, D.C.-based company to guard the governor of Kandahar and train his security detail. Canada reportedly started paying that expense in 2008.²⁵¹

As far as government policy on the use of PMCs is concerned, a Foreign Affairs departmental spokesman is quoted in the same media report as saying that, "All private security contractors employed by Canada are known to the Afghan Government, and are subject to Afghan law."²⁵² He added that the department has no plans to draft an oversight policy and believed the current reporting mechanism, applied through wording in the contracts, was sufficient.

Other than the media reports referred to above, it has proved extremely difficult to obtain information on the use of PMCs by the Canadian military. One assessment by a Canadian military lawyer writing in his personal capacity puts the number in Afghanistan at 28,000.²⁵³ In terms of the impact of PMCs on operations, the few available assessments of the Canadian experience by military lawyers tend to be positive. Legal issues are flagged but not highlighted.

²⁵⁰ *Ibid.*

²⁵¹ See discussion on this Parliamentary document, above at 13.

²⁵² "Afghan hired guns," *Supra* note 248.

²⁵³ *Spearing, supra* note 217 at 481.

5.4.1 Canadian policy

The question of the status of PMCs does not seem to have been perceived as a serious problem, although the lack of policy and doctrine on the subject is frequently acknowledged.²⁵⁴ By way of justification, PMCs are seen as a means of making up for the shortfall in recruitment,²⁵⁵ as well as of allowing the regular forces to concentrate on their “core capacities.”²⁵⁶ A media comment from a senior military officer on duty in Afghanistan confirmed this assessment.²⁵⁷ One solution proposed for whatever legal difficulties PMCs may present to the Canadian authorities is their integration into the chain of command.²⁵⁸ In general, commentators stress the importance of restricting PMCs to defensive activities. The distinction between defensive and offensive activities, as a criterion for combatant status, although without any legal basis,²⁵⁹ is one which has been incorporated into official defence department communications,²⁶⁰ but neither this criterion, nor the idea of integration of PMCs into the regular armed forces, have been publicly endorsed by the Canadian government.

The Canadian contribution to the European University Institute study on the “privatization of war” concentrates on domestic regulation, particularly the *Foreign Enlistment Act*²⁶¹ and the control regime set up under the *Export and Import Permits Act*.²⁶² It asserts that the activities of PMCs are “entirely subject to host nation laws”²⁶³ and should be regulated by contract terms.²⁶⁴ Problems which may arise in connection with the principle of state responsibility are dismissed, since it is “unlikely that the conduct of private actors would be attributable to Canada.”²⁶⁵ No substantiation is provided for this assertion, although the author makes a general reference to a “legal vacuum” regarding the status of PMCs in his concluding

²⁵⁴ *Gifford supra* note 25 at 86.

²⁵⁵ *Ibid.* at 90.

²⁵⁶ *Spearing, supra* note 217 at 485.

²⁵⁷ *Ibid.* at 448

²⁵⁸ *Gifford supra* note 25 at 90.

²⁵⁹ Olivier Delas, “Quelques Reflexions Entourant la Participation de Compagnies Militaires Privees aux Conflicts Armes” R.Q.D.I. (2007) 49 at 57.

²⁶⁰ See discussion below at 79.

²⁶¹ R.S.C. 1985 c. F-28,

²⁶² R.S.C. 1985 c. E-19.

²⁶³ See *Antonyshyn supra* note 29 at 5.

²⁶⁴ *Ibid.* at 20.

²⁶⁵ *ibid.* at 24.

comments.²⁶⁶ There is almost no discussion of international law in this assessment. Unlike other commentators, however, this author does not advocate integration into the armed forces, although his solution of regulating PMCs by means of contract provisions could theoretically impose an equivalent degree of control.²⁶⁷

What these military lawyers have in common, broadly speaking, is an interest in asserting more control over the activities of PMCs by means of greater regulation, more stringent contract conditions or integration. This amounts to a status similar to what was envisaged by the provisions on “sub-categories” of combatants outlined in Article 4 of the *Third Geneva Convention*. There is, however, no indication in the sources reviewed of the extent to which this view may reflect official thinking or foreshadow a future development of military doctrine.

5.4.1.2 Department of National Defence (DND) Perspective on PMCs

As noted, the official position of the Canadian government on the use of PMCs has not been officially communicated, nor has the issue been addressed on the website of the Department of National Defence. Requests for policy statements or guidelines on the subject have not produced substantive results.²⁶⁸ In reply to an access to information request, some previously

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.* at 23

²⁶⁸ The issue is not addressed on the websites of either DND or DFAIT. An access to information request was submitted to these two Departments and CIDA in September 2010. In a letter of 15 October 2010, the DND access office stated that “the Department holds no documents that respond to the request.” Subsequently, there were several exchanges by telephone and e-mail with the DND office for access to information resulting in the following reformulation of the request:

Any position papers, military or operational manuals, background briefs or memoranda, policy statements or guidelines (whether in electronic or hard copy format) on DFAIT, DND or Government policy direction or guidelines on the role, status or conduct of members of Private Military (or security) Companies under contract with any agency or department the Canadian government operating in Afghanistan, and whether that policy (if it exists) is reflected or incorporated into those contracts. I would also request a copy of any template which may exist for the preparation of such contracts. Specifically I would like to know if there is any policy guidance or direction for those companies regarding a requirement to observe the rules or principles of the law of armed conflict, particularly the *Geneva Conventions of 1949 and the Additional Protocols*, and, more specifically again, with respect to the protection and treatment of civilians. If there is no such policy I would appreciate confirmation that that is the case. I would also like to know how many private military

released internal documentation related to the subject was provided and is discussed below. This documentation covers the period 2006-2010.

Significant portions of the documentation have been blacked out, in particular, information related to the terms of contracts and even the names of contractors, although some of this information has appeared in the media, as discussed above. Nevertheless, the documentation does reveal, in general terms, the Department's views on the question, although it is not possible to determine what the status of those views is, or the extent to which they constitute the official position of the Canadian Government. Nevertheless, it is submitted that, in the absence of anything more official, correspondence and documentation released by the Department of Defence can be relied on to represent the considered internal view of the Department. This could not be confirmed however.

Departmental views are couched in the most general of terms, but they do indicate an awareness of the problem and the need to develop a more comprehensive policy on it. The following discussion is a synthesis of the main elements of the DND position in the Afghan context:

With the expansion of the number and complexity of international peace and security operations since the early 1990s, there has been increased participation of private military and security companies in providing a range of security services. These activities range from the training of new military and police forces, reconstruction assistance and engagement in drug-crop-eradication to the more high profile

companies have received contracts from the Canadian government to work in Afghanistan and if possible the names of those companies.

Following this reformulation the DND access office forwarded the author two cds containing several hundred documents released in response to previous requests on the same or similar subjects. The relevant documents from the cds are discussed below.

DFAIT initially responded that they had no records related to the request. However in a e-mail of 2 February 2011, they advised that the Department of Foreign Affairs and International Trade (DFAIT) "is currently developing a contract clause and point rated criteria which respects the Montreux Agreement, to which the Government of Canada is signatory, within our limited tendering documents as well as our contracts. The clause will be forwarded to Legal Services for confirmation that it is appropriate to incorporate into our Request for Proposal and subsequent contracts. DFAIT will integrate the appropriate wording once approved." Requests for copies of this clause were not successful.

On 24 March 2011 an e-mail was sent to the Judge Advocate General (JAG) requesting his comments on the summary of Canadian policy, as set out below. Follow-up reminders resulted in a response from the JAG's office on 18 July 2011. This and a few subsequent communications did not contain any substantive information on the existence or not of a Canadian policy.

provision of close protection services for leaders in specific countries. In addition to these services however, some private military and security companies have engaged in activities that fall outside those that are considered under international law and beyond those found acceptable by the military codes of conduct of various countries. Canada is involved, along with a number of international partners, in a process to identify how best to ensure that human rights and international humanitarian law are respected by all actors, including private military and security companies.²⁶⁹

Over the years, Canada has had experience with private military and security companies in operations abroad, mostly in Canadian-led activities and in situations of working with a broader coalition of forces or UN peace operations. In its work with security contractors in Afghanistan, the Department of National Defence works to ensure that contractors follow international humanitarian law and apply the military code of conduct.²⁷⁰

PMC responsibilities in Afghanistan included: long range patrol security; Kandahar City patrol security; rapid intervention; security escorts; traffic control; event security; miscellaneous additional tasks.²⁷¹

The following is a synthesis of these policy elements arranged under four general headings:

Tasks and Rationale:

The Canadian forces do not engage personnel or contractors for any use in combat operations. Private security companies are employed in defensive roles, primarily as perimeter security. Contracted personnel may also serve as site security for PRT (provincial reconstruction team) personnel visiting various locations in and around Kandahar City; “escorting personnel on convoys, visiting various locations in and around Kandahar city and by rapidly securing incident sites.”²⁷² Departmental spokesmen are quoted as stating that not having the Private Security Contractors working with the Canadian Forces would limit the effectiveness of the PRT and would further risk the lives of Canadians working there. Engaging these firms to conduct specific duties is said to allow the Canadian Forces personnel to focus efforts where they are most valuable.²⁷³ These partners are considered to be integral to the security of Canadian personnel.²⁷⁴

Responsibility and Control:

²⁶⁹ This is presumably a reference to the diplomatic process that produced the Montreux document, p. 83 above.

²⁷⁰ DND Document AO283316 disclosed September 2009 provided in response to access to information request referred to in note 232. The numbering system, eg AO 283316 etc. is that used by DND in relation to each document transferred to a CD made available in response to the request.

²⁷¹ *Ibid.* Neither the meaning of these terms nor details on what these tasks entailed were made available.

Material with policy content appears to have been prepared mainly in response to media enquiries and as advice to the Minister, presumably for the same purpose.

²⁷² AO247799.

²⁷³ AO283591.

²⁷⁴ AO283312.

All contracted personnel are monitored and supervised by the senior military commander on site at any time.”²⁷⁵

This statement is ambiguous but could be interpreted as describing some form of integration of PMCs into the Canadian military command structure. As such it approaches the position advocated by some military, and other observers. It is in fact frequently stated in the documentation that Private Security contractors hired by the Canadian Forces in Afghanistan are under the supervision of the on-site Canadian personnel.²⁷⁶ However, contracts were acknowledged to be “silent on question of jurisdiction over the firms.”²⁷⁷

Jurisdiction and Legal Questions:

Legal jurisdiction over civilian companies hired by the Canadian Forces is described by DND as a complex issue which depends on a number of factors, including the nature of the contract and the operation.²⁷⁸ Any allegations of wrongdoing would be investigated and referred to the appropriate authority for action.²⁷⁹ Afghan contractors providing security and protective services would be subject to local laws.²⁸⁰ The relevant contracts are silent on which law “protects” security firms although a document reporting on a review of contracts states that they include provisions to the effect that: “the contractor shall abide by the International Committee of the Red Cross Code of Conduct for Combatants.”²⁸¹ In addition, contractors have agreed “to obey, comply with and enforce all applicable Afghan laws and regulations as well as all applicable Canadian Forces standing orders and regulations.”²⁸² Security contractors do not conduct offensive operations, but just as CF soldiers have the right to self-defence, if attacked, contracted personnel may engage attackers to defend themselves and safeguard the force they are hired to protect.²⁸³

The foregoing statements are not free from ambiguity and seem to have significant gaps which, admittedly, may be due to the redaction process. As already noted, they endorse the invalid distinction between offensive and defensive operations as a factor in determining combatant status. The defensive/offensive criterion is significant and, as already mentioned, not without legal difficulties. It would seem difficult to contend that PMCs carrying out

²⁷⁵ *Ibid.*

²⁷⁶ AO247813.

²⁷⁷ AO283288.

²⁷⁸ Elsewhere the documents assert that DND spokespersons cannot comment on legal questions and that the Department has not developed any doctrine on the matter.

²⁷⁹ AO283589. The statement does address accountability but remains ambiguous.

²⁸⁰ AO283318. The statement begs the question of what happens to foreign contractors.

²⁸¹ AO283288 A subsequent e-mail from the office of the JAG indicated that this clause has since been dropped. No explanation for this change was provided.

²⁸² *Ibid.* It should be noted that these references are presumably made in reference to Afghan nationals, leaving the requirements for non-Afghan PMCs unclear.

²⁸³ AO283312.

defensive actions are not, by definition, engaged in combat. In general, if it is argued that they are nonetheless civilians, it is indisputable that, by virtue of taking up arms, they have rendered themselves legitimate objects of attack.²⁸⁴ An argument to the contrary would have to be based on the proposition that such armed engagement was part of some kind of policing operation governed by municipal law or, alternatively, a case of two groups of civilians engaged in hostilities. Neither scenario seems very credible. PMCs are not civilians who occasionally and spontaneously take up arms against opposing forces. They are on the contrary armed on an ongoing basis in situations of armed conflict in which they are involved to a greater or lesser extent. This reality puts the Canadian Government in the difficult if not untenable position of employing contractors whom they know will be made objects of attacks. This *de facto* makes them combatants but without the ability to invoke that status as a defence.

Uncertainty:

The documentation indicates that the Canadian Government has not developed a comprehensive response to the legal challenges arising from the employment of PMCs. There are references to “the absence of an overarching policy on the use of private security contractors,”²⁸⁵ and the fact that “there is no formal policy governing the use of PSFs (private security firms) by Canada.”²⁸⁶ This uncertainty is underscored by similar comments in the Gifford and Spearing articles.²⁸⁷

The extent of the use of PMCs does not appear to have been anticipated by the Canadian military. As is the case with the US, the reliance on PMCs was not planned and this perhaps partially accounts for the absence of policy or doctrine on the subject.²⁸⁸

Although DND has not issued any policy statement on the use of PMCs, the practice was

²⁸⁴ See discussion in Chapter 4 above.

²⁸⁵ AO272303.

²⁸⁶ AO248024.

²⁸⁷ *Supra* notes 25 and 217 respectively

²⁸⁸ *Schwarz, supra* note 22 at 15. Schwarz discusses the absence of references to PMCs in the US 2008 National Defense Strategy and Quadrennial Defense Review, despite the fact that contractors make up more than 50% of DOD’s workforce in Afghanistan and Iraq, including more than 13,000 armed contractors. *Ibid.* at 18.

reviewed as part of an evaluation of the Canadian Forces Contractor Augmentation Program (CANCAP) in 2006.²⁸⁹ The evaluation stressed the need for an effective governance framework and the development of policy and doctrine governing the employment of contractors in support of CF operations abroad. More specifically there was a requirement to facilitate a clear understanding of roles, responsibilities, and expectations. The report highlighted problems related to inconsistency in interpretations of contracts, “constant negotiations” and possible liability for the crown resulting from exposure of contract personnel to hostile environments. The stark conclusion of the report reinforces the concerns highlighted in this thesis:

In terms of assuring the safety of contractor employees, while steps can be taken to protect their status as non-combatants (e.g., through Status of Forces Agreements, by ensuring they are unarmed, having them wear identification, etc.) the reality is that the enemy may not honour the laws of war. Therefore the distinction may be meaningless. The status of contract personnel on the battlefield under the international law of war is inherently uncertain.²⁹⁰

This comment seems to suggest that, if not addressed, uncertainty and confusion about the status of PMCs carries the potential for serious problems. The Department’s general response to the evaluation was that, “Contractor Personnel Policy is being developed” but it was not possible to find out whether such a policy actually came into being.

5.5 Conclusions

What conclusions can be drawn from this fragmentary evidence? The fact that the documentation nowhere comments on the official status of PMCs only underscores the uncertainty. The statements cited cannot therefore be regarded as definitive. Nevertheless, in the absence of anything else, it is not unreasonable to rely on them as an accurate reflection on official thinking, as far as it goes, on the issue. An informal response from the office of the Judge Advocate General²⁹¹ did not take issue with any of the policy elements summarized above, other than to note that after 2007, the clause regarding the ICRC Code of

²⁸⁹ <http://www.crs-csex.forces.gc.ca/reports-rapports/2006/93P0705-eng.asp#recommend>.

²⁹⁰ *Ibid.*

²⁹¹ E-mail of 19 July 2011.

Conduct is no longer included in PMC contracts.

First, then, it is not unreasonable to assume that there is no official policy, although it appears that some work may have been done to develop one. Second, it could again be assumed that the default position of the Department of Defence is that, in terms of any applicable legal regime, the conduct of PMCs is governed by the relevant contract and local law. Third, it would seem safe to say that the Canadian military do not consider PMCs to be combatants. References to the relevance of IHL, the ICRC Code and Canadian military regulations and codes of conduct seem to run counter this conclusion, however. Many of the security-related tasks entrusted to PMCs are, at a minimum, combat-related if not combat in nature. The documentation stresses, however, that PMCs are restricted to defensive actions only – including, of course, self-defence. All of these uncertainties create a climate of doubt as to how the Canadian military would respond to cases of violations of local or international law committed by PMCs operating in the service of Canada. Other than noting that this is a “complex issue” and that allegations of wrongdoing would be investigated, the documentation gives no indication of the state of Canadian preparedness to respond to the worse case scenarios.

6 Unlawful combatants

6.1. Development of the Term

We have seen in the previous discussion that the term combatant remains basically undefined. The absence of significant state practice adds to the uncertainty regarding its scope of application. Nevertheless, there seems to be no question that there is broad, perhaps universal acceptance that members of regular armed forces are combatants and are therefore entitled to prisoner of war status. Beyond that however, the question of precisely what other categories may be included is unclear, despite the fact that the law of armed conflict itself (up to and including the *Additional Protocols to the Geneva Conventions* as well as recent jurisprudence) acknowledges the existence of other groups which may, potentially or partially, qualify for this designation.

A number of commentators have affirmed, often categorically, the exclusive binary categorization of participation in armed conflict. According to this view, because there is no vacuum in the law, participants must be either one thing or another – civilians or combatants. This is the position of the ICRC:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that this is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.²⁹²

This position has been endorsed by many IHL experts.²⁹³ The strict dualistic “either-or” approach does not, however, definitively dispose of the problem. In fact it simply leads to another question: given the imprecise scope of the term combatant (once we move beyond

²⁹² ICRC Commentary, *supra* n.174.

²⁹³ See eg. Jelena Pejic, “Unlawful/Enemy Combatants: Interpretations and Consequences” in Michael Schmitt and Pejic, *supra* n.201 at 335. K.H.Govern et. al., “Taking Shots at Private Military Firms: International Law Misses its Mark (Again),” 32 Fordham Int’l L. J. (December 2008) 55-95; “Editorial,” Gillard, “Business Goes to War: Private Military Security Companies and International Humanitarian Law” *Int’l Rev. Red Cross* *supra* n.11 at 445 and 530 respectively.

the armed forces designation), plus the recognized existence of other categories of military or quasi-military groups, on which side of the line should these groups be placed? In this connection, it has already been noted that some commentators have called for the recognition of PMCs, as has already been done in the cases of insurgents or liberation movements. This would give them the “restricted international personality”²⁹⁴ accorded insurgent groups under IHL. Alternatively, placing them unequivocally in the civilian camp can be seen to lead to serious anomalies if not contradictions, mainly because of their normally strong link to the armed forces of one or other party to the conflict.

On the basis of the discussion so far, what are the options for designation of PMCs? First, we have identified them as non-state actors, according to the criteria applied by international relations and international law theory. This means that they are *de facto* seen as actors in the international arena and important participants in contemporary armed conflict. This participation has to a great extent been accepted as legitimate, at least informally, in state practice. This *de facto* legitimization has not been matched, however, by formal recognition of their status in a legal sense, beyond what is accorded to them under governing municipal law. Given the fact that they are involved in international and internal conflicts governed by international law, this limited recognition seems inadequate. Although there are parallels with resistance and liberation movements which have gained formal recognition, the legal position PMCs remains murky.

The acceptance of their role, while its extent may be viewed differently by various states, is a fact of modern military life. Placing PMCs on the “civilian” side of the ledger, as most governments do technically, does not reflect the reality of their involvement in armed conflict. They are clearly engaged in state-sanctioned, combat-related responsibilities. On the other hand, they do not completely fit into the combatant category either, although there is a strong case to be made for placing them into one of the sub-categories which could be incorporated into the armed forces, were states prepared to take this step. What we seem to have ended up with, then, are the negative designations of: ‘rogue’ or ‘non-peaceful’

²⁹⁴ *Wilmshurst & Breau, supra* n.148 at 46.

civilians or 'unlawful' combatants. This latter category has official acceptance primarily in US usage, but is nonetheless problematical. A discussion of the concept is however useful in clarifying how it might relate to PMCs.

The term 'unlawful combatants' was first used in US municipal law in a 1942 United States Supreme Court decision in the case *ex parte Quirin*.²⁹⁵ In this case, the Supreme Court upheld the jurisdiction of a U.S. military tribunal over the trial of several German saboteurs in the US. The key passage from the decision is as follows:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.²⁹⁶

The foregoing passage is an illustration of how the two elements of combatant status (prisoner of war entitlements and immunity from prosecution) are not distinguished.

In 2006 the US Military Commissions Act was amended to include a definition of an "unlawful enemy combatant" as follows:

a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida, or associated forces); or a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.²⁹⁷

The Code definition is quite different from that of *Quirin* which specifically stated that

²⁹⁵ *Ex parte Quirin*, 317 U.S. 1 (1942) in *Sassoli supra* n.72 at 690.

²⁹⁶ *ibid.*

²⁹⁷ The *Military Commissions Act* of 2006, Pub. L. No. 109-366, 120 Stat. 2600 s.948a(1) at http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf.

unlawful combatants are subject to trial for acts they have committed. Under the 2006 amendment, the new term ‘enemy combatant’ is introduced and is broadly defined so as to include anyone who is a member of Al Qaida or the Taliban. The qualification ‘enemy’ seems intended to limit the legal protections available to such detainees.

Whereas the terms ‘combatant,’ ‘prisoner of war’ and ‘civilian’ are incorporated into relevant international law instruments, ‘unlawful combatant’ and ‘unprivileged combatants/belligerents’ are not. They have, however, been frequently used, at least since the beginning of the last century in American legal literature, military manuals and case law. The official Canadian definition is similar in that it simply defines unlawful combatants as, “those who take a direct part in hostilities without having the legal right to do so under the LOAC.”²⁹⁸

The connotations given to these terms and their consequences for the applicable protection regime are not always very clear.²⁹⁹ The discussion has been further complicated by the use of the alternative term “enemy combatant”. It is not clear as to whether this is a concept different from “unlawful” combatant. At least one commentator thinks that it is:

At the center of this [post 9/11] reorganization of power, symbolically and legally has been the creation of a new category of person, applicable to US citizens as well as to non-citizens. The nomenclature used to designate this new category as "enemy combatant" is a term that mixes confusingly several legal and military concepts. What those who adopted it were searching for was a term that could indicate prisoners in the war on terror who were not conventional prisoners of war. Although it conflates a number of previously well-defined categories (especially "enemy prisoner of war," combatant and "civilian combatant") "enemy combatant" apparently seemed to anonymous administration linguists to be the best option at the time."³⁰⁰

The vague and broad terminology used in the definition of ‘enemy combatant’ has been the

²⁹⁸ *The Law of Armed Conflict at the Tactical and Operational Levels, Joint Doctrine Manual 2003* Department of National Defence, at <http://www.cda-acd.forces.gc.ca/cfm/cdmfc/doc/LOACatOperationalandTacticalLevels.pdf>, p.3-1 n.17.

²⁹⁹ See discussion in Karen J. Greenberg and Joshua L. Dratel, eds. *The Enemy Combatant Papers: American Justice, the Courts, and the War on Terror* (Cambridge, New York: Cambridge University Press, 2008)

³⁰⁰ *ibid.* at x.

subject of judicial criticism in the US.³⁰¹ A useful survey of the history of the terms is provided by Garraway,³⁰² but the continuing confusion points to a need for clarification by states, beginning with the US.

What is the point of having this category? In a sense it is already a backhanded acknowledgement to IHL by reason of the very utilization of the term combatant in the nomenclature. The designation, presumably, indicates that persons in this category are not to be considered as merely “rogue civilians.” The unstated purpose in the US practice, nevertheless, seems to be to deprive such combatants of any kind of legal protection altogether. In that sense it seems almost like saying nothing more than “accused criminal.” In accordance with the principle of the rule of law, however, and from a human rights perspective, one would argue that the accused in armed conflict situations are entitled to be treated in accordance with at least minimal criminal justice standards.³⁰³ Given the controversy and confusion surrounding the term, the better course could be to dispense with it altogether. One way to do this may be to find a qualification other than “unlawful” which would thereby accord a certain degree of legitimacy to this category. This brings us to Richard Baxter’s thesis.³⁰⁴

Many of the difficulties related to the expansion of categories of protected persons were anticipated in 1951 by Baxter in an insightful essay. Baxter’s views now seem to be widely shared by scholars³⁰⁵ and his analysis remains surprisingly relevant to the issues addressed in this paper. Baxter was exceedingly well-placed to tackle the question of combatant status, in particular the legal problems created by the utilization of the qualification of ‘unlawful.’ His article was written shortly after the adoption of the *Geneva Conventions* of 1949. Baxter

³⁰¹ In, for example, US District Court for the District of Columbia decision in *Rasul v. Bush* in *Greenberg and Dratel supra* n. 299 at 125.

³⁰² Charles H.B. Garraway, “Combatants- Substance or Semantics?” in *Schmitt and Pejic, supra* n.202 at 320.

³⁰³ Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 at <http://www2.ohchr.org/english/law/treatmentprisoners.htm>.

³⁰⁴ *Baxter, supra*, n.186.

³⁰⁵ Anthony Rogers says that “this author has yet to meet a law of war expert who does not subscribe to Baxter’s view.” in *Wilmshurst & Breau, supra* n.148 at 123.

served in the US Army from 1942 to 1954, mainly in the Judge Advocate General's office.³⁰⁶ He was also a member of the US Delegation to the conferences which negotiated the *Additional Protocols to the Geneva Conventions* (1971-76). He was a respected scholar and teacher and was appointed to the ICJ in 1978, two years before his death. He belonged to that select group of scholars (the UK's Gerald Draper was another) who had had practical experience of serving in the military, while attaining an intellectual and scholarly standing of the highest order. This gave additional weight to his views.

6.2 Baxter's propositions

The following propositions, not stated as such by Baxter, are derived from his analysis:

(i) *Law of war is prohibitive rather than authorizing*³⁰⁷

The law of armed conflict forbids rather than authorizes certain manifestations of force.³⁰⁸ This proposition is key to Baxter's analysis. Historically, everyone on the side of the enemy (including civilians) was considered "fair game" and could be attacked or killed, even upon capture. With the development of IHL however, the law exercised its "prohibitive" capacity to extend protection to additional categories of persons. Humane treatment of prisoners-of-war (POWs) is one of the first examples of this extension. The categories of those entitled to POW status was also extended. According to the logic of the law of war, this would require a corresponding expansion of those considered to be combatants. For the sake of argument PMCs could be considered candidates for such treatment, as had been the case with insurgents/ resistance fighters.

But even within the limits of the then existing protected categories in 1951, Baxter argues

³⁰⁶ International Court of Justice Communique of 29 September 1980 a8 <http://www.icj-cij.org/presscom/files/7/11807.pdf>.

³⁰⁷ *Baxter, supra* n.186 at 324. The underlying philosophical premise articulated at the beginning of the 1951 essay is that IHL does not authorize or legitimate war or the use of force: it simply tries to restrain what it is powerless to prevent. The overall objective of IHL is humanitarian protection. This rationale colours Baxter's argument throughout the article.

³⁰⁸ *ibid.*

that the failure of an actor to qualify for one of these categories was not in itself a violation of humanitarian law. Thus a PMC (or an insurgent) could not be prosecuted for being an ‘unlawful’ combatant as such, although he could be for the commission of unlawful acts, after a judicial determination of his status. The determination process did not, of course, have any bearing on the question of guilt or innocence. Regardless of status, Baxter argues later on in his discussion, the detaining power would have the discretion to treat the prisoner as a POW because of the flexibility inherent in IHL.

In Baxter’s view, this was the weakness, if not error, of the *Ex Parte Quirin* judgment: it incorrectly concluded that “the failure to qualify as a lawful combatant could be described as a violation of international law.”³⁰⁹ Baxter’s critique was in effect endorsed by the ICRC study on direct participation in hostilities: “The absence in IHL of an express right for civilians to directly participate in hostilities does not necessarily imply an international prohibition of such participation. Indeed, as such, civilian direct participation in hostilities is neither prohibited by IHL nor criminalized under the statutes of any prior or current international criminal tribunal or court.”³¹⁰

Thus, legal consequences attach not so much to formal status (i.e. membership in the armed forces) as to **conduct** i.e. what a particular combatant does. The status-based criterion, on the other hand, allowed the court in *Quirin* to determine that the defendants were combatants, but “unlawful” combatants in that they were “entitled to the status of combatants [but acted] outside the rules governing that status thus depriving [themselves] of combatant privileges.”³¹¹ This growing proportion of fighters who could be so qualified, of course includes PMCs and adds to the attendant barriers in the way of accountability: “the sheer number of “unprivileged belligerents” in modern day conflict makes it impossible to deal with the problem by way of criminal proceedings.”³¹²

³⁰⁹ *ibid.* at 331

³¹⁰ International Review of the Red Cross, Volume 90 Number 872 December 2008: *Direct participation in hostilities*: “ICRC Interpretative Guide on Direct participation in Hostilities under International Humanitarian Law” [<http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf>] ICRC at 1045 [ICRC Interpretative Guide].

³¹¹ *Garraway supra* note 202 at 327

³¹² *ibid.* 331.

(ii) *“The Geneva Conventions are at their weakest in delineating the various categories of persons who benefit from the protection of each.”*³¹³

This proposition in a sense restates the basic problem discussed above in Chapter 4: how to define “combatant?” Baxter’s primary focus is on “spies, guerillas and saboteurs,” that is actors who do not qualify as combatants because they operate clandestinely. Espionage is a classic example of a category or qualification which is not in itself a violation of IHL. “Espionage is not in violation of the law of nations but a...belligerent penalizes this conduct because of the danger it presents to him.”³¹⁴ So a spy could be prosecuted according to municipal law or a national military code. Baxter seems to be saying: ‘Do not look to IHL to determine how ‘unqualified’ participants are to be dealt with. That is a determination that a detaining belligerent power can make and the determination may be guided by considerations which expand the level of humanitarian protection available to detained persons.’ Nevertheless, the scarcity of state practice on the definitional question highlights the uncertainty of this approach.

The simplistic attempt to resolve these difficulties by imposing an “either/or” alternative (i.e. civilian or combatant) is complicated by the addition of imprecise sub-categories of combatants introduced into IHL, some pre-dating the adoption of the *Geneva Conventions*. The resulting ambiguities may well have been inadvertent or due to inadequate negotiating or drafting expertise, but, in any case, there are no bright lines which clearly delineate the categories. This is the weakness that Baxter is presumably pointing to. Unintentionally perhaps, this has produced potential flexibility in the application of the definitions, giving states considerable leeway in applying, or ignoring them. This may have arisen out of an almost unacknowledged realization that, because of the chaotic nature of war, the applicable law cannot be implemented on the basis of airtight compartments. This suggests a need for states to develop common pragmatic definitions of these concepts through understandings and practice.

(iii) *“Only a rigid formalism could lead to the characterization of the resistance conducted*

³¹³ Baxter, *supra* note 186 at 327.

³¹⁴ *ibid.* at 330.

against Germany, Italy and Japan as a violation of international law.”³¹⁵

This sounds more like a political than a legal judgment. The underlying rationale is that there was an aspect of the nature of resistance movements that took them out of (or placed them above) the merely ‘rogue’ civilian (bandits or criminal) category. The characteristics that Baxter applies to guerilla movements (self-constituted, lack of permanency, absence of uniforms, etc.³¹⁶) also apply to PMCs. The same consideration also probably informed the negotiations on the provisions on the recognition of NLMs in the *First Additional Protocol*.³¹⁷ Baxter illustrates the ambiguity underlying the concept of “unqualified belligerents” when he points out that the difficulty of distinguishing the traitor from the spy and secret agent increased by reason of the view that “a given act may be reasonable if committed by a citizen and espionage if committed by an alien.”³¹⁸ The same logic exactly applies to PMCs, particularly if both (or all) parties to the conflict are using them. Thus there may be a kind of “half-way” acknowledgment of the legitimacy of PMCs by one party to the conflict, even if the other side regards them as mercenaries. A similar argument can be made to the effect that the role of PMCs in supporting the state lends them at least a colour of legitimacy.

(iv) “*The listing of those persons who are entitled as a matter of law to be treated as prisoners of war cannot reasonably be construed as prohibiting a belligerent from granting that status to persons having no legal right thereto.*”³¹⁹

The conclusion that Baxter again draws is that legal problems have been caused by the mistaken characterization of “unlawful belligerency” as an offence under international law. This has resulted from “a fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection.” (e.g. spying³²⁰) There are however, limits to drawing a parallel between resistance movements and PMCs. It must be acknowledged that Baxter’s analysis relates primarily to hostile acts (e.g. spying, sabotage) arising from non-compliance with qualifications established for recognition as

³¹⁵ *ibid.* at 335.

³¹⁶ *ibid.* at 333.

³¹⁷ Article 1(4) of *Additional Protocol I*, *supra* note 2.

³¹⁸ *Baxter*, *supra* note 186 at 332.

³¹⁹ *ibid.* at 337.

³²⁰ *ibid.* at 340.

prisoners of war. PMCs are not normally engaged in such clandestine activities: their activities are generally out in the open. It is noteworthy that a key element in Baxter's argument is that the reason for the stigmatization (i.e. denial of prisoner-of-war status) of spying and sabotage is the spy's reliance on deceit and subterfuge. PMCs however are closer to guerrillas in that there is a genuine (albeit contractual) allegiance to their principal and their activities are looked upon as licit and laudable by the state on whose behalf they are undertaken, and perhaps by third parties to the conflict as well. It is thus "highly unreal"³²¹ to regard them as internationally criminal.

Baxter's analysis can be summarized as follows: armed hostilities committed by persons other than those entitled to prisoner-of-war status merely deprives such persons of protection they might otherwise enjoy.³²² From this perspective, then, the term "unprivileged" (rather than "unlawful") belligerency would, in his view, more accurately reflect the correct legal state of affairs. Thus PMCs, depending on the circumstances, could be generally categorized as "unprivileged" combatants. Baxter explains that international law does not protect unprivileged belligerents, having in mind, as noted above, the situation of spies and saboteurs who are penalized "because of the danger their acts present to their opponent."³²³ The question then becomes, can PMCs be moved out of the "unprivileged" category to be designated as legitimate combatants? The groups that Baxter treats as "unprivileged" i.e. saboteurs, spies and so on, open themselves to harsh penalties because of the clandestine and deceptive nature of their activities. PMCs do not employ these tactics which pose a greater danger to the other party than readily recognizable combatants from the other side. Baxter concludes that what is to be done to the person who lacks privileged status "is left to the discretion of the belligerent" state.³²⁴ Since participating in hostilities without a privileged designation is not a violation of international law, states have the discretion to accord protection (i.e. prisoner-of-war status) to such participants, especially to those bearing readily identifiable distinctive signs or uniforms.

³²¹ *ibid.* 337

³²² *ibid.* 343

³²³ *ibid.*

³²⁴ *ibid.* at 344

6.3 Additional Protocol I

How have the provisions of Additional Protocol I affected the relevance and persuasiveness of Baxter's argument? It is submitted that they have strengthened it. Baxter talks about "the current tendency of the law of war...to extend prisoner-of-war status to an ever-increasing group."³²⁵ If NLMs have been covered by this extension, why not PMCs?

Garraway has pointed out the difficulties of dealing with the problem of "unlawful combatants" in the context of the traditional categories of participants in armed conflict.³²⁶ He elaborates on those he qualifies as unlawful belligerents "in that they are taking direct and continuous part in hostilities but failing to comply with the requirements for taking such part... This is not the case of the civilian who takes up arms briefly. Many of these people are indistinguishable in their conduct from armed forces... The sheer number of "unprivileged belligerents" now appearing in modern day conflict makes it impossible to deal with the problem by way of criminal proceedings." Garraway's analysis³²⁷ underscores the elements of the *Additional Protocol* which tend to substantiate Baxter's argument. He confirms that the categories and qualifications of combatant have been expanded, as Baxter predicted, by, for example, Art. 1 (4): "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination." This provision introduces a much less structured category of combatant into the IHL taxonomy. Art. 43 following the precedent of the *Geneva Convention III* dropped the *Hague Regulations* distinction between combatant and non-combatant members of the armed forces: all are combatants under the *Protocol*, thus resulting in an expansion of the coverage of that category. Art. 44 recognizes that there are situations in armed conflict where combatants cannot distinguish themselves from civilians in traditional IHL terms. Provided that they carry their arms openly (and even if they do not fulfill this minimal requirement) the combatant must now receive treatment "equivalent" to the provisions of the *Third Convention*. All of these provisions have moved in the direction of increasing the

³²⁵ *ibid.*

³²⁶ Garraway, *supra* note 202 at 330.

³²⁷ *ibid.* at 325 and following.

categories of persons entitled to formal recognition as combatants. This would tend to undermine any argument that the scope could not be further widened.

By contrast, Art. 47 deprives mercenaries of combatant and prisoner-of-war status. This was the basis for the 1989 *Mercenaries Convention* which criminalizes the mere “fact” of being a mercenary. This development vindicates Baxter’s argument by making an exception to his general proposition that failure to meet the requirements of the IHL categories is in itself not an offence in international law. This is one type of such failure which is specifically criminalized. Generally speaking PMCs would not fulfill the cumulative requirements of Article 47 or the *Mercenaries Convention*.³²⁸ They have not been separately criminalized but rather remain as part of the broader undefined category of belligerents (“privileged” or not). Art 51(3) of *Protocol I* deprives civilians who take a direct part in hostilities of protection from attack, only, but not of the other protections of the *Fourth Convention*. If PMCs are to be classified as civilians, then they should be entitled to the protection of the *Fourth Convention*, notwithstanding what action may be taken against them in criminal law terms. In addition, Article 45 of the *Protocol* provides “residual” protection for those who have taken part in hostilities but do not benefit from more favourable treatment under *Convention IV*. They are at least entitled to the protection of Article 75 of the *Protocol* (fundamental guarantees). At least one commentary goes to great lengths to justify the argument for minimum protection under *Convention IV* on the basis of an analysis of the *travaux preparatoires* of the Conventions.³²⁹

On the question of mercenaries in particular, it is interesting to note that the Red Cross study considers the *Protocol I* provisions on mercenaries to have acquired customary law status (Rule 108). Nevertheless, it also acknowledges that the US does not accept this conclusion and maintains, on the contrary, that mercenaries are “lawful combatants entitled to prisoner

³²⁸ *Additional Protocol I*, Art.47 *supra* note 2. Two of the conditions in particular would seem difficult to apply or prove: motivated by a desire for private gain (c) and not being a national of a party to the conflict (d) In its study on Customary IHL Law the ICRC found no case law on the application or interpretation of this provision. See *ICRC Study*, *supra* note 198, http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule108.

³²⁹ Knut Doermann, “The Legal Situation of Unlawful/unprivileged Combatants,” 85 *Int’l. Rev. Red Cross* No. 849 (March 2003) 46.

of war status.”³³⁰ Given this concession, from a US perspective at least, it is hard to understand why PMCs could not be accorded similar treatment.

6.4 Red Cross Interpretative Guide on Direct participation in Hostilities under International Humanitarian Law

Baxter’s concept of “unprivileged combatants” can be usefully applied to PMCs in an effort to demonstrate that the qualification of “unprivileged” can be altered to benefit those so classified. In that regard, it would not be far removed from the conclusions of an ICRC study on the concept of direct participation in hostilities.³³¹ IHL is flexible enough to accommodate PMCs either as civilians, part-time combatants or fully-fledged combatants. What is missing from the equation, however, is an interest on the part of states to recognize and clarify, individually or collectively, the appropriate application of the law to the circumstances.

The study (“Interpretative Guide”) resulted from an expert process initiated and conducted by the ICRC from 2003 to 2008. It concluded that “all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party.”³³² The report notes, however, that while this was the “prevailing opinion” among the experts,³³³ concern was expressed that it would create a category of persons protected by neither the *Third* nor the *Fourth Conventions*. The Red Cross position³³⁴ is that, at a minimum, such actors remain “protected persons” under the *Fourth Convention* and would be entitled to the fundamental guarantees under Article 75 of the *Additional Protocol I* as well.

³³⁰ ICRC Study, *supra* note 198 at 391.

³³¹ *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009* at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf> [ICRC Interpretative Guidance].

³³² *ibid.* at 999.

³³³ *ibid.* at note 17.

³³⁴ *ibid.* at note 15.

According to the study³³⁵, the most direct negative consequence of civilian (if that is how PMCs are to be regarded) participation in hostilities is loss of protection from direct attack, but Baxter would argue that it is still within the discretion of states to grant such persons prisoner-of-war status. Loss of protection from attack would be, in the expert analysis, the fate of armed civilians (contractors) who participate in hostilities sporadically or occasionally. In the Red Cross view, this would apply to the “great majority of private contractors”³³⁶. This conclusion is correct only if it relates to contractors who are not involved, as most PMCs in Iraq and Afghanistan are, in ongoing security-related functions. Thus,

A different conclusion must be reached for contractors and employees who, to all intents and purposes, have been incorporated into the armed forces of a party to the conflict, whether through a formal procedure under national law or *de facto* by being given a continuous combat function. Under IHL, such personnel would become members of an organized armed force, group, or unit under a command responsible to a party to the conflict and, for the purposes of the principle of distinction, would no longer qualify as civilians.³³⁷

It has been pointed out that the ICRC Study on customary IHL extends the traditional status-based definition of combatants to “part-time” members of the armed forces, including separate organized armed groups, all others being civilians. This is contrasted with a definition based on conduct i.e. participating directly in hostilities.³³⁸ Another way in which to capture this dichotomy is to distinguish “status” (members of the armed forces) from “activity” (anyone fighting).³³⁹ The latter criterion opens the door to the question of degrees of participation and to some extent also blurs the combatant/civilian distinction even further. Thus those who cannot be accommodated either as combatants or civilians fall into a grey zone. One commentator has come up with yet another term for this category: “unqualified participants.”³⁴⁰

Although a call for the integration of paramilitary groups is logical and consistent with Baxter’s analysis, it ignores two basic realities: (i) Governments do not seem inclined to take

³³⁵ *ibid.*

³³⁶ *ibid.* at 1010.

³³⁷ *ibid.*

³³⁸ *Wilmshurst & Breau, supra* note 148 at 111.

³³⁹ Garraway in *Schmitt and Pejic, supra* note 202 at 320.

³⁴⁰ *Wilmshurst & Breau, supra* note 148 at 113.

this step and, on the contrary, they usually wish to maintain their organizational distance from such groups; (ii) many private groups are in fact independent from government and some are even operating against them.

Thus the ICRC solution of accommodating private groups within the IHL existing categories is not open to all of them and thus the only alternative would be to accord them combatant status as independent NSAs. Nonetheless, the ICRC has clearly posed a challenge to states, as if to say “we have designated PMCs working in your military interests as part of your armed forces whether you like it or not. Otherwise they must be treated as civilians”.

It is beyond question that these groups have normally been authorized by a state to participate in hostilities on its behalf and have *de facto* thus become part of the armed forces, regardless of the lack of formal incorporation. It was noted in the study that, “from the historical letters of marque and reprisal issued to privateers to the modern combatant privilege, direct participation in hostilities with the authority of a State has always been regarded as legitimate and, as such, exempt from domestic prosecution.”³⁴¹ The study draws an important distinction between these groups and those which may engage in “occasional” participation in hostilities:

Members of organized armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function. Formally, therefore, they no longer benefit from the protection provided to civilians “unless and for such time” as they take a direct part in hostilities. Indeed, the restriction of loss of protection for the duration of specific hostile acts was designed to respond to spontaneous, sporadic or un-organized hostile acts by civilians and cannot be applied to organized armed groups. It would provide members of such groups with a significant operational advantage over members of State armed forces, who can be attacked on a continuous basis.³⁴²

The ICRC study is noteworthy in that it simply requires membership in an armed group belonging to a party. It does not enter into the debate about whether the activities of that armed group are of a defensive or offensive nature, for example. This approach was

³⁴¹ *ICRC Interpretative Guidance*, *supra* note 331 at 1011.

³⁴² *ibid.* at 1036.

described as a “functional.”³⁴³ In any case, no distinction is made within IHL between offensive and defensive military operations, thus casting doubts on claims that defensive actions on the part of PMCs are not “combat.” The ICRC conclusion that participation in hostilities by civilians does not exclude IHL protection could have been expressed by Baxter: “The absence in IHL of an express right for civilians to directly participate in hostilities does not necessarily imply an international prohibition of such participation. Indeed, as such, civilian direct participation in hostilities is neither prohibited by nor criminalized under the statutes of any prior or current international criminal tribunal or court.”³⁴⁴ The omission in the International Criminal Court’s statute of any reference to “unqualified” participation in hostilities is not conclusive of the matter. It is, however, persuasive. “The weight of contemporary legal opinion now seems to be that unlawful participation is not, by itself, an offence under the law of war and that unlawful participants would have to be tried under that law for any war crimes they may have committed in the course of their activities.”³⁴⁵

This perspective strongly suggests that unrecognized NSAs should not be automatically excluded from the protection afforded combatants under IHL, nor should their participation in hostilities be considered, *prima facie*, to be a violation of the law of armed conflict. Governments may have decided that this approach suits their interests, but we do well to remember that the initiators of humanitarian law were not states but individuals and organizations motivated by humanitarian concerns. This may well explain the ambiguity surrounding such terms as “combatants,” “parties to the conflict,” “non-international armed conflict” and “militias and volunteer corps” and so on. In some ways, it is these very ambiguities which have allowed IHL to evolve, strengthening both humanitarian protection and the rule of law.

³⁴³ *ibid.* note 196 at 1036.

³⁴⁴ *ibid.* at 1045.

³⁴⁵ *Wilmshurst & Breau*, note 148 at 123.

7 Conclusion

The ICRC/Baxter position, while persuasive, may not convince everyone.³⁴⁶ It does however encourage the development of the law in the direction of the recognition of new categories of NSA participants in armed conflict, just as resistance movements and NLMs were recognized in the past. This is also the logic of the previous discussion of the growing acceptance of NSAs in international relations and international law, in both theory and practice. The proposition that NSAs must be recognized as independent actors accords with the realities of contemporary international life. The ICRC study concedes this point to some degree: “Theoretically, private military companies could even become **independent non-State parties** to a non-international armed conflict.”³⁴⁷ In Baxter’s paradigm, such NSAs need not necessarily have links to any state in order to be accorded recognition within the existing legal regime. Given that IR theorists see a growing role for NSAs on the international scene, formal and legal recognition as independent players may be the most practical solution to the problem. The alternative of regulating PMCs by means of contract terms will produce a patchwork result at best, while at the same time undermining the effectiveness of IHL.

Much has been written about the “privatization” of war³⁴⁸ as a reflection of the broader phenomenon of the privatization of government functions across a wide spectrum of activities. The increasing involvement of NSAs in modern conflict has been facilitated by the asymmetrical nature of warfare, the de-territorialization of networks of insurgents and terrorists and the non-hierarchical organization of violence. The state-centric model had already begun to break down by the middle of the 20th century as a result of wars of national liberation and the post-colonial power struggles in the developing world. Regulation of and accountability for the acts of NSAs is still dependent, however, on an international system

³⁴⁶ It is by no means universally accepted that participation in hostilities by unqualified belligerents is not a violation of international law. One commentator states flatly that, “It is generally accepted that unlawful combatants may be prosecuted for their mere participation in hostilities, even if they respect all the rules of international humanitarian law,” *Knut Doermann, supra* note 329.

³⁴⁷ *ICRC Interpretative Guidance, supra* n. 331 at 1011.

³⁴⁸ See Cockayne’s helpful historical overview, *supra* note 63.

created and controlled by states. The problem is how to accommodate NSAs into that system in light of their real but limited legal capacity. There will probably have to be different solutions for different NSAs. Transnational corporations, for example, are already well integrated into the global economic system. NGOs have also achieved a considerable degree of legitimacy through their working partnerships with governments and recognition within the UN system. Where does that leave the military involvement of NSAs in armed conflict? Insurgent groups and paramilitary entities like PMCs have to a great extent been accepted as subjects of international humanitarian law. In some situations they have achieved quasi-governmental status. PMCs involved in the same situations however cannot be equated with NLMs, despite some operational similarities.

The practical problem with the accountability of NSAs, as already pointed out, relates to the absence of any effective process for the adjudication of their rights, claims and obligations. It is difficult to determine whether IHL governs their actions or whether “some other legal regime, such as human rights, refugee law or criminal law applies.”³⁴⁹ At the same time, this difficulty should not perhaps be overstated, particularly in light of the arguments for the application of human rights law and IHL simultaneously in armed conflict situations. Recent case law from international tribunals supports a more inclusive approach. Municipal criminal law also has an important role to play, particularly since Article 17 of the *Statute of the International Criminal Court (ICC)* requires that the Court must determine whether national criminal law processes have commenced as a first step.³⁵⁰ So the international community has already shown how accommodations among different legal regimes can be made.

What should be done to ensure that PMCs operate in conformity with IHL and human rights standards? The argument advanced in this thesis has been that their status first must be clarified. This would involve recognizing a measure of legal capacity that corresponds to the important role they play as NSAs on the international stage. It is submitted that in order to achieve this objective, it is not necessary to engage in any significant revision or development of international law. The legal basis already exists. Besides, it is difficult to

³⁴⁹ *ibid.* at 482

³⁵⁰ *Rome Statute of the International Criminal Court* at <http://untreaty.un.org/cod/icc/statute/rome fra.htm>.

pinpoint where and how the law needs to be developed. One possibility would be to broaden the definition of mercenaries as the UN Working Group is attempting to do. This would probably be a move in the wrong direction and there is no indication that it would garner significant international support. What is required, rather, is the development of a consensus toward an understanding of a number of possible measures which could affect the status of PMCs.

International law offers two solutions to the PMC problem. The first is to make use of the mechanism already provided in the *Geneva Conventions and Protocols* and integrate PMCs as militias into the regular armed forces of states. As discussed above, there is no history of state practice to rely on in this regard. Furthermore, there may be practical and administrative reasons why this would not be an attractive option for many governments. There is no doubt, however, that this would be the easiest solution from a legal point of view. A second response would require expansion of the concept of combatants so as to cover members of PMCs as non-state actors recognized as subjects of international law. At the most formal end of the spectrum, recognition of PMCs as NSAs similar to resistance groups or national liberation movements would probably require amendments to IHL. Short of that however, it is conceivable that PMCs could be considered by states to be lawful combatants, as Baxter suggested in general terms. This approach is compatible with the views of the ICRC and some IHL experts. Such recognition could, depending on the circumstances, be granted unilaterally or collectively by states. In keeping with a provision that goes back to the *Hague Regulations*, it would also require a formal commitment on the part of PMCs to abide by the law of armed conflict. There is no reason to believe that these companies would not be prepared to give such an undertaking.

This study has linked the issue of NSAs as subjects of international law with that of the status of the individual PMC fighter. Our conclusion was that the POW criteria were not intended to define the term combatant. They were to be applied for the purposes of determining the status of “fighters” upon capture, in order to identify the level of protection to which they may be entitled. The law assumes that all kinds of combatants will be involved in conflict: the reality of war dictates that it cannot be otherwise.

Participation in conflict by ‘unqualified’ combatants, however, is not a violation of international law. It is therefore open to states to determine what level of protection they will grant to such combatants and whether, in particular, they will consider them to be combatants for the purposes of application of the *Third Convention*. There is no basis in international law for excluding PMCs as NSAs from the protection of the *Geneva Conventions* on the grounds either that: (i) they are not subjects of international law or (ii) their individual members cannot be treated as combatants.

If the wars in Iraq and Afghanistan are any indication, the role of PMCs in modern armed conflict is likely to grow in importance. We have seen how the ranks of contracted security personnel outnumber uniformed regular soldiers in Afghanistan. To exclude such a significant group from the application of IHL undermines the rule of law and threatens accountability for violations of the law in life-and-death situations. It risks relegating the law to irrelevance.

There is therefore a need for governments to address this problem in a comprehensive and responsible manner. Canada, as a country which has traditionally played an important part in the development of international law, is well placed to take a lead in such an initiative. The Canadian role was prominent in advances in the human rights and disarmament fields, law of the sea and, more significantly in this context, the *Additional Protocols to the Geneva Conventions*. Considerable progress has already been made. The international community has recently demonstrated that it is possible to develop consensus on some important aspects of the legal implications of the role of PMCs. The Montreux document and the ICRC studies, for example, provide a good basis for such a development.

The nature of modern armed conflict has changed. In many ways the classic law of armed conflict no longer fits these changed circumstances. The humanitarian concerns which inspired the development of IHL are, however, as real as ever. It is now time for the international community to make whatever adjustments are necessary in order to ensure that those concerns find an appropriate and effective legal response

BIBLIOGRAPHY

Cases

International

UN Reparations Case [1949] (*Reparations for Injuries Suffered in the Service of the United Nations*), Advisory Opinion, I.C.J. Rep. 8.

Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Judgment (Merits), 27 June 1986, ICJ Reports 1986, Oxford Reports on International Law online at <http://www.oxfordlawreports.com>.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, (1996) ICJ Rep 226; ICGJ 205 (ICJ 1996).

Prosecutor v Tadic, Judgment on appeal, 15 July 1999, (International Criminal Tribunal for the Former Yugoslavia IT-94-1-A, Oxford reports online Tadic. Case no.IT-94-1-AR72, para.97, at <http://www.oxfordlawreports.com/>.

Prosecutor v. Blagoje Simic et al., ex parte confidential. Trial Chamber Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, (27 July 1999) International Criminal Tribunal for the Former Yugoslavia Trial Chamber, <http://www.icty.org/x/cases/simic/tdec/en/90727EV59549.htm>.

Legal consequences of the construction of a wall in the occupied Palestinian territory (Advisory Opinion) [2004] ICJ Rep 136.

USA

Ex parte Quirin, 317 U.S. 1 (1942) in *Sassoli*.

Sosa v. Alvarez Machain 124 S. Ct 2739 (2004) and *Jama v. Esmor* Civ. No.97-3093 (DRD) [448].

Haidar Muhsin Saleh et al v. Titan Corporation, CACI International Inc. and Technology Inc United States Court of Appeals for the District of Columbia Circuit decided 11 September 2009. Available online at <http://ccrjustice.org> (Center for Constitutional Rights).

United States of America v. Paul A. Slough et al. Criminal Action 08-0360 (RMU)¹ US District Court, District of Columbia (December 2009), online at: www.dcd.uscourts.gov.

Treaties and International Instruments

Additional Protocol I relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3, ICRC Treaty Website <http://www.icrc.org/ihl>.

Additional Protocol II relating to the Protection of Victims of Non-international Armed Conflict, 1977, 1125 UNTS 609, ICRC Treaty Website <http://www.icrc.org/ihl>.

Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, 75 UNTS 31, ICRC Treaty Website <http://www.icrc.org/ihl>.

Geneva Convention II for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, 1949, 75 UNTS 85, ICRC Treaty Website <http://www.icrc.org/ihl>.

Geneva Convention III relative to the Treatment of Prisoners of War 1949, 75 UNTS 135 ICRC Treaty Website <http://www.icrc.org/ihl>.

Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 1949, 75 UNTS 287, ICRC Treaty Website <http://www.icrc.org/ihl>.

Hague Convention IV Respecting the Law and Customs of War on Land 1907 and 1909 Regulations Concerning the Law and Customs of War CTS 227, ICRC Treaty Website <http://www.icrc.org/ihl>.

International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, <http://www.icrc.org/ihl.nsf/FULL/530?OpenDocument>.

Rome Statute of the International Criminal Court, at <http://untreaty.un.org/cod/icc/statute/romeFra.htm>.

Commentary on the Geneva Conventions and Additional Protocols

Henckaerts, J.M. and L. Doswald-Beck, *Customary International Humanitarian Law, vol.1 Rules and vol.2 Practice* (Cambridge: Cambridge University Press, 2005).

ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, (Geneva: ICRC, 1987).

Pictet, Jean ed. *Commentary III Geneva Convention relative to the treatment of prisoners of war* (Geneva: ICRC, 1958).

Pictet, Jean ed. *Commentary IV Geneva Convention relative to the Protection of Civilian*

Persons in Time of War (Geneva: ICRC, 1958).

Sassoli, M. & Bouvier, A, *How does the law protect in War? Cases Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 2nd edition (Geneva: ICRC, 2006).

Books and Monographs

Alston, Philip, ed. *Non-State Actors and Human Rights*, (Oxford: Oxford University Press, 2005).

Andrew, Alexandra, et. al. *Private Military and Security Companies Ethics, Policies and Civil-Military Relations*, Series: Cass Military Studies (Routledge, 2008).

Arnold, Roberta & Noelle Quenivet, eds. *International Humanitarian Law and Human Rights Law: towards a new Merger in International Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2008).

Aust, Anthony. *Handbook of International Law* (Cambridge, Cambridge University Press 2005 and electronic book).

Andress, Carter. *Contractor combatants: tales of an imbedded capitalist* (Nashville, Tenn.: Thomas Nelson, 2007).

Arts ,Bas et al eds. *Non-state Actors in International Relations*, (Aldershot: Ashgate Publishing, 2001).

Arts, Bas “*Non-State Actors in Global Governance: Three Faces of Power*”, (Bonn, Max-Planck Projektgruppe: Recht der Gemeinschaftsguter, 2003).

Bangerter, Olivier et al., *Exploring Criteria & Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law & Human Rights Law - Conference Report* (Geneva: 4-5 June 2007)

Brownlie , Ian. *Principles of Public International Law*, 7th ed. (Oxford, New York: Oxford , 2008).

Buur, Lars & Helene Maria Kyed, *State Recognition and Democratization in Sub-Saharan Africa: a New Dawn for Traditional Authorities?* (New York: Palgrave Macmillan, 2007).

Buss, Doris & Ambrina Manji, eds. *International Law: Modern Feminist Approaches*,

- (Oxford, Portland, Or.: Hart, 2005).
- Chesterman, Simon ed. *Civilians in War*, (Boulder, Colorado: Lynne Rienner Publishers, 2001).
- Chesterman, Simon and Angelina Fisher eds. *Private Security, Public Order* (Oxford: Oxford University Press, 2009).
- Chesterman, Simon and Chia Lehnardt, eds. *From Mercenaries to Market: the Rise and Regulation of Private Military Companies*, Oxford: Oxford University Press, 2007).
- Clapham, Andrew. *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).
- _____. *Human Rights Obligations of Non-state Actors* (Oxford, New York: Oxford University Press, 2006).
- Crawford, Emily. *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*. (Oxford: Oxford University Press, 2010).
- Cullen, Anthony. “*The Concept of Non-international armed conflict in International Humanitarian Law*,” Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University, 2010).
- Currie, John H. *Public International Law*, 2nd ed. (Toronto: Irwin Law Inc., 2008).
- Cutler, Leonard. *The Rule of Law and the Law of War: Military Commissions and Enemy Combatants Post 9/11* (Lewiston, New York: Edwin Mellen Press, 2005).
- Detter, Ingrid. *The Law of War*, 2d ed. (Cambridge University Press, 2000).
- Dinstein, Yoram. *The conduct of hostilities under the law of international armed conflict* (New York: Cambridge University Press, 2004).
- Dolgopoulou, Ustunia & Judith Gardam, eds. *The Challenge of Conflict: International Law Responds* (Leiden, Boston: Martinus Nijhoff Publishers, 2006).
- Evans, Malcolm. *International Law*, (Oxford: Oxford University Press, 2003).
- Fleck, Dieter ed. *The Handbook of International Humanitarian Law* (Oxford, New York: Oxford University Press, 2008).
- Green, L.C. *The Contemporary Law of Armed Conflict*, 2nd ed. (Manchester; New York: Manchester University Press and St. Martin's Press, 1993).
- Greenberg, Karen J. and Joshua L. Dratel, eds. *The Enemy Combatant Papers: American*

Justice, the Courts, and the War on Terror (Cambridge, New York: Cambridge University Press, 2008).

Harding, Christopher. "The Role of Non-state Actors in International Conflict: Legal Identity, Delinquency and Political Representation" in Ustinia Dolgopol and Judith Gardam, eds., *The Challenge of Conflict: International Law Responds* (Leiden, Boston: Martin Nijhoff Publishers, 2006).

Josselin, Daphne and William Wallace, eds. *Non-state Actors in World Politics*, (Houndmills, New York, Palgrave. 2001).

Kalshoven, Frits. *Reflections on the Law of War: Collected Essays* (Leiden, Boston: Martinus Nijhoff Publishers, 2007).

Lauterpacht, Hersch, ed., *International Law: A Treatise by L. Oppenheim*, 8thed. (London: Longmans, 1955).

Lewis, Michael W. ed. *The War on Terror and the Laws of War: a Military Perspective* (New York, N.Y.: Oxford University Press, 2009).

Mahoney, Kathleen and Paul Mahoney, eds., *Human Rights in the Twenty-first Century: a Global Challenge*, (Dordrecht: Martinus Nijhoff, 1993).

Nanda, Ved P. ed., *Law in the War on International Terrorism* (Ardsley, NY: Transnational Publishers, 2005).

Musah, Abdel-Fatau and J. Kayode Fayemi, eds., *Mercenaries: an African Security Dilemma* (London: Pluto Press, 2000).

O'Connell, D.P., *International Law*, (Dobbs Ferry NY: Stevens and Sons Limited, 1964).

Paust, Jordan J. *Beyond the Law: the Bush Administration's Unlawful Responses in the "War" on Terror* (Cambridge; New York: Cambridge University Press, 2007).

Prefontaine, Daniel C. "Under International Law is there a Category of Prisoner in Armed Conflicts Known as an "Unlawful or Unprivileged or Enemy Combatant"?" in *The measure of international law: effectiveness, fairness and validity: proceedings of the 31st Annual Conference of the Canadian Council on International Law, Ottawa, October 24-26, 2002 / Canadian Council on International Law = Prendre la mesure du droit international: effectivité, équité et validité : travaux de 31e congrès annuel du Conseil canadien de droit international, Ottawa, 24 au 26 octobre 2002 / Conseil canadien de droit international*. (The Hague; New York: Kluwer Law International, 2004).

Primoratz, Igor ed., *Civilian Immunity in War*

- (Oxford; New York: Oxford University Press, Electronic Book, 2007).
- David Rodin and Henry Shue, eds., *Just and Unjust Warriors: the Moral and Legal Status of Soldiers* (Oxford; New York: Oxford University Press, 2008)
- Rowe, Peter. *The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge University Press, 2006).
- Scahill, Jeremy. *Blackwater: the Rise of the World's Most Powerful Mercenary Army* (New York: Nation Books, 2007).
- Schmitt, Michael and Jelena Pejic, eds. *International Law of Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (Leiden: Martinus Nijhoff, 2007).
- Martin Shaw, *International Law*, 6th ed. (Cambridge : Cambridge University Press, 2008)
- Sheehy, Benedict et al., *Legal Control of the Private Military Corporation* (Palgrave MacMillan, 2009).
- Singer, Peter. *Corporate Warriors: The Rise of the Privatized Military* (Cornell University Press, 2003).
- Smith, Rupert. *The Utility of Force: the Art of War in the Modern World* (New York: Alfred A. Knopf, 2007).
- Starke, J.G. *Introduction to International Law*, 10th ed. (London: Butterworths, 1989).
- Wilmshurst ,Elizabeth and Susan Breau eds., *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge; New York: Cambridge University Press, 2007)
- Zegveld, Liesbeth. *The Accountability of Armed Opposition Groups in International Law* (Electronic Book, Cambridge: Cambridge University Press, 2007)

Articles

- Aldrich, George ‘The Laws of War on Land’ (2000) 94 AJIL 42.
- Antonyshyn, David et al. “Beyond the Law: the Regulation of Canadian Private Military and Security Companies Operating Abroad” (2009) PRIV-WAR Report: Canada, National Report Series 03/09, <http://priv-war.eu/EuropeanInstitute>.
- Bina, Mark W. “Private Military Contractor Liability and Accountability after Abu Ghraib” (2005) 38 J. Marshall L. Review 1237.

- Bassiouni, M.C. "The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors" (2008) 98 J. Crim. L. & Criminology 711.
- Baxter, Richard R. "So-called "unprivileged belligerency: spies, guerrillas and saboteurs" (1951) 28 Brit. Y.B. Int'l L. 338.
- Bearpark, Andrew. "The Future of the Market" in S. Chesterman and C. Lehnardt, eds. *From Mercenaries to Market: the Rise and Regulation of Private Military Companies*, (Oxford:Oxford University Press, 2007) 240
- Bogar, T. J. "Unlawful Combatant or Innocent Civilian? A Call to Change the Current Means for Determining Status of Prisoners in the Global War on Terror" (2009) 21 Fla. J. Int'l L. 29
- The British Association of Private Security Companies (BAPSC) www.bapsc.org.uk/
- Callen, J. "Unlawful Combatants and the Geneva Conventions" (2004) 44 Va. J. Int'l L. 1025.
- Cameron, Lindsay. "Private Military Companies: Their Status under International Humanitarian and its impact on their Regulation" (2006) 88 Int'l Rev. Red Cross 575
- Capie, David & Pablo Policzer, "Keeping the Promise of Protection: Holding Armed Groups to the Same Standard as States" (January 2004) Working Paper 3, Armed Groups Project.
- Carney, Heather "Prosecuting the Lawless: Human Rights Abuses and Private Military Firms" (2005) 74 Geo. Wash. L. Rev. 319.
- Chesterman, Simon "We can't spy if we can't buy: the Privatization of Intelligence and the Limits of Outsourcing and Inherently Governmental Functions" (2008) 19 E.J.I.L.
- Cockayne, James "Regulation of Private Military and Security Companies: the Contents, Negotiations, Weaknesses and Promise of the Montreux Document," (2009) 13 J. Confl. & Sec. L. 401.
- _____, "The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law," 88 I. Rev. Red Cross 459.
- Cottier, Michael. "Elements for Contracting and Regulating Private Security and Military Companies" in 88 Int'l Rev Red Cross 637
- Crawford, Emily. "Unequal before the Law: The Case for the Elimination of the Distinction

- between International and Non-international Armed Conflicts” (2007) 20 Leiden J. Int’l L.
- Cullen, Anthony. “The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)” (2007) 12 J. Confl. & Sec. L. 419
- Cutler, A.C. “Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy” in Review of International Studies quoted in Bas Arts, “Non-State Actors in Global Governance: Three Faces of Power” (Bonn, Max-Planck Projektgruppe: Recht der Gemeinschaftsgüter, 2003) 133.
- Danner, M. “Defining Unlawful Enemy Combatants: A Centripetal Story” (2007) 43 Tex. Intl. J. 1.
- Delas, Olivier. “Quelques Reflexions Entourant la Participation de Compagnies Militaires Privees aux Conflicts Armes” R.Q.D.I. (2007) 49.
- Department of National Defence (Canada), “The Law of Armed Conflict at the Tactical and Operational Levels, Joint Doctrine Manual 2003 Department of National Defence, at <http://www.cda-acd.forces.gc.ca/cfm/nc->
- Doermann, Knut “The Legal Situation of Unlawful/unprivileged Combatants,” (March 2003) 85 Int’l. Rev. Red Cross No. 849
- Dickinson, L.A. “Accountability of State and Non-State Actors for Human Rights Abuses in the “War on Terror” (2004) 12 Tulsa J. Int’l & Comp. L. 53.
- Elmore, C.D. “An Enemy Within Our Midst: Distinguishing Combatants from Civilians in the War Against Terrorism” 57 U. Kan. L. Rev. 213.
- Elsa, J.K. “Private Security Contractors in Iraq” (11 July 2007) CSR Report to Congress, Congressional Research Service.
- Finkelman, Andrew. “Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits against Military Contractors,” (2009) 34 Brook. J. Int’l L. 395.
- Francioni, F. “Private Military Contractors and International Law: an Introduction,” (2008) 19 E.J.I.L. 961
- Franklin, S. “South African and International Attempts to regulate Mercenaries and Private Military Companies” (2008) 17 Transn’l L. & Contemp. Probs. 239
- Gaston, E.L. “Mercenaries 2.0?: the Rise of the Modern Private Security Industry and its implications for Humanitarian Law Enforcement” (2008) 49 Harv. Int’l L.J.

- Gardam, Judith G. "The Law of Armed Conflict: a Feminist Perspective" in *Mahoney and Mahoney*.
- Gifford, Shane "The Armed Private Military Company and the Canadian Forces: the Next Step in Contractor Support" (Spring 2008) 11 *Canadian Army Journal* 79.
- Govern, K.H. "Taking Shots at Private Military Firms: International Law Misses its Mark (Again)" (2008) 32 *Fordham Int'l. L. J.* 55.
- Greenwood, D.J.H. "Introduction to the Metaphors of Corporate Law" (2005) 4 *Seattle Journal for Social Justice* 273.
- Gul, S. "The Secretary will deny Knowledge of Your Actions: the Use of Private Military Contractors and the Implications for State and Political Accountability," (Summer 2006) 10 *Lewis and Clark Law Review* 287.
- Halliday, Fred "The Romance of Non-state Actors" in Daphne Josselin and William Wallace eds. *Non-State Actors in World Politics* (New York: Palgrave Houndmills, 2001) 22
- Harding, Christopher "The Role of Non-state Actors in International Conflict: Legal Identity, Delinquency and Political Representation" in Ustinia Dolgopol and Judith Gardam, eds., *The Challenge of Conflict: International Law Responds* (Leiden, Boston: Martin Nijhoff Publishers, 2006) 547.
- Hendrix B. "Defending Non-Combatants: A Reply to Richard Arneson" (2006) 39 *Cornell Int'l L. J.* 705.
- Honigsberg, P.J. "Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse" (2007) 12 *UCLA J. Int'l L. & Foreign Aff.* 1.
- Carsten, Hoppe. "Passing the Buck: State Responsibility for Private Military Companies" (2008) 19 *E.J.I.L.* 989
- Jackson, Aaron L. "Civilian Soldiers: Expanding the Government Contractor Defence to Reflect the New Corporate Role in Warfare" (2009) 63 *A. F. L. Rev.* 211.
- Jennings, K. "Armed Services: Regulating the Private Military Industry"(2007) FAFO Report 532.
- Jensen, E.T. "Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance" (2005) 46 *Va. J. Int'l. L.* 209
- Craig S. Jordan. "Who will Guard the Guards? The Accountability of Private Military Companies in Areas of Armed Conflict" (Winter 2009) 35 *New Eng J on Crim & Civ Confinement* 309.

- Krause, Keith & Jennifer Milliken. "Introduction: The Challenge of Non-State Armed Groups" (2009) 30 Contemporary Security Policy 202
- Kranz, S.M. "Taking the "Combat" out of the "Enemy Combatant" Category: Yet Another Expansion of the President's Authority to Indefinitely Detain "Enemy Combatants" within the United States--Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008)" (2009) 35 Wm. Mitchell L.Rev.
- Lehnardt, Chia. "Individual Liability of Private Military Personne; under International Criminal Law" (2008) 19 E.J.I.L. 1015.
- _____, "Private Military Companies and State Responsibility" (2007) No. 2007/2, New York, Institute for International Law and Justice.
- Lennox, Victoria. "Conceptualising Global Governance in International Relations," *International Relations* (3 October 2008), website <http://www.e-ir.info>
- Lubell, Noam. "Challenges in Applying Human Rights Law to Armed Conflict," (2005) 87 Int'l Rev. Red Cross 737.
- Maxwell, M.D. et. al., 'Unlawful Enemy Combatant': Status, Theory of Culpability, or Neither?" (2007) 1 Journal of International Criminal Justice 19.
- Meisels, Tamar. "Combatants - Lawful and Unlawful" (2007) 26 Law and Philosophy 31.
- McDonald, Avril. "Ghosts in the Machine: Some Legal Issues Concerning US Military Contractors in Iraq" in Michael Schmitt and Jelena Pejic, eds. *International Law of Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (Leiden: Martinus Nijhoff, 2007).
- Michaels, J.D. "Beyond Accountability: the Constitutional, Democratic and Strategic Problems with Privatizing War," (Fall 2004) 82 Wash U.L.Q. 1001.
- Minow, Martha "Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism and Democracy" (2005) 46 B.C.L. Rev.989.
- Morgan, R. "Professional Military Firms under International Law" (2008) Chicago J. Int'l. L. 213.
- Nabulsi, Karma. "Evolving Conceptions of Civilians and Belligerents: One Hundred Years After the Hague Peace Conferences" in S. Chesterman (ed), *Civilians in War*, (London: Lynne Rienner, 2001).
- Nagan, W.P. et al. "The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors and the Constitutive Process" (2008) 60 Me. L. Rev. 42.

- O'Connell, Mary Ellen. "Combatants and the Combat Zone" (2009) 43 U. Rich. L. Rev. 845.
- _____, "Enhancing the Status of Non-State Actors Through a Global War on Terror?" (2005) 43 Colum. J. Transnat. L. 435.
- Okafor, C. "After martyrdom: international law, sub-state groups, and the construction of legitimate statehood in Africa" 41 Harv. Int'l L. J. no. 2 (Spring 2000) 503.
- Perrin, Benjamin. "Guns for hire- with Canadian taxpayer dollars" (2008) 6 Human Security Bulletin 5.
- _____, "Promoting Compliance of Private Military and Security Companies with International Humanitarian Law," (2006) 88 Int'l. Rev. Red Cross 615.
- Pushaw, R. J. "The "Enemy Combatant:" Cases in Historical Context: the Inevitability of Pragmatic Judicial Review" (2007) 82 Notre Dame L. Rev. 1005.
- Ridlon, D.P. "Contractors or Illegal Combatants: the Status of Armed Contractors in Iraq" (2008) 62 A.F.L. Rev. 199.
- Rumsfeld, Donald H. "Transforming the Military" (May/June 2002) Foreign Affairs 20.
- Ryngaert, Cedric. "Litigating Abuses Committed by Private Military Companies" (2008) Working paper No. 15, Leuven Centre for Global Governance Studies
- Sadat, Leila Nadya "A Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror" (2009) 37 Denv. J. Int'l L. & Pol'y 539.
- Schabas, William A. "Theoretical and International framework: Punishment of non-state actors in non-international armed conflict" (2003), 26 Fordham Int'l. L.J. 907
- Salzman, Zoe. "Private Military contractors and the Taint of a Mercenary Reputation" (2008) 40 N.Y.U. J. of Int'l L. & Pol. 853
- Sassòli, Marco. "The Status of Persons Held in Guantánamo under International Humanitarian Law" (2004) 1 Journal of International Criminal Justice 96.
- Schmitt, Michael N. "Humanitarian law and Direct Participation in Hostilities by Private Contractors or Civilian Employees" (2005) Chicago J. Int'l L. 511.
- Singer, Peter W. "War, Profits and the Vacuum of Law: Privatized Military Firms and International Law" (2004) 42 Colum. J. Transnat'l L. 521.
- _____, "The Private Military Industry and Iraq: What we have learned and where to next?" Policy paper (Geneva: Geneva Centre for the Democratic Control of Armed Forces, November 2004).

Schwartz, Juli. "Saleh v. Titan Corporation: The Alien Tort Claims Act: More Bark than Bite? Procedural Limitations and the Future of ATCA Litigation against Corporate Contractors" (2006) 37 Rutgers L. J. 867.

Taussig-Rubbo, Matteo. "Outsourcing Sacrifice: the Labor of Private Military Companies" (Winter 2009) 21 Yale J L & and Human. 101.

Whippman, D. "Redefining Combatants" (2006) 39 Cornell Int'l. L. J. 699.

Wiessner, Siegfried "Non-State Actors and Their Impact on International Human Rights Law" Association of American Law Schools, Outline for AALS Workshop on Human Rights Alexandria, Virginia, October 26-28, 2000 <http://www.aals.org>