Private security contractors and international humanitarian law – a skirmish for recognition in international armed conflicts

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In recent international armed conflicts private security contractors (PSCs) have played an ever increasing role and military advisors and tribunals are facing the dilemma of assessing the primary and secondary status of PSCs under international humanitarian law. In this article the misconception that PSCs are necessarily mercenaries will be dispelled. The possibility that PSCs might be categorised as combatants or civilians will then be explored. The conclusion is that where they are incorporated into the armed forces of a state, PSCs might attain combatant status. However, given that states are reluctant to formally incorporate PSCs into their armed forces, they will most likely remain essentially civilian. Their degree of participation in hostilities will determine whether they retain their immunity under international humanitarian law from attack and prosecution (as civilians) or whether they are rendered unlawful belligerents.

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Introduction

Recent international armed conflicts have witnessed the unprecedented outsourcing of military and security functions to private security contractors (PSCs). States are not alone in this trend towards greater use of PSCs – ‘private corporations, international and regional inter-governmental organisations, as well as non-governmental organisations’ are also employing PSCs, particularly when they find themselves operating in conditions of armed conflict (Gillard 2006:525). This boom in the private security industry has had a mixed reception. Some brand PSCs as ‘mercenaries’, while others tout them as the world’s future peacekeepers (Lilly 2000; Cameron 2006). In response to the two international treaties on the eradication of mercenaries, proposed by the United Nations and the African Union, some states have introduced measures to ban or regulate the activities of PSCs.

International humanitarian law treaties, although binding on PSCs operating in situations of armed conflict, currently make no specific reference to PSCs by this appellation, save to say that where there is doubt as to whether an individual qualifies for protected status (as a prisoner of war) under the conventions they are ‘presumed to have protected status until such time as their status is determined by a competent tribunal’ (GC III:5; AP I:45(1)). With PSCs fast outnumbering traditional armed forces on the ground in international armed conflicts, there is an urgent need for international humanitarian law to address the question of their specific primary and secondary status. Beyond the prospect of tribunals being flooded with such cases lie other motivations for this analysis: first, opposition forces need clarity on whether PSCs may be legitimately targeted in the theatre of armed conflict; second, PSCs need to know whether they are permitted to participate directly in hostilities; and finally, PSCs must appreciate the consequences which might follow from their actions if they do participate directly in hostilities (Cameron 2006:582).

PSCs do however share similarities with a variety of persons to whom recognised status has been granted. By conducting a comparative exercise, the author hopes to explore possible analogies for PSCs in the light of current humanitarian law operational in international armed conflicts. The intention is to be of some assistance to military advisors and tribunals in assessing the primary and secondary status of PSCs.

Determining the primary status of private security contractors: Are they status-less under international humanitarian law?

At the heart of international humanitarian law is the notion that every individual in the theatre of war possesses a recognised primary status as either a combatant or a civilian (Ipsen 1995:65). By and large the members of a state’s armed forces are combatants (unless wounded, in which case they are termed ‘hors de combat’) and the civilian
population are non-combatants. There is no intermediate ‘quasi-combatant’ category under international humanitarian law (Rothwell 2004, par 7). The determination of primary status informs not only the protections that the individual is afforded in the theatre of war, but also the legal consequences which flow from their actions, and the international legal obligations imposed upon their captors (Ipsen 1995:65). Those who enjoy primary combatant status are afforded secondary status as prisoners of war in the event of capture, and cannot be prosecuted for their lawful participation in hostilities (HR IV:3(2); GC III:4A(1-3) and (6); AP I:43 and 44(1); Ipsen 1995:93). Those who are granted primary civilian status may not participate directly in hostilities and, consequently, cannot be targeted and are to be respected and protected (GC IV:3).

Unfortunately the civilian/combatant distinction is somewhat complicated by the reality that, as with any rule, there are often exceptions. Despite being members of the armed forces, service personnel are denied authorisation (by national legislation) to ‘use a weapon or a weapons system’ (AP I:43(2)) and are consequently called non-combatants (HR IV:3). Another unusual category which challenges the stark combatant/civilian distinction is the group labelled ‘persons accompanying the armed forces’. Like service personnel, these persons are also not authorised to participate directly in hostilities and as a consequence of their non-combative role enjoy primary civilian status (GC III:4(a)(4); AP I:50(1); Ipsen 1995:65).

Beyond the ranks of the armed forces are two categories of persons who actively participate in hostilities despite not being legally authorised to do so. The first is the ‘levée en masse’ (GC III:4(6); AP I:43(1)) and the second are called ‘unlawful belligerents’ (Ipsen, 1995:68). Through special recognition under international humanitarian law, the civilian ‘levée en masse’ acquire the secondary protections afforded combatants when they take up arms spontaneously in the face of occupation. The ‘unlawful belligerent’ is not in so fortunate a position. The nature of their unauthorised actions precludes them from enjoying the prisoner of war protections and exposes them to criminal prosecution (AP I:45). Civilians make up the balance of those found in the theatre of war who do not fit within any of the categories set out above.

Clearly international humanitarian law is accustomed to a somewhat muddled response to the ambiguous scenarios which are encountered in the theatre of war. In the grey area surrounding the unusual cases in international armed conflict there are very few clear-cut answers and almost as many exceptions as there are rules. PSCs are accordingly just one of many recent challenges with which international humanitarian lawyers have had to deal.

**Combatants**

Primary combatant status is afforded to members of the ‘armed forces’ of those states that are party to a conflict (GC III:4A(1)). The term ‘armed forces’ is understood to
'consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates ... and subject to an internal disciplinary system' (AP I:43; Ipsen 1995:71). Combatant status is also extended to militia or volunteer forces provided they fulfil the following conditions set out in article 4A(2) of Geneva Convention III:

- That of being commanded by a person responsible for his/her subordinates
- That of having a fixed distinctive sign recognisable at a distance
- That of carrying arms openly
- That of conducting operations in accordance with the laws and customs of war

As a result of their 'combatant privilege' (HR IV:3; AP I:43(2)) members of the armed forces enjoy immunity from prosecution for their actions provided they observe the laws of war which regulate the methods and means of warfare. With the privilege of engaging in combat comes the liability of being considered a legitimate military target. Because of the targeting implications which follow from their primary status, combatants are duty bound to distinguish themselves from the civilian population (AP I:44(3)). The most common way in which combatants assert their primary status, as distinct from the civilian population, is by their practice of wearing uniforms. Even when not in uniform combatants are still required to wear a permanent distinctive sign visible from a distance and to carry their arms openly (GC III:4A(2); AP I:44(3) and (7)). Any failure to observe the fundamental principle of distinction will render them unlawful combatants, guilty of perfidy and unable to claim prisoner of war status upon capture (AP I:44(3) and (4)).

What then of PSCs? Can they be considered combatants in accordance with these provisions in international humanitarian law? Admittedly they are not members of the armed forces as traditionally understood. However, some might suggest that the facts support the argument that PSCs have been incorporated into the armed forces by contractual agreement, particularly when they are contracted to work for a state alongside the state’s armed forces. Gillard (2006:533) suggests that the following factors might indicate affiliation to the armed forces of a state:

- Whether they have complied with national procedures for enlistment or conscription, where they exist
- Whether they are employees of the department of defence
- Whether they are subject to military discipline and justice
Whether they form part of and are subject to the military chain of command and control

Whether they form part of the military hierarchy

Whether they have been issued with the identity cards envisaged by the third Geneva Convention or other forms of identification similar to those of ‘ordinary’ members of the armed forces

Whether they wear uniforms

International law does not stipulate how states should go about incorporating individuals into their armed forces; this is a matter purely for a state’s internal laws (Cameron 2007:3).²⁰ Once a state’s internal laws have endorsed the incorporation of individuals into the armed forces, all that international humanitarian law requires is that the state should ensure that individuals distinguish themselves from civilians, are subject to command responsibility and internal disciplinary systems, and that the opposition forces are notified of their incorporation (GC III:4A(2); AP I:43(3)). In theory then there is no legal bar to states’ incorporating PSCs into their traditional armed forces (Gillard 2006:534). Once a company employing PSCs can show the requisite incorporation into the armed forces of a state party to an international conflict, the PSCs (as a group) would then need to satisfy the four requirements set out in article 4A(2) of the third Geneva Convention in order to enjoy full ‘combatant privilege’.

Having said that, it is noteworthy that the majority of states making use of PSCs are at pains to emphasise that they are merely civilian contractors, authorised to accompany the armed forces (US Department of Defence instruction 2005:6.1.1). In fact, PSCs are often hired from states that are not party to the conflict, precisely to circumvent the belligerent state’s ‘national laws that would prevent them from sending their own armed forces’ (Cameron 2007:5). State practice suggests that commercial contracts, on their own, are not considered by states to be sufficient to incorporate PSCs into the armed forces, despite the fact that state responsibility may be invoked as a result of the contract alone (Ipsen 1995:69; Cameron 2006:584; Gillard 2006:533).

If a state were to take the necessary steps to formally incorporate PSCs into their armed forces, and notify the opposition of this position, would PSCs fulfil the criteria for belligerency set out in article 4A(2) of the third Geneva Convention? The first requirement of command responsibility does not necessitate ‘command by a military officer’ (Sandoz et al 1989:59), and might be satisfied by PSCs, particularly those coming from the more established companies where there is a ‘supervisory structure’ (Schmitt 2005:529). PSCs may fall foul of the requirement of a fixed distinctive emblem, sufficient to distinguish them from the civilian population, as they have
been known to dress in anything from full army fatigues to bermuda shorts and jeans (Gomez 2000; Schmitt 2005:527). PSCs on the whole would satisfy the requirement of carrying their arms openly and do (for the most part) observe the rules of war despite the occasional incidents of gross human rights violations (which violations are also – sadly – perpetrated at times by official combatants). In the final analysis, however, even if some PSCs could fulfil the four criteria for combatant status and did emanate from states party to the conflict, the deliberate refusal by states to officially incorporate them into their armed forces and their insistence that these are civilian contractors, scuttle any hopes of their being granted primary combatant status under international humanitarian law.

**Non-combatants**

Service personnel are an exception to the general rule that members of the armed forces are authorised to participate directly in hostilities. These personnel are prohibited from using ‘a weapon or a weapons system’ (AP I:43(2)) and are consequently dubbed non-combatants (HR IV:3). Within the category of non-combatants are quartermasters, members of the legal services and other non-fighting personnel, who enjoy special protection as a result of their limited combat competence (Ipsen 1995:82; GC I:24,26 and 27). Their status as members of the armed forces, albeit non-combatant members, guarantees their secondary status as prisoners of war upon capture. Although they are not authorised to participate directly in hostilities, save for defending themselves (GC I:22(1); GC II:35(1) and AP I:13(2)(a)), they are nevertheless not classified as civilians. As members of the armed forces, non-combatants are not protected by a prohibition against attack (as is the case with civilians) as they remain fundamentally a ‘military objective’ (AP I:51(1); Ipsen 1995:84). Article 52(2) of AP I defines military objectives as ‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage’.

With the exception of religious and medical personnel (who enjoy special protections under international humanitarian law) all other non-combatants contribute to the achievement of a military advantage, and are susceptible to attack without special considerations or collateral damage calculations (Ipsen 1995:85).

It seems as if many PSCs are contracted to perform the training and support services which are often carried out by non-combatants. There is however one fundamental barrier to concluding that PSCs might be categorised with non-combatants, which is their failure to be incorporated officially into the armed forces. As was discussed above, states hiring PSCs are at pains to emphasise that they are not incorporated as members of the armed forces.
‘Persons accompanying the armed forces’

As was stated earlier, international humanitarian law is fraught with exceptions to the rule that there is a stark distinction between civilians and combatants, and nowhere is this more evident than in the case of ‘persons accompanying the armed forces’ (GC III:4A(4)). These individuals are not members of the armed forces, do not wear a uniform, are not armed and are not permitted to engage in hostilities in any direct way (Ipsen 1995:95), but they often provide the necessary specialised expertise which the armed forces might lack. From the list of envisaged tasks that might be performed by those accompanying the armed forces it can be deduced that the drafters did not intend to include in this group ‘persons carrying out activities that amount to direct participation in hostilities’ (Gillard 2006:537). The assistance that they render to the armed forces exposes them to collateral injury while they are in the business of providing support for weapons and infrastructure (Ipsen 1995:95). These essentially civilian contractors still retain their inherently civilian status, despite the fact that their activities are aimed at maintaining the effectiveness of a piece of hardware which might be used to win a military advantage over the opposition (Parrish 2007:10). Despite their civilian status, persons who accompany the armed forces and provide for the welfare of the armed forces are afforded prisoner of war status if detained for security reasons (Ipsen 1995:95; GC III:4A(4)). This special privilege is recorded on an identity card which confirms their function (GC III, annex IV A).

A case could be made for concluding that PSCs should be grouped with these civilian contractors when they provide similar services to those who traditionally accompany the armed forces, notwithstanding the fact that they do not carry the recognised identification reflecting this status. This argument would rest upon the factual finding that such PSCs did not participate actively in hostilities, and might permit PSCs to claim prisoner of war status, provided they can overcome the treaty requirement that they carry identification as persons accompanying the armed forces (Cameron 2007:6). It is accepted that when the drafters of the Geneva Convention included the provision regarding the identity card it was agreed that ‘possession of one was a supplementary safeguard for the person concerned, but not an indispensable prerequisite for being granted prisoner of war status’ (Gillard 2006:537). There might then be room to argue that where states have contracted PSCs to assist the armed forces it is sufficient to infer protected status as civilian contractors, even if the contract itself is insufficient to actively incorporate them into the armed forces. Having said that, it is clear that this argument cannot be made where PSCs participate directly in hostilities, or where they are hired by non-state actors without any affiliation to the armed forces (Cameron 2007:593).

Mercenaries under international humanitarian law

The earliest customary law references to mercenaries in international humanitarian law were codified in the Hague Convention of 1907 (Hague V). Historically concerns over
the activities of mercenaries arose out of concerns that their actions would compromise the right of post-colonial states to self-determination (Fallah 2006:599). In short, the provisions in Hague V prevent the recruitment or organising of combatants in neutral territories (art 4), while permitting individuals to cross the border and offer their services to the belligerent party without negating their state’s neutral status (art 6). At most neutral states were to refrain from assisting mercenaries, but mercenarism per se was not criminalised under international humanitarian law.

Today mercenarism alone is still not a prosecutable offence under international humanitarian law, neither is it a crime under the Rome Statute of the International Criminal Court (Fallah 2006:610). At worst an individual might be prosecuted under the domestic laws of a detaining state which is party to either of the two anti-mercenary treaties. The focus here however is limited to exploring the possibility that PSCs might be mercenaries as the term is understood by international humanitarian law. Once individuals are identified as mercenaries they no longer have the right to claim combatant and prisoner of war status (AP I:47). Consequently they may not be immune from prosecution for participating in hostilities (as is the case with any civilian found participating directly in hostilities), and at best they can claim the minimum fundamental guarantees enshrined in article 75 of AP I (Fallah 2006:606).

Until 2004, when Shaista Shameem replaced Enrique Bernales-Ballesteros as the special rapporteur on mercenarism, the official position of the special rapporteur’s office was that PSCs were mercenaries (UN 1997), a finding that the majority of the international community chose to reject (Cameron 2006:575). Instead, the lax implementation by states of the two anti-mercenary conventions, coupled with the fact that PSCs operate in over 50 states, often on government contracts, suggest that under customary international law PSCs are not considered mercenaries for wont of state practice (Singer 2004:533). Furthermore, endeavours by the International Committee for the Red Cross (ICRC) to engage in dialogue with those in the private security industry in order to promote compliance with the international humanitarian law, lends credibility to the position that PSCs are not as a general rule mercenaries (Gillard 2006:527).

The term mercenary is defined in AP I (art 47(2)) as any person who (in the context of an international armed conflict):

- Is specially recruited locally or abroad in order to fight in an armed conflict
- Does in fact take a direct part in the hostilities
- Is motivated to take part in the hostilities essentially by the desire for private gain and is promised, by or on behalf of a party to the conflict, material compensation
substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party

- Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict
- Is not a member of the armed forces of a party to the conflict
- Has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces

Given that all six criteria have to be fulfilled simultaneously, the threshold is difficult to attain and the result is that the term mercenary is rarely used in its legally accurate sense and the definition is widely regarded as being unworkable (Cameron 2007:6 and 2006:578; UK 2002, par 6).

In many ways PSCs do not fulfil the six criteria required by the international humanitarian definition of a mercenary. Even a cursory analysis reveals that many PSCs are not recruited to fight, but are contracted to provide advice, training, logistical support or to act as bodyguards. According to the ICRC commentary on AP I, military advice, training, and technical maintenance of weapons are not mercenary activities and do not in and of themselves amount to direct participation in hostilities (Major 1992:103). Consequently PSCs providing advice or support services cannot be said to be participating directly in hostilities (Sandoz 1999:209). Only those specifically recruited to participate actively and directly in hostilities will satisfy the first two criteria. The others would retain their civilian status (Pictet 1987:57). The third criterion that PSCs be motivated purely by excessive material compensation would from a legal point of view be extremely difficult to prove (Committee of privy counsellors 1976, par 7; Fallah 2006:605). Paradoxically any PSCs emanating from states party to the conflict would automatically be exempt from mercenary status under the fourth criterion, while fellow employees of the same PSC might satisfy this requirement due to their citizenship or residential status. The last criterion dictates that any individual sent by another state (even one that is not party to the conflict) on official duty is exempt from the status of mercenary. Some have argued that where the state has contracted PSCs the contract of employment is sufficient to conclude that they are contractors of their employing state (Maogoto 2006:20).

In conclusion it seems that in theory it is possible for a PSC (in the context of an international armed conflict) to fulfil all the requirements of the legal definition of a mercenary in terms of international humanitarian law, although it would be a rare occurrence (O’Brien 2006:3). However, from the above it is clear that in the majority of cases the term mercenary is not useful in determining the status of PSCs under international humanitarian law.
**Civilians**

If PSCs are not incorporated into the armed forces (and consequently are not able to access combatant and non-combatant status), and they are unlikely to fulfil the definitional requirements of mercenaries under international humanitarian law, all that is left is civilian status. According to the ICRC commentary ‘nobody in enemy hands can be outside of the law’ (Pictet 1952:51): they are either combatants (or authorised to accompany the armed forces) or they are civilians. If they are not combatants they are necessarily civilians, whether or not their actions are such that they forfeit the special protections afforded civilians. Consequently international humanitarian law defines a civilian as any person who is not a combatant (AP I:50(1)).

Unlike combatants, civilians are not obliged to identify themselves as civilians (Gasser 1995:210) because of a presumption that where there is ‘doubt a person shall be considered to be a civilian’ (AP I:50(1)). With the exception of the levée en masse, civilians are not authorised to participate directly in hostilities, and it is this limitation which precludes the targeting of the civilian population as a military objective (Gasser 1995:210; GC IV:27(1)). Provided they do not take part in the hostilities, they are to be respected (GC I:27(1)), shielded from attack and may not be taken prisoner without sufficient reason (AP I:51(2); AP II:13(2)). This obligation demands not only that armed forces refrain from acts which would cause harm to civilians, but also that they are required to take steps to ensure the safety of civilians (Gasser 1995:212). Consequently any attacks on military objects must first be assessed to establish that the loss caused to civilian life is not excessive in relation to the concrete and direct military advantage anticipated (AP I:51(b)). Incidental harm caused to civilians and civilian objects are only lawful when it is an unavoidable and proportionate side effect of lawful attacks on military objectives (Gasser 1995:214). In every attack precautions must be taken to ensure that civilian losses are kept to a minimum, civilians are warned of imminent attacks, and where feasible removed from the vicinity of the military objective (AP I:57 and 58(a)).

The special protections afforded civilians are respected because the laws of war dictate that persons who take a direct part in hostilities are not entitled to claim the protections afforded civilians under international humanitarian law (AP I:51(3)). Civilians who participate actively in hostilities lay themselves open to attack from the opposition acting in self-defence during and while as they continue with their active participation (AP I:51(8)). Exactly when the actions of a civilian can be said to amount to direct participation in hostilities has been the source of some academic debate. The ICRC in their commentary to AP I summarises the controversy as follows: ‘undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly’ (Sandos 1957:516).
The International Criminal Tribunal for the Former Yugoslavia, when faced with this issue in the Tadic case, commented that ‘it is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time’ (Prosecutor v Dusko Tadic 1997, par 616).

Hans-Peter Gasser (1995:232; see also ICRC commentary to AP I, 1977:1679), proposes that direct participation involves not only ‘direct personal involvement but also preparation for a military operation, and intention to take part therein [provided the activities] represent a direct threat to the enemy’. Consequently direct participation does not extend to every act which might eventually result in a threat to the enemy. Civilians employed in industries which support the war effort (like persons working in an armaments factory) are not considered to be engaging in a military activity (Gasser 1995:211 and 233) although the munitions factory itself would still constitute a military objective. According to the ICRC (2003–2005:1) it would seem that any ‘acts aimed at protecting personnel, infrastructure or materiel, where that behaviour constitutes a direct and immediate military threat to the adversary constitutes a direct participation in hostilities’. Technological developments which would allow individuals located far from the front lines to direct a weapon to strike a target remotely by computer must be taken into account and would amount to direct participation in hostilities (Cameron 2007:9). On the other hand, support and logistical activities carried out by civilians, such as catering, construction and maintenance of bases, do not constitute direct participation in hostilities, provided these civilians do no more than act in self-defence (Cameron 2006:588–589).

Schmitt argues that once a determination is made that a civilian is directly participating in hostilities he or she may be legally targeted without further need to justify any resultant injury or death by considerations of proportionality or by taking special precautions in the attack. The author of this article is of the opinion, however, that Schmitt puts the case too strongly. The fundamental focus of the body of international humanitarian law is to protect those involved in armed conflicts; consequently it is ‘rare for the conventions to sideline particular categories of actors’ (Fallah 2006:603). Schmitt centres his argument on the fact that allowing protected status in grey areas will jeopardise the absolute protected status afforded civilians and not discourage participation by civilians. He maintains that the growing trend towards using civilians for military functions because of military downsizing, costs and expertise, increases the temptation for states to outsource armed conflicts (Schmitt 2004:505, 513). If civilian status is still afforded these civilian armed forces, the concepts of distinction and direct participation are going to come under fire. This author prefers the more nuanced conclusion that while there is still doubt as to exactly what actions constitute ‘direct participation’ on the part of civilians, the proportionality and special precautions tests are easier to satisfy when
civilians are playing a more involved role in hostilities. In other words, there is still an obligation to assess the proportionate result of the impending attack and to take special precautions during the attack (Gasser 1995:211). It is easier to reach the threshold for justifying these actions when civilians are actively participating in hostilities.

What then is the position regarding PSCs? Are they civilians who are participating directly in hostilities without authorisation? First, it must be clearly understood that international humanitarian law does not prohibit the use of civilian contractors in a civil police role in occupied territory, in which case they might be authorised to use force when absolutely necessary to defend persons or property (Elsea et al 2004). It is also uncontroversial that PSCs located at purely civilian sites or otherwise protected sites like schools, churches and hospitals could never constitute a direct immediate military threat to the belligerent party. This is endorsed by articles 51(1) and (2) of AP I. The conclusion is that PSCs at civilian sites will never constitute a legitimate military target and will retain their essentially civilian status because they do not participate directly in hostilities. Likewise PSCs employed as guards for reconstruction companies would be entitled to use force in self-defence and to protect the facilities they are guarding as long as they did so in a defensive manner and employed no more force than was strictly necessary (Dworkin 2004). However, in actual fact privatised security measures provided for private corporations in the context of an armed conflict are problematic because the environment in which they carry out their guarding duties is unstable and it may be difficult to distinguish criminal activities from military activities.

The same will not be true of PSCs who position themselves at purely military objectives like an armoury or command centre belonging to the opposition forces. Some would take the uncompromising position that ‘PSCs who, through their presence at a legitimate military target, aid the war effort and can be said to be participate directly in hostilities … effectively revoke their civilian protected status and exempt military commanders from considering their welfare further when calculating the collateral damage likely to result from an attack’ (Parrish 2007:13). Other authors maintain that even when PSCs are located at purely military objectives, commanding officers still bear an obligation to factor their presence into their calculations of collateral damage. The latter view is reminiscent of the approach taken towards workers in munitions factories. While the workers may not personally be targeted (because they retain their civilian immunity from attack) the military objectives in which they work remain open to attack, ‘subject to the attacking party’s obligations under international humanitarian law to assess the potential harm to civilians against the direct and concrete military advantage of any given attack, and to refrain from attack if civilian harm would appear excessive’ (Human Rights Watch 2003:1).

Perhaps it is more useful to ask what a tribunal might have to say about PSCs. It is intuitively right that a tribunal investigating an alleged war crime for an attack on a military objective
guarded by PSCs should demand less by way of justification of commanding officers than would ordinarily be expected when civilians are involved. PSCs are inherently a different category of civilian than those envisaged in the conventions. They are clearly not wholly innocent civilians going about their daily routine, caught in the crossfire. They have after all deliberately chosen to place themselves in the line of fire in an attempt to influence the outcome of hostilities. As is the case with workers in munitions factories, they do not become quasi-combatants (personally subject to attack) by their presence at a military objective, but the installation remains a permissible military objective (Oeter 1995:163). Even a large group of PSCs would not change the status of a single-use military objective. However, the point that is worth stressing is that a commander is expected to be aware of the principle of proportionality in his justification for an attack at all times and should thus exercise greater caution if a site is inhabited predominantly by PSCs.

Probably the area of greatest concern lies at neither end of the spectrum (civilian sites and purely military objectives), but rather concerns instances where PSCs carry out guarding duties at dual-use installations such as communications networks, power sources, oil refineries and transportation infrastructure (ports and airports) which serve both the civilian population and the armed forces. It seems intuitively right that PSCs located at dual-use sites be afforded greater protection than those located at single-use military installations. Article 52 of AP I states, ‘in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house, or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used’. There is a clear presumption in favour of protected status for sites which may be used for military gain. However, there is no distinction in international humanitarian law between defensive and offensive guarding. AP I (49(1)) is clear that an ‘attack means any act of violence … whether in offence of defence’. The question remains about the status of a PSC that is guarding (defensively) a dual use site. This author argues that the presumption of protected status (in respect of the site) would transfer to PSCs guarding the site, granting them civilian status until such time as the status of the installation can be deemed to be definitely military in nature. Once this determination has been made, the act of defending these sites would constitute direct participation in hostilities (Gillard 2006:540). However, despite this determination PSCs would still be justified in guarding the site against individuals acting with general criminal intent (Cameron 2006:589). In conclusion it would appear that the location plays a role in determining the status of PSCs. Those in civilian locations retain their civilian status and cannot be said to participate directly in hostilities, while those at single-use military sites might be said to be participating directly in hostilities. Like workers in munitions factories, PSCs would not be legitimate military targets but their presence at a legitimate military target makes them vulnerable to attack with lesser consideration of collateral damage than if they were purely civilians. In light of the presumption in favour of protected status for dual-use sites, PSCs guarding such sites should be afforded civilian status until such time as the status of the installation can be found to be predominantly military in nature.
If PSCs do participate directly in hostilities (more than just acting in self-defence or in defence of the subjects or objects they are guarding) they do not, as a result of their hostile actions, acquire combatant status. They may be grouped with civilians unlawfully participating in hostilities or unlawful belligerents. As such they may become legitimate targets for the opposition (Dworkin 2004:2, 3). Once they are hors de combat they once again regain their primary civilian status (unless they are found to satisfy the definitional criteria of mercenary) (Gasser 1995:233). Should they fall into enemy hands after such resistance they will still be treated humanely as civilians, held to account for their unauthorised actions and afforded the ‘regular and fair judicial guarantees’ extended to civilians (GC IV:5(3); AP I:75; Gasser 1995:211; ICRC 2006).

**Conclusion**

From the above it seems that PSCs will rarely satisfy the cumulative criteria which define a mercenary under international humanitarian law. Therefore the focus must be on their primary status as combatants or civilians. PSCs who are officially incorporated into the armed forces will automatically enjoy primary combatant privileges and secondary prisoner of war status. However, the vast majority of PSCs will not enjoy this privilege because states purposefully refrain from incorporating PSCs into their armed forces. Consequently under international humanitarian law they will necessarily be categorised as civilians. Civilians, on the other hand, are not authorised to participate directly in hostilities. If they do so they can be targeted, and also prosecuted on capture for these unlawful actions.

Some civilians are ‘licensed’ to accompany the armed forces and perform non-combative functions. PSCs who are engaged in non-lethal services mirror these individuals most closely. The difficulty is that PSCs do not carry the required authorisation and identification from the armed forces confirming their accompanying status. PSCs who engage in defensive activities should thus retain their civilian status until it can be concluded that they are directly participating in hostilities. This finding is subject to much speculation: academics like Schmitt argue that any participation in hostilities (offensive or defensive) strips PSCs of their essentially civilian status and renders them unlawful belligerents. The author of this article has argued that a more nuanced analysis might allow for PSCs to retain their civilian status provided they limit their participation to the defence of purely civilian targets. PSCs who engage in offensive activities on the other hand, are clearly unlawful combatants, may be targeted and could face prosecution for their unlawful behaviour.

The final conclusion is that PSCs would, depending on their particular actions, most likely be categorised as civilians (sometimes ‘accompanying the armed forces’). Their degree of participation in hostilities will determine whether they retain their civilian status or are considered to be unlawful belligerents.
Notes

1 The focus of this paper has been limited to the status of private security contractors (PSCs) in international armed conflicts.

2 In 1991 the ratio of military personnel to contractors was 50:1; by 2003 the ratio exceeded 10:1 (Singer 2003). Today, contractors working for the US government and military outnumber US troops in Iraq (Amnesty International 2006).

3 According to the International Committee for the Red Cross (ICRC 2006b:1) these functions include ‘logistical support, military operations, maintenance of weapons systems, protection of premises, close protection of persons, training of military and police forces at home or abroad, intelligence gathering, custody and interrogation of prisoners and, on some occasions, participation in combat’. Some PSCs limit their involvement to consultancy work, others are hired to provide on-site security for large mining corporations, and only very few engage in active combat (Blain 2007).

4 Some texts discriminate between private military contractors/companies, private security contractors/companies and non-lethal service providers. According to Brooks (2002:2–3): ‘Private security companies are companies that provide defensive armed protection for premises or people, capable of defending against guerrilla forces, or serving as personal bodyguards. While private military companies include both active private military contractors willing to carry weapons into combat, and passive contractors that focus on training and organizational issues. By contrast, non-lethal services providers (NSPs) provide logistical support such as de-mining, laundry and food services.’ For the purposes of this article the generic term of private security contractors (PSCs) is used, with the caveat that within this group there will be those whose activities might range from active combat or passive defence, through to non-lethal support.

5 The UN Mercenaries Convention entered into force on 20 October 2001, and by 2006 only 16 states had signed the treaty and 28 had become party to the convention (Fallah 2006:603).

6 The US and South Africa are amongst the biggest producers of PSCs, ‘so it is perhaps not surprising that they have come the farthest in regulating the industry’ (Holmqvist 2005:50). To this end South Africa has passed the Foreign Military Assistance Act, 1998 (Act 15 of 1998).

7 International humanitarian law is unusual in that it applies ‘to all individuals who find themselves in a territory in which there is an armed conflict (international or non-international), whether they are state or non-state actors’ (Cameron 2007:2).

8 While this article has been limited to an analysis based entirely on international humanitarian law, it is worth noting that the actions of PSCs may have human rights implications and raise questions of state responsibility.

9 It is worth mentioning at this juncture that in an armed conflict only a recognised subject of international law can clothe their armed forces with authorised combatant status. Combatant status is not given to the individual but is granted as a result of his or her affiliation to a party to the conflict, which is a subject of international law (Ipsen 1995:66–67).

10 Civilians who participate directly in hostilities might face criminal prosecution for their unauthorised actions, while combatants are not prosecuted for participating in hostilities provided they observe the rules of war.

11 However, if they breach the laws of war they may be subjected to disciplinary proceedings or military prosecutions (AP I:85-86; GC III:82–88). Nevertheless, a breach of the laws of war does not result in the forfeiture of their secondary prisoner of war status, unless they also breach the fundamental obligation of distinction (AP I:44 (4); Ipsen 1995:81).

12 This essentially civilian group is afforded primary combatant status if ‘they have spontaneously taken up arms against invading troops; without having had time to form themselves into armed units; and they carry their arms openly and respect the laws and customs of war in their military operations’ (GC II: 4(6)). The primary combatant status ensures that if captured, these individuals will be afforded secondary prisoner of war status.

13 The term ‘unlawful belligerent’ is afforded to those who intend to harm the enemy, but who do so in a manner which disregards the laws of war in order to attain a special military advantage (Parrish 2007:8). Such actions are regarded as perfidious and can result in the forfeiture of combatant and prisoner of war status (AP I:37(l)(l); HR IV: 29-31; Ex parte Quirin).
14 Voluntary human shields and non-state actors are just two of the categories which do not fall squarely within current international humanitarian law.

15 GC III article 4 includes in this category organised resistance movements, provided they fulfil the four criteria set out in article 4A(2)(a–d). Also mentioned are civilians who are accompanying the armed forces and crews of the merchant marine or civil aircraft.

16 AP I article 44(3) further states: ‘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. Recognising, 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.’

17 It must be noted that these privileges may be forfeited as a result of the actions of the particular individuals, for example engaging in spying (Ipsen 1995:65–66).

18 It is worth noting that failure to observe the laws of war will not render the combatant an unlawful combatant. It will however expose him or her to military prosecution provided he or she meets the other requirements for combatant status (GC III:82ff; Ipsen 1995:68). There have already been cases of PSCs attempting to claim immunity, by virtue of combatant status, from civil claims brought against them for unlawful actions (see Ibrahim v Titan; Saleh v Titan).

19 Although militia groups, volunteer corps and organised resistance movements are exempt from wearing uniforms they are still required to distinguish themselves from the civilian population (Ipsen 1995:76–77).

20 Since there are a number of civilians who are in fact officially incorporated into the armed forces as reservists it is not impossible for this act of incorporation to take place, provided the opposition is informed (AP I:43(3)). However, it is estimated that 80 per cent of PSCs are not contracted by states, which automatically exclude them from being incorporated or assimilated into the state’s armed forces (Gillard 2006:532).

21 Often this is done by way of national legislation.

22 AP I article 50(1) precludes this by its restrictive definition of a civilian (Ipsen 1995:84).

23 GC I articles 24–27 afford protected status to medical and auxiliary personnel who collect and care for the wounded and administer medical units. During armed conflict they are to be respected and protected and can never form part of the military objective as do other non-combatants. Any attack upon these specially protected personnel is unlawful. While they may not participate directly in hostilities, medical personnel in particular are nevertheless entitled to use small arms to defend themselves and the injured in their care (AP I:13(2)(a)). Upon capture they are granted the same legal protections afforded to prisoners of war (although they are not deemed to be prisoners of war), and they can only be detained in so far as it is necessary for assisting prisoners of war (GC I:28 and 30; GC II:36 and 37; GC III:33; Ipsen 1995:85–92).

24 These might include civilian members of military aircraft crews; war correspondents; supply contractors; reconstruction contractors; members of labour units; and those providing services for the welfare of the armed forces (Parrish 2007:8).

25 The focus of this section will be limited to mercenarism as it is understood under humanitarian law. While the few states party to the UN mercenaries convention and the OAU mercenaries convention might be obliged to criminalise a broader range of related activities, these obligations are necessarily limited to those states. Thus the focus is rather on the customary law provisions enshrined in international humanitarian law and is further limited to mercenaries as they occur in international armed conflicts, as this is where they run the risk of losing their prisoner of war status. Mercenaries active in non-international armed conflicts would not forfeit prisoner of war status because of the internal nature of the conflict (Sandoz 1999:208).

26 Having said that, it must be noted that under the two mercenaries’ conventions the recruitment, use, financing and training of mercenaries can result in offenders being prosecuted in domestic courts of states party to the treaties, provided the individuals fulfil all the stated definitional criteria of a ‘mercenary’ (Cameron 2007:7; Fallah 2006:608).

27 Only a small number of states have taken steps to enact legislation specifically aimed at regulating the PSC industry within their territory. Many of these instances of regulation have come about after PSCs have been accused of mercenary type activities, coup attempts and human rights abuses (Gillard 2006:528).
It is interesting to note that under the UN mercenaries’ convention this first definitional criterion excludes the requirement that the individual in fact does take part in hostilities (Fallah 2006:609).

AP I article 51(3) states that civilians are protected from attack ‘unless and for such time as they take a direct part in hostilities’.

Gasser (1995:232) suggests the following activities as examples of direct participation in hostilities: ‘carrying out a hostile act against the adversary; killing or taking prisoners; destroying military equipment; gathering information in the area of operation; operating or supervising the operation of a weapons system; servicing weapons systems; transmitting information regarding targets and engaging in activities around the logistics of military operations’.

The principle of proportionality prohibits attacks ‘which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’ (AP I:51(5)(b); Schmitt 2004:541).

There is a further imperative on commanding officers, once they have determined that an attack is proportional, to select a military objective ‘which may be expected to cause the least danger to civilian lives and to civilian objects’ (AP I:57(3); Schmitt 2004:519).

AP I article 52(1) states that ‘civilians objects are all objects which are not military objectives as defined in paragraph 2’. Paragraph 2 then goes on to define military objectives as ‘objects which make a contribution to military action’.

Article 1: ‘The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.’

Article 2: ‘The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.’

What analysts have learnt from the conflict in Iraq is that a situation can change from passive defence to active offence very quickly in an unstable environment, and that the distinction between combat and non-combat operations is often artificial (UK 2002, par 10). PSCs will need to be assessed on a case by case basis to determine their primary status with accuracy (Jennings 2006:15; Sandoz 1999:211).

Oeter argues that the presence of civilian workers in a munitions factory does not change the status of the factory as a legitimate military target, ‘even if there are hundreds or thousands of them’ (1995:63).

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