UNIVERSITY OF CAPE TOWN

REVISITING THE CLASSIFICATION OF PRIVATE MILITARY AND SECURITY CONTRACTORS UNDER INTERNATIONAL HUMANITARIAN LAW

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DECLARATION

I, Kenneth Wyne Mutuma, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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ABSTRACT

The past two decades have witnessed the emergence and rapid growth of private military and security contractors (PMSCs). Today these corporate entities make up a global security industry based on the provision of security services to both state and non-state clientele across the world whose value is over 100 billion dollars. Although their initial rise was intimately associated with post-Cold War factors and were expected to taper off with the decline of these factors, these speculations have not materialised. Instead, the gap presented by the demand for and supply of security services with the advent of the war on terror has bolstered their growth to the point that the world's leading military power, the United States of America, has become dependent upon these actors.

It is not surprising that their rapid rise has sparked enormous interest regarding their activities. In particular the services of PMSCs during armed conflict has generated intense debates on how they should be viewed and treated in this context. . These debates have intensified as high profile PMSCs have been forced to submit to the scrutiny of the public because of their use of violence in scenarios that amount to gross violations of human rights and humanitarian law. Even far more significant is the underlying question of the nature of the services they carry out on the battlefield — including services that constitute direct participation in hostilities — and whether the present legal regime governing armed conflict foresees, and adequately caters for, this peculiarity.

International humanitarian law classifies all actors operating in armed conflicts as either combatants or civilians, conferring rights and obligations upon them on the basis of where it is that they fall in this divide. To this end, this study relies upon primary and secondary legal materials to outline the current legal regime and ascertain on which side of the dichotomy these actors lie. This study concludes that the majority of PMSC personnel will be considered as civilians, a contradiction of in view of the reality of their activities, and proceeds to make a case for a review of their legal status in the light of certain challenges that arise from their present classification.

DEDICATION

To

My beloved wife

Doris

&

My precious children

Zarella, Jabu & Keilana

For your unwavering faith & support

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The considerable resources required of a runner embarking on a marathon provide a fitting analogy for the resources one needs when one undertaking a doctoral study. A good coach, a strong sense of solidarity with other runners, intimate supporters to cheer you on, and access to powerful faith reserves are crucial to the completion of these journeys.

To this end, I would like to acknowledge the tremendous support provided by my supervisor Professor Danwood Chirwa. One could not have asked for a better 'coach' for the task at hand. Thank you for enhancing my capacity in key analytical and writing skills required for a study of this nature. In addition to the technical support I received, I am truly grateful for the encouragement you gave me which the provided me with the mental fortitude needed in such a lengthy project. Thank you, too, for your patience while I 'learnt the ropes' and for demonstrating to me the qualities of a good supervisor. I hope that in future I will measure up to this standard.

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This thesis is dedicated to my family who have been my core resource during the ups and downs that accompanied my many years of doctoral study. It has been a 'collective project', and I am forever indebted to them their sacrifice, without which I would not have completed this study. I truly thank my beloved wife Doris for sharing this load alongside me. You have been a towering strength through all seasons and

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ABBREVIATIONS

AECA	Arms Export Control Act
AP I	Additional Protocol I
AP II	Additional Protocol II
AU	African Union
BAPSC	British Association of Private Security Companies
CPA	Coalition Provisional Authority
DCAF	Geneva Centre for the Democratic Control of the Armed Forces
DPH	Direct Participation in Hostilities
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
EO	Executive Outcomes
EU	European Union
GC	Geneva Convention
GWOT	Global War on Terror
ICC	International Criminal Court
ICRC	International Committee for the Red Cross
ISOA	International Stability Operations Association
ISS	Institute for Security Studies
ITAR	International Trade in Arms Regulation
MEJA	Military Extraterritorial Jurisdiction Act
MPLA	Movimento Popular de Libertação de Angola
MPRI	Military Professional Resources Incorporated
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organization
OAU	Organization of African Unity
POW	Prisoner of War
PMSC	Private Military Company
PMSC	Private Military/Security Contractor
PSC	Private Security Company

SADC	Southern African Development Community
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNITA	União Nacional para a Independência Total de Angola
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UK	United Kingdom
USA	United States of America

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND

Private military and security contractors (PMSCs) are the subject of a growing body of research in a range of disciplines and have, within the framework of international law, been canvassed from various angles.[1] Given their rapid growth in the past two decades and the increased reliance on them by states and non–state actors, it is not surprising that they have sparked enormous interest across different fields. The global industry earnings of the PMSC industry are currently estimated at over 120–140 billion dollars.[2] The highest demand for their services remains governments not just in the developed, but also in the developing world.[3] The world's leading military power, the United States of America (USA), has become dependent upon them to support its operations across the globe, as well as to protect its diplomats in dangerous and unstable locations.[4] PMSCs, in addition, attract a number of non–state clientele such as multi–national corporations extracting minerals in unstable regions, humanitarian actors providing relief in zones of conflict and potential victims of

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[1] M Tausig–Rubbo 'Outsourcing Sacrifice: The Labor of Private Military Contractors' (2009) 21(1) *Yale Journal of Law and Humanities* 1031–168 — discussing labour rights of their employees; N D White & S MacLeod 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility' (2008) 19(5) *European Journal of International Law* 965–988 — discussing their corporate responsibility; A Mehra 'Corporate Accountability — Ensuring the Promotion and Protection of Human Rights by Non–State Actors' Human Rights Report Submitted to the 11th Human Rights Council, California, available at http://www.dtp.unsw.edu.au/documents/CorporateAccountability.pdf [accessed on 20 June 2012]; A Krishnan *War as Business: Technological Change and Military Service Contracting* (2008) 71–80 — focusing upon technical and management services.

[2] T Dietz, K Havnevik & M Kaag *African Engagements: Africa Negotiating an Emerging Multipolar World* (2011) 58; A M Butazu 'European Practices of Regulation of PMSCs and Recommendations for Regulation of PMSCs through International Legal Instruments' Geneva Centre for the Democratic Control of Armed Forces, Geneva (September 2008) 7; A Ebrahim 'Going to War with the Army You can Afford: The United States, International Law, and the Private Military Industry' (2010) 28 *International Law Journal* 181 at 184.

[3] F Fransesco 'Private Military Contractors and International law: An Introduction' (2008) 19(5) *European Journal of International Law* 961 at 962.

[4] H Tonkin *State Control Over Private Military and Security Companies in Armed Conflict* (2011) 1; S Engbrecht *America's Covert Warriors: Inside the World of Private Military Contractors* (2010) 4; P W Singer *Corporate Warriors: The Rise of the Privatized Military Industry* (2003) 15; A Belasco 'The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11' Congress Research Service Report Number RL33110, Washington DC (29 March 2011) 22, 32.

kidnapping from rebel forces and drug lords.[5] A primary concern of the research on the industry has been on understanding the factors that have contributed to its emergence and prevalence.

PMSCs emerged as a force to be reckoned with during the 1990s following the end of the Cold War,[6] when they were involved in military operations in Africa and key to the restructuring of the security sector in Eastern Europe.[7] Some of these PMSCs acted on behalf of states (both sending states — outside the zone of conflict and territorial states where conflict was taking place) while others supported non–state actors.[8]

The initial rise of PMSCs is closely attributed to factors associated with the collapse of the Cold War.[9] These post–Cold War factors, which are discussed more elaborately in Chapter Two, presented a gap for the supply of and demand for military services which was filled by PMSCs.[10] Common to the environments in which PMSCs mushroomed and operated was the demand for security services in zones where the legal environment was weak, and public law enforcement agencies could not guarantee the rule of law.

There were expectations that the use of private contractors would diminish as the factors that contributed to the instability of the immediate post–Cold War period receded.[11] These expectations have not materialised. On the contrary, other factors,

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[5] J Palou–Loverdos & L Armendri 'Privatiation of Warfare, io lence and Private Military & Security Companies: A Factual and Legal Approach to Human Rights Abuses' Report presented to United Nations Working Group, Geneva (October 2011) 43–44, 498, available at http://nova.cat/wp–content/uploads/2011/12/Informe_PMSC_Iraq_Nova_ok.pdf [accessed on 21 May 2013].

[6] T Nandi & S Mohanty *The Emergence of Private Military Firms and Their Impact on Global Human Rights* (2010) 4; C Kinsey *Corporate Soldiers and International Security: The Rise of Private Military Companies* (2006) 58–71.

[7] Kinsey ibid at 72–93; H M Howe *Ambiguous Order: Military Forces in African States* (2001) 195-221 & 239; T Edmunds *Defense Reform in Croatia and Serbia–Montenegro* (2003) 54–55.

[8] Singer op cit note 4; H Wulf 'Good Governance Beyond Borders: Creating a Multi–level Public Monopoly of Legitimate Force' Occasional Paper No 10 Geneva Centre for the Democratic Control of Armed Forces, Geneva (2006) 15–16.

[9] Kinsey op cit note 6 at 58–71; Singer op cit note 4 at 49–66.

[10] Singer op cit note 4 at 73–86; J Cockayne, E S Mears, I Cherneva, A Gurin, S Oviedo & D Yaeger 'A Feasibility Study for a Standards Implementation and Enforcement Framework for the Global Security Industry' (2008) 1–2, available at www.ipinst.org/GSI [accessed on 4 October 2012]; Wulf op cit note 8 at 13–17.

[11] D C Kidwell 'Public War, Private Fight? The United States and Private Military Companies' Global War on Terrorism Occasional Paper 12 Combat Studies Institute Press, Fort Leavenworth

closely associated with the rise of the global war against terror have led to an increase in the need for their services.[12] The war on terror, with its emphasis on security, has facilitated the domination of the notion of humanitarian intervention over the need for development support to these nations.[13] In many instances the result has been armed conflict, characterised by parties of unequal strength, such as between a state and terrorist cells.[14] This has given rise to a new demand for private contractors to support states in their endeavours to quell terrorism.[15] There is every reason to believe that the trend towards their growth will continue as long as the gap between the demand for military security and the supply exists.

PMSCs currently work across the entire geographical spectrum and there is hardly a continent that has not in some way or the other felt the presence of these actors. They have become a large contingent force employed in the ongoing wars against terror in the Middle East.[16] In addition, many parts of the developing world remain reliant on PMSCs, though for different reasons.[17] Their services across the globe are provided during times of both peace and armed conflict.

Amidst the undeniable reality of their growth and spread, the behaviour of private contractors has not been without criticism. Their use has generated concerns about their conduct and violations of international law. Such concerns have been raised in

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Kansas (2005) 65, available at http://www.cgsc.edu/carl/download/csipubs/kidwell.pdf [accessed on 30 October 2012].

[12] Singer op cit note 4 at 49–72, 243–261; J Scahill *: R f W ' M Powerful Mercenary Army* (2007) Chapter 2; S Fainaru *g R : Am ' M n Fighting in Iraq* (2009) 48–66, 161–180.

[13] K Clements *The Center Holds: UN Reform for 21st Century Challenges* (2008) 161; S Fit si mmons 'A Private Solution to a Humanitarian Catastrophe' Vanguard, The Forum for Canada Security & Defence Community (1 September 2006), available at http://www.vanguardcanada.com/PrivateMilitaryFitzsimmons [accessed on 4 October 2012].

[14] C W Kegley & S L Blanton *World Politics: Trends and Transformations: Trend and Transformations* (2011) 243; C S Gray 'Thinking Asymmetrically in Times of Terror' (2002) 32(1) *Parameters* 5–14.

[15] P Purpura *Terrorism and Homeland Security: An Introduction with Applications* (2011) 201; T Winkler, M B Hansson & A Ebnother *Combating Terrorism and the Implications for the Security Sector* (2005) 47; Palou–Loverdos & Armend r i op cit note 5 at .

[16] D Isenberg *Shadow Force: Private Security Contractors in Iraq* (2009) 29–66; J I M Doty 'International Law and Private Military Firms' (2008) *GP Solo Magazine,* available at https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/intlprop_internationallaw.html [accessed on 12 October 2012].

[17] Graduate Institute of International and Development Studies *Small Arms Survey 2011: States of Security* (2011) 1 6; C Ero ' ig ilantes, Civil Defense Forces and Militia Groups: The Other Side of the Privati a tion of Security in Africa' (2000) 1 *Conflict Trend Magazine* at 25–29.

relation to their presence and activities during armed conflict, generating intense debates on how these actors should be viewed and treated in this context of armed conflict.[18] A credible response to this phenomenon ought to be premised on the need to ascribe to PMSCs an appropriate identity within the context of war, as a precursor to developing a suitable legal regime response — in other words, seeking first to understand who they are before tackling the question of what to do with them.

1.2 CONCERNS ASSOCIATED WITH PMSCs

The activities of PMSCs both inside and outside zones of conflict have raised concerns from various quarters.[19] This study is concerned with the challenges their presence bring within the context of armed conflict. In this environment, the accusations made against PMSCs have been in widespread. Amongst others, the personnel of these companies have been accused of committing serious breaches of humanitarian law, perpetrating gross violations of human rights, suppressing legitimate protests on behalf of autocratic regimes, plundering the natural resources of a country in association with such regimes, infringing international sanctions and United Nations (UN) embargoes, and undermining the system of international humanitarian relief established for zones of conflict.[20] While all of these allegations warrant close scrutiny, this study is concerned specifically with those incidents that have occurred in zones of conflict in which the operations of PMSCs pose a serious threat to the respect of international humanitarian law, as the *lex specialis* applicable in war.

This threat is evident in the much–publicised incidents of PMSC violations in conflict areas in different parts of the world. The Middle East in particular is awash

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[18] Chapter 1 (section 1.2). Particularly the fact that many of these activities are intrinsically military and yet these actors fall outside the purview of those considered as members of the armed forces of a state.

[19] L Gaultier, G Hovsepian, A Ramachandran, I Wadley & B Zerhdoud *The Mercenary Issue at the UN Commission on Human Rights: The Need for a New Approach* (2001) 14–15. Commentators have categorised three abuses: 1) commercial security, for example phone tapping, harassment of protesters and complicity with local law enforcement forces in arbitrary detentions and enforced disappearances; 2) in armed conflict, attacks on the civilian population, summary executions, torture, arbitrary detentions, as well as the use of prohibited weapons; and 3) abuses involving the extraction of natural resources and violations of the right of peoples to self–determination and the right to development.

[20] Wulf op cit note 8 at 18–19, 21.

with examples of such violations. One such incident emerged from the Abu Ghraib prison where Iraq detainees were subjected to dehumanising treatment by Consolidated Analysis Centers International Incorporated (CACI International Inc) personnel that shocked the world.[21] Another highly publicised incident occurred where staff of the PMSC, Blackwater, intentionally opened fire on 17 unarmed civilians while operating in Iraq, committing grave breaches of humanitarian law.[22] Here they alleged self–defence to justify their actions.[23] The company had already been in the limelight after the bodies of their personnel were dragged in an undignified manner in the town of Fallujah.[24] These examples are not limited to the Middle East. In Eastern Europe, the personnel of Dyncorp were implicated in scandals involving the sale of women for the purposes of sexual slavery during the Balkan War which involved the states of the former Yugoslavia.[25]

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[21] F Francioni & N Ronzitti (eds) *War by Contract: Human Rights, Humanitarian Law and Private* (2011) 7; J Prado 'Private Military and Security Companies and the UN Working Group on the Use of Mercenaries' (2008) 13(3) *Journal of Conflict Security Law* 429 at 434–435. For details of another shooting incident involving a different PMSC, United Resource Group (URG) on 9 October 2007 in Baghdad, Iraq: P Chatterjee 'Iraq War Logs: Military Privatisation Runs Amok' *The Guardian* 23 October 2010, available at http://www.guardian.co.uk/commentisfree/cifamerica/2010/oct/23/iraq–war–logs–us–military [accessed on 12 October 2012]; P Singer 'Nation Builders and Low Bidders in Iraq' *New York Times* 15 June 2004 at 1, available at http://www.nytimes.com/2004/06/15/opinion/nation–builders–and–low–bidders–in–iraq.html [accessed on 12 October 2012]; E McCarthy 'CACI Defense Contracts Ha y on Civilian Authority' *Washington Post* 29 July 2004, available at http://www.washingtonpost.com/wp–dyn/articles/A21858–2004Jul28.html [accessed on 12 October 2012].

[22] J Glan & A W Lehren 'Use of Contractors Added to War's Chaos in Iraq' *The New York Times* 23 October 2010, available http://www.nytimes.com/2010/10/24/world/middleeast/24contractors.html?pagewanted=all&_r=0 [accessed on 12 October 2012]; Scahill op cit note 12 at 25, available at http://articles.latimes.com/2007/nov/15/opinion/oe–scahill15 [accessed on 12 October 2012]; J Gibeaut 'Beyond Reach: US Contractos in Iraq Accused in Killing Say Courts Can't Touch Them' (2009) 95(3) *American Bar Association Journal* 12–1 ; A Portero 'Blackwater Changes Name Twice, But can't Escape Reputation' 6 June 2012, available at http://www.ibtimes.com/blackwater–changes–name–twice–cant–escape–reputation–721658 [accessed on 4 October 2012]. Blackwater has since changed its name to 'Academi'.

[23] 'Iraq: "Blackwater Must Go"' CNN.com 17 October 2007, available at http://edition.cnn.com/2007/WORLD/meast/10/16/iraq.blackwater/ [accessed on 4 October 2012]; P W Singer 'Can't Win With 'Em, Can't War Without 'Em: Private Military Contractors and Counterinsurgency' Policy Paper No. , (September 2007) 1; D Phinney 'Marines Jail Contractors in Iraq' CorpWarch.com June 2005, available at http://www.corpwatch.org/article.php?id=12349 [accessed on 4 October 2012]. A similar story is seen with another PMSC, Aegis, whose employees recorded a 'trophy video' shooting civilians while they listened to Elvis Presley's Song 'Runaway Train'.

[24] T Mlinarcik 'Private Military Contractors and Justice: A Look at the Industry — Blackwater and the Fallujah Incident' (2006) 4 *Regent Journal of International Law* 129 at 129, 138.

[25] V Chetail & L Cameron *Privatizing War: Private Military and Security Companies Under Public International Law* (2013) 275.

The engagement of private contractors in the above activities also raises questions about whether they should be performing such functions. Their presence in zones of conflict in this capacity is said to blur the space between persons legitimately entitled to engage in hostilities and those who have nothing to do with the conflict — such as civilians (including humanitarian relief workers) — and therefore ought to be protected and respected.[26] This confluence of contractors rendering military–like services, often alongside the military, creates uncertainty about their rights and obligations in the highly dynamic space of conflict. Furthermore, this uncertainty undermines the execution of war among belligerents, and it has been thought to impact upon the protection afforded to civilians and the ability of humanitarian agencies to offer relief to victims of armed conflict.[27] The presence of private contractors in these circumstances has muddled the space of conflict and increased the likelihood of attacks by fighters unable or unwilling to distinguish between genuine civilians and PMSCs.[28]

1.3 NEED FOR AN APPROPRIATE LEGAL RESPONSE TO THESE CONCERNS

The concerns associated with PMSCs highlight three main anxieties: first, the fact of their engagement in activities amounting to direct participation in hostilities; secondly, the impact that such conduct has on the broader environment of conflict, including the objectives of the law regarding the protection of civilians without undermining the military mission of belligerents; and, thirdly — the impact on existing accountability mechanisms established to enforce respect for humanitarian law of the ambiguities associated with them — particularly in cases where these activities result in violations of humanitarian law. Possibilities for addressing these challenges exist at national and international level. What follows is a brief overview of these, as well as their limitations and succinct reasons why the legal framework of humanitarian law presents a better mechanism for tackling these anxieties.

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[26] B Perrin *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organisations, and the Law* (2012) 159; Prado op cit note 21 at 443.

[27] Chapter 5 (section 5.3.2); Perrin ibid at 123–156.

[28] Perrin ibid at 168–180; Prado op cit note 21 at 443.

The national platform has witnessed few developments specifically aimed at addressing the challenges posed by PMSCs. Only a few countries such as South Africa[29] and the USA[30] have come up with provisions aimed at regulating the offshore activities of companies incorporated in their territories. These national laws depend on the provision of licences by executive bodies to PMSCs to ensure that their operations comply with certain conditions. These conditions are crafted from the perspective of national interests and do not necessarily resonate with humanitarian and human rights values that should prevail in the environment of armed conflicts. Such laws are difficult to enforce beyond the state's territory. Finally, attempts to use domestic legal regimes to respond to a transnational phenomenon of this nature will always be undermined by PMSC's fluidity because of their ability to re-locate to territories or states seen as a safe haven. This is likely to lead to a race to the bottom as those countries that have the lowest standards of regulation become a location for private contractors. Clearly, these reasons compel one to look at the international legal regime for a more effective response to the transnational nature of PMSCs.

The international platform presents a useful alternative to the geographic constraints that face national laws that seek to address the fundamental concerns associated with the emergence of PMSCs. In particular, international human rights, international criminal law and international humanitarian law offer greater promise for a coordinated response to the global concerns surrounding PMSCs. The relevance of the international human rights regime in the light of the gross violations caused by these actors cannot be understated. The international legal regime clearly outlines core rights that are non–derogable in the exceptional circumstances that arise during an armed conflict.[31] In addition, there have been attempts to use the international human rights regime to hold corporates accountable for their transnational

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[29] South Africa enacted The Regulation of Foreign Military Assistance Act 15 of 1998 (FMA). This Act was replaced by The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006 (PMA).

[30] Special Maritime and Territorial Jurisdiction (SMTJ) 18 USC §7 (2000); Uniformed Code of Military Justice (UCMJ) 10 USC §802 (2007); Military Extraterritorial Justice Act (MEJA) 18 USC § 3261-67 (2000); International Traffic Arms Regulations 22 CFR §120(8) (2004).

[31] Articles 8, 9 and 11 of the International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 (16 December 1966) available at: http://www.refworld.org/docid/3ae6b3aa0.html [accessed 28 June 2013].

activities.[32] The interest of this study focuses on concerns apparent in armed conflicts where the human rights regime has certain limitations. Only a core number of rights remains applicable in comparison with the dense network of rights and obligations under humanitarian law that come into operation as soon as there is an armed conflict. For example, the human rights framework does not indicate whether PMSC personnel have a right to engage in hostilities in the first place. Further, there are constraints to be expected from relying upon this framework, given that the human rights regime is addressed to and leveraged upon the state, which more often than not is a party to the conflict. Finally, attempts to hold corporate entities accountable on the basis of human rights norms are founded on non–binding legal instruments. This approach may not be ideal for securing fundamental rights of persons operating within the extreme circumstances of armed conflict.

International criminal law may offer recourse where the concerns in respect of PMSCs touch upon violations that amount to international crimes. This is the case, for example, where PMSCs are said to have intentionally targeted civilians, actions which are clearly defined as war crimes under Article 8 of the Rome Statute Establishing the International Criminal Court (Rome Statute).[33] While international criminal law remains useful in tackling individual criminal responsibility of this nature, its scope remains limited for addressing PMSC violations that fall outside the threshold set for international crimes. Humanitarian law contains a number of infringements that may be committed by PMSCs, which may not necessarily amount to grave or serious breaches, and would thus fall outside the domain of international criminal law. Furthermore, International criminal law does not address the fundamental question regarding what rights and responsibilities PMSCs have in

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[32] J Ruggie 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' Report of the Special Representative of the Secretary–General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, United Nations Documents A/HRC/8/5, Prepared for the UN Human Rights Council, New York (21 March 2011) available at http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf [accessed on 5 May 2013]; 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' UN Doc E/CN. /Sub/2/2003/12/Rev.2, United Nations Sub–Commission on the Promotion and Protection of Human Rights, New York (13 August 2003) available at http://www1.umn.edu/humanrts/links/norms–Aug2003.html [accessed on 5 May 2013].

[33] The Rome Statute of the International Criminal Court, 17 July 1998 (last amended 2010), ISBN No. 92–9227–227–6, available at http://www.unhcr.org/refworld/docid/3ae6b3a84.html [accessed 3 October 2012].

zones of conflict, for example, whether they are in the first place entitled to take part in activities of war, and if they do so, how they should execute these operations. Finally, the international criminal law does not answer fundamental questions regarding the effect that the presence of PMSCs has upon the wider environment of conflict and, in particular, upon the people who occupy this space. Unlike humanitarian law, international criminal law focuses upon the culpability of the individual for the crimes in question, and not on what is happening within the wider terrain of conflict.

It is important to state that, in addition to the public instruments established under national and international legal frameworks, there is a host of private instruments that have sought to address the difficulties that PMSC present in the terrain of conflict. Private regulatory mechanisms have taken the form of industry codes of conduct and the use of the PMSC contract as a regulatory tool.[34] Contracts offer solutions in the form of vetting processes of employees and an internal sanction system for violations.[35] Their quality and uniformity, however, is undermined by the negotiating powers of the parties and their openness to re–negotiation.[36] Further, contractual obligations provide a limited range of remedies for breach, which may not effectively provide redress for the victims of violations, and worse still, make other factors, like insurance liability, more important in the view of the company than International Humanitarian Law obligations.[37] Their confidential nature also shields them from public scrutiny, thereby creating a culture that differs from the public accountability expected of military personnel who commit violations.[38] The gravity of allegations made against PMSC conduct arguably demand binding and enforceable measures such as those applicable to military forces.

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[34] R de Nevers 'The Effectiveness of Self–Regulation by the Private Military and Security Industry' (2010) 30(2) *Journal of Public Policy* 219–240; L Dickinson 'Contract as a Tool for Regulating Private Military Companies' in S Chesterman & C Lehnardt *From Mercenaries to Market, The Rise and Regulation of Private Military Companies* (2007) 217–238.

[35] Dickinson ibid; B Perrin 'Promoting Compliance of Private Security and Military Companies with International Humanitarian law' (2006) 88 *International Review of the Red Cross* 613 at 618, 621, 629.

[36] G Simm *Sex in Peace Operations* (2013) 105; A K O'Brady *The Sustainability Effect: Rethinking Corporate Reputation in the 21st Century* (2005) 64—5.

[37] C Ryngaert 'Litigating Abuses Committed by Private Military Companies' (2008) 19 *European Journal of International Law* 1035 at 1042–1043.

[38] M u ijlsteke & P Stroobants 'Private Military/Security Companies Operating in Situations of Armed Conflict' (2007) 36 *Collegium* 1 at 12, 89.

As with contracts, voluntary agreements based upon codes of conduct drawn up by the industry and its key stakeholders also have their benefits. The idea behind such codes is to enable clients to gravitate toward those companies that comply with the higher standards outlined within the codes, with the hope that this would gradually increase compliance as other companies seek similar endorsement and the prestige associated with upholding the relevant standards.[39] PMSC associations, such as International Stability Operations Association (ISOA)[40] and the British Association of Private Security Companies (BAPSC),[41] have recognised these advantages and established self–regulatory standards to govern their internal management and the circumstances under which force should be used.[42] However, these codes are often vague and do not have grievance mechanisms that third parties can use. The gravity of some of the violations alleged to be committed by PMSCs makes binding norms and enforcement mechanism necessary.

It is hereby argued that the international humanitarian law has potential to address the three primary concerns raised by PMSCs during armed conflict, namely, whether PMSCs have the right to engage in hostilities; the impact that these activities may have on the broader environment of conflict and what accountability mechanisms are applicable when PMSCs commit violations during hostilities. The detailed provisions of the law applicable during armed conflict offer framework as to how contractors should fit within the overall context of armed conflict. It outlines expressly who has and who has not the right to participate in armed conflict. It also defines the roles and responsibilities of the actors in an armed conflict. Lastly, the International Humanitarian Law offers accountability mechanisms, for the behaviour of the actors involved in armed conflict.

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[39] Chetail & Cameron op cit note 25 at 336.

[40] Instability Stability Operations Association Code of Conduct, available at http://psm.du.edu/media/documents/industry_initiatives/isoa_code_of_conduct.pdf [accessed on 12 October 2012].

[41] British Association for Private Security Companies Charter was launched in 2006, available at http://www.bapsc.org.uk/?keydocuments=charter [accessed on 12 October 2012].

[42] A Bearpark & S Schulz *The Future of the Market* (2007) in S Chesterman & C Lenhardt (eds) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007) 248–249.

1.4 PROBLEM STATEMENT

Much discourse has centred on whether the current provisions of humanitarian law respond appropriately to the emergence of these PMSCs. On the one hand, are those who believe that the present legal regime is adequate and any apparent deficiencies in the law are largely based on the lack of international political will to enforce their relevant application?[43] For example, commentators point to occasions where PMSCs are alleged to have violated human rights and humanitarian law, but have not been held accountable for those violations.[44] On the other hand, a considerable body of opinion holds that there is scope for further development of the present legal framework to respond to PMSCs. In particular, and of relevance to this study, is the view that the impediment to an effective response to contractors lies in ambiguities surrounding their status under the humanitarian legal regime.[45] Humanitarian law classifies all actors operating in armed conflict as either combatants or civilians and confers rights and obligations upon them on the basis of where they fall in this divide.[46] This dichotomy for determining the confines of combatancy and civilians are found in Article 4A of Geneva Convention III of 1949[47] and Articles 43 and 44 of the Additional Protocols of 1977.[48] Combatants have the right to participate in hostilities within the confines of the laws of war and may, thus, be targeted by their adversaries. Civilians, on the other hand, are entitled to protection from attack

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[43] Chapter 1 (section 1.7) for examples of authors that believe humanitarian law is adequate as it stands.

[44] Francioni & Ronzitti op cit note 21 at 7; Tonkin op cit note 4 at 123–170; D Kassebaum 'A Question of Facts — The Legal Use of Private Security Firms in Bosnia' (2000) 38 *Columbia Journal of Transnational Law* 581–602; R Capps 'Outside the Law' *Salon* 27 June 2002, available at http://www.salon.com/2002/06/26/bosnia_4/ [accessed on 12 October 2012]. For example, Only contractual penalties were meted to Dyncorp employees involved in serious human rights violations in relation to the slave scandal. They were merely dismissed allowing them to revolve within the industry. In this regard, they escaped national and international criminal sanctions.

[45] J C Hansen 'Rethinking the Regulation of Private Military and Security Companies Under International Humanitarian Law' (2012) 35 *Fordham International Law Journal* 699–736.

[46] Article 50(1) of the Additional Protocol I. The Article makes it clear that all persons that do not meet the requirements of combatants are civilians; F Terry *Condemned to Repeat: The Paradox of Humanitarian Action* (2013) 27; M N Schmitt 'War, International Law, and Sovereignty: Re-evaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2005) 5 *Chicago Journal of International Law* 511 at 522, 534, 539.

[47] Article 4A of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) 75 UNTS 135 (12 August 1949) available at http://www.unhcr.org/refworld/docid/3ae6b36b4.html [accessed 8 October, 2012].

[48] Article 47 of Additional Protocol I.

provided they refrain from hostilities.[49] The fundamental question that this study seeks to investigate, is whether PMSC personnel are combatants or civilians. What follows thereafter is an exploration of the implications of their classification.

1.5 OBJECTIVES OF STUDY

This study accurately reflects the roles of the various actors involved in armed conflict. In particular, it asks the question of whether this definition takes seriously the involvement of PMSCs in armed conflict. Thus the study will explore the context in which the present law takes shape. This will entail examining whether private instruments of forces have been a historical reality. This will entail an exploration of the philosophy and the theories that influence the development of international law as far as the involvement of private actors in conflict is concerned.

The next objective will be to determine whether private contractors are combatants or civilians under the provisions of the International Humanitarian Law. This will entail critical analysis of the criteria that delineate these two exclusive categories as elaborated in the relevant international legal framework.

Lastly, the study will explore the implications of this determination in terms of the broader aim of international humanitarian law, which is to facilitate an environment in which belligerents can execute their military mission, while at the same time minimising the suffering of those not involved in conflict. This exploration will entail an examination of the impact of the classification of PMSC personnel, on the protection of civilian populations in conflicts, and on the effectiveness of the existing mechanisms of accountability.

Finally, the study will attempt to make proposals as to how the present legal criteria distinguishing combatants and civilians may be improved in order to make them more responsive to the reality of PMSCs and their services on the battlefield.

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[49] J M Henckaerts and L Doswald–Beck *Customary International Humanitarian Law* (2005) 19–24. See Rule 6 regarding civilian loss of protection from attack. I Primorat 'Civilian Immunity in War: Its Grounds, Scope, and Weight' in I Primorat (ed) *Civilian Immunity in War* (2010) 21–41.

1.6 CONCEPTUAL DEFINITIONS AND IDENTITY ISSUES

From the onset it must be pointed out that there is no international or domestic instrument that defines the term 'private military/security contractor'.[50] The term is an attempt to refer to a phenomenon within the security industry that accommodates a trend by states to privatise assets and services previously located within the public domain. Privatisation involves the conscious and deliberate transfer of responsibilities and functions from the public to the private sphere.[51] Thus, privatisation of the use of force in zones of armed conflict should be understood as part of a trend of outsourcing in this context.[52] Since the private entities that provide these services are corporate entities established upon the principle of profit maximisation, there have been attempts to link these entities to the mercenaries who in the 1960s embarked on various excursions in Africa. The legal definition of a mercenary as defined under Article 47 of the Additional Protocol I[53] (later adopted by the UN and Organisation of Africa Unity mercenary conventions),[54] therefore, focuses on the traditional concept of individual freelancers, and not corporate entities. Furthermore, its cumulative requirements rule out the possibility of any PMSC falling within this definition.

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[50] J Finer 'Holstering the Hired Guns: New Accountability Measures for Private Security Contractors' (2008) 33 *Yale Journal of International Law* 259 at 260, noting that security contractors do not fit neatly under Convention Against Mercenaries.

[51] J Freeman & M Minow *Government by Contract: Outsourcing and American Democracy* (2009) 195; P Starr 'The Meaning of Privati ation' (1988) *Yale Law & Policy Review* 6 at 7–10; J C Becker 'Privati ed Military Operations' Final Report, Industry Study, The Industrial College of the Armed Forces, National Defense University, Washington DC (2007) available at http://www.ndu.edu/es/programs/academic/industry/reports/2007/pdf/icaf–is–report–privatized–mil–ops–2007 [accessed on 30 May 2013]. 'Outsourcing' is defined as the condition where the government maintains capacity but utilizes the private sector for execution of functions, whereas 'privatisation' refers to where the government no longer maintains capacity and the function in question is completely privatised.

[52] L A Dickinson *Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs* (2011) 23–39; G R Lucas 'New Rules for New Wars, Military Ethics and Irregular Warfare' Dunbar Lecture, Millsaps College, Jackson (February 2010) 24–26; M Schwartz 'Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis' Congressional Research Service Report, Washington DC (13 May 2011) ; W Matthews 'U.S. Contractor Use in Iraq Expected to Rise' *Defense News* 12 July 2010, available at www.defensenews.com/story.php?i=4704826 [accessed on 4 October 2012].

[53] Article 47 of Additional Protocol I.

[54] Article 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, UN General Assembly Resolution 44/34A/RES/44/34, available at http://www.refworld.org/docid/3b00eff31f.html [accessed 29 June 2013]; Article 1 of the Organization of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa, 3 July 1977, CM/817 (XXIX) Annex II Rev.1, available at http://www.refworld.org/docid/514ae5c82.html [accessed 29 June 2013].

In this legal vacuum, the identity and parameters of the private military and security industry can only be canvassed from secondary material written on the subject. A useful starting point is to deconstruct the industry on the basis of various services it offers. The private military and security industry should not be treated as a holistic unit since the players within it provide all types of private military and security services.[55] An examination of the industry reveals two broad categories, that of private military contractor (PMC) and private security contractor (PSC). PMCs are involved in providing a broad range of military and security services, [56] while PSCs provide security services more akin to firms employed during peace to deter criminal activities.[57] In line with this distinction, companies like Executive Outcomes (EO), that in the past have engaged in direct combat action fall within the category of PMCs.[58] In contrast, companies, such as Armcour, whose principal business is limited to providing guarding services to clientele's premises and personnel, are considered as PSCs.[59] This distinction clarifies to a degree the difference between those entities that are more akin to security contractors and those that resemble military contractors.

The distinction between PMCs and PSCs is, however, less than clear when one considers how these services are practically employed during armed conflict. In such contexts, the distinction could give the impression that only PMCs are involved in military conflict and thus obscure the extent that PSCs may actually be caught up in a military confrontation with one of the parties to the conflict. PSCs have found

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[55] W Kidane 'The Status of Private Military Contactors Under International Humanitarian Law' (2010) 38 *Denver Journal of International Law* 391 at 413.

[56] C Orti 'The Private Military Company: An Entity at the Center of Overlapping Spheres of Commercial Activity and Responsibility' in T Jager & G Kümmel (eds) *Private Military and Security Companies. Chances, Problems, Pitfalls and Prospects* (2007) 60–61. PMCs are defined as legally established multinational commercial enterprises offering services that involve the potential to exercise force in a systematic way and/or the transfer of that potential to clients.

[57] ICRC 'Interview with Andrew Bearpark' (2006) 88(863) *International Review of the Red Cross* 449–457; Wulf op cit note 8 at 16.

[58] A Mcintyre & T Weiss 'Weak Governments in Search of Strength: Mercenaries and Private Military Companies' in S Chesterman & C Lenhardt (eds) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007) 69–70; H Howe 'African Stability Private Security Forces and African Stability: The Case of Executive Outcomes' (1998) 36(2) *Journal of Modern African Studies* 307–331.

[59] Armour Security/SIA Approved Security Contractor, available at www.armoursecurity.com/ [accessed on 12 December 2012].

themselves employed to defend properties and installations during armed conflicts,[60] in the course of which they become involved in offensive and defensive action. In regulating the conduct of players in war, the law of armed conflict places no distinction between actions that arise for purely offensive and defensive purposes.[61] Both defensive and offensive conduct in war constitutes direct participation in hostilities. It can be quite misleading for companies in such contexts to conceal the true nature of their involvement in the conflict by indicating that they are simply PSCs. This is particularly so where the perception of PSCs as entities confined to fending off criminality and having minimal military engagement is enticing to companies who may wish to tag a 'peace–like' label on themselves (that is, as a PSC), notwithstanding their engagement in military activities (*de facto* PMCs).

Bearing these limitations in mind, the term Private Military and Security Contractor (PMSC), encapsulating activities of both the activities of PMCs and PSCs in armed conflict, has been adopted in this research. This approach casts a wide net to include the broad range of military and security services offered by these entities including: [62]

- Direct military services: These include PMSCs that have directed active combat operations such as those that were initially associated with the emergence of PMSC activities;[63]

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[60] Francioni & Ronzittiop cit note 21 at 15; P D Williams *Security Studies: An Introduction* (2008) 451.

[61] Article 9 of Additional Protocol describes attacks as 'acts of violence against the adversary whether in offence or defense'. W C Banks *New Battlefields/Old Laws: Critical Debates on Assymetrical Warfare* (2011) 159; G R Lucas 'Defense or Offense: Two Streams of Just War Tradition' in A P French & A J Short (eds) *War and Border Crossings: Ethics when Cultures Clash* (2005) 45–57.

[62] For comparison see the approaches adopted by D Isenberg 'A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq' British American Security Information Council Research Report, Washington (September 2004) available at http://www.ssrnetwork.net/document_library/detail/3463/a–fistful–of–contractors–the–case–for–a–pragmatic–assessment–of–private–military–companies–in–iraq [accessed on 20 November 2012]. This outlines three categories of contractors: 1) personal security for civilian officials; 2) non–military site security; and 3) convoy security. Singer op cit note 4 at 93–95; Singer groups PMCs into a threefold classification of 1) military support forms (logistics and services); 2) military consultant firms (advice and training); and 3) military provider firms (implementation and command of conflict).

[63] Singer op cit note 4 at101–118; D Shearer *Private Armies and Military Intervention* (1998) 316. An example of a PMSC in this category is Executive Outcomes.

- Indirect military services: These include services to support military operations , for example military advice, training, operating weapons systems intelligence gathering and interrogation services; [64]
- Protection security services provided in conflict zones e.g. to cover the provision of guarding services around military installations and personnel (including civilian political heads);[65] and
- Logistical support services that comprise non–military functions such as transportation management, warehousing, laundry service, routine maintenance of residential and office facilities. [66]

In this regard, the label the entity attaches to itself — identifying itself as a PMC or PSC — does not matter. What matters is whether their actions fall within the broad sets of services outlined above as being performed by PMSCs. Furthermore, within the context of armed conflict, the broad categorisation of PMSC services as outlined is a critical part of understanding concerns that have been raised regarding their presence in conflict zones. As discussed below, these concerns particularly relate to what some view to be their intrusion into the space reserved for legitimate fighters in conflict. Essentially then, PMSCs providing these services pose a dilemma as to whether they should be considered fighters alongside the military or part of the civilian population.

1.7 LITERATURE REVIEW

There has been a considerable body of literature that helps the researcher to understand the nature of these actors. A number of books provide insight into their emergence, growth and operations. In this regard both Kinsey[67] and Spicer[68] discuss

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[64] Singer op cit note 4 at 119–135; D Isenberg 'Soldier of Fortune Ltd: A Profile of Today's Private Sector Corporate Mercenary Firms' Center for Defense Information Monograph, Washington DC (November 1997) available at http://www.aloha.net/~stroble/mercs.html [accessed 12 March 2013]. An example of a PMSC in this category is Military Professional Resource Incorporated.

[65] M N Schmitt, J Pejic & Y Dinstein *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honor of Yoram Dinstein* (2007) 359; Wulf op cit note 8 at 15. Such as Global Security Consultants

[66] Singer op cit note 4 at 136–150. Such as the PMSC, Brown & Root.

[67] Kinsey op cit note 6 at 34-57.

[68] T Spicer *An Unorthodox Soldier: Peace and War and the Sandline Affair* (1999).

the history and challenges of the actors drawing upon real examples of conflicts where PMSCs have been involved. The conflict in Sierra Leone between the government and the Revolutionary United Front (RUF) rebels during the 1990s in particular is a case in point. It presents a base for many authors to discuss the involvement of PMSCs in direct combat and enables them to detail the crucial role played by two PMSCs, Executive Outcomes and Sandline, in providing support to government forces.[69]

As mentioned earlier in this chapter,[70] an extension of these sources is the development of a conceptual framework differentiating firms within the industry, as proposed by Singer in his *Tip of the Spear*.[71] This construct provides a useful start for an analysis of the industry by grouping these companies according to their proximity to the frontline of the engagement. This kind of literature is important for understanding who PMSCs are and what they do. This information is of critical importance if the law is to be examined in the light of the reality of their behaviour on the ground. It does not, however, address the central question of the identity of these actors within the framework of international humanitarian law.

There are also a number of books that discuss the industry from a positive standpoint. This literature, often by people close to the industry,[72] portrays the industry as legitimate and documents its contribution. For example, Colonel Schumacher (Ret)[73] lauds the training offered by these companies and praises them for being instrumental in saving military officials faced with critical challenges on the battlefield. Echoing Schumacher, a number of academic articles have suggested that, more than ever, the

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[69] Howe op cit note 7 at 187-242; Howe op cit note 59 at 307–331; I Douglas 'Fighting for Diamonds: Private Military Companies in Sierra Leone' in J Cilliers & P Mason (eds) *Peace, Profit or Plunder? The Privatisation of Security in War Torn African Societies* (1999) 175–197; M S Kargbo *British Foreign Policy and the Conflict in Sierra Leone: 1991–2001* (2006); T Legg & and R Ibbs 'Report of the Sierra Leone Arms Investigation' Prepared for the House of Commons, Foreign and Commonwealth Office, London (1998) available at www.fco_pdf_sierraleone1.pdf [accessed on 27 July 2012].

[70] Chapter 1 (section 1.6).

[71] Singer op cit note 4 at 88–100; A Drury & D R Rothwell 'War and Profit: Doing Business on the Battlefield' Australian Strategic Policy Institute, Barton (2005) 11–15. Even though some firms will straddle across the groupings.

[72] D Brooks 'Messiahs or Mercenaries? The Future of International Private Military Services' in A Adebajo & C K Sriram (eds) *Managing Armed Conflicts in the 21st Century* (2001) 129-144; E Barlow *Executive Outcomes: Against All Odds* (2007) 145-156.

[73] G Schumacher *Bloody Business* (2006) 124–166.

armed forces of the state today remain heavily dependent on private contractors. For example, Singer and Isenberg speak of US reliance upon them to fill a security gap in many of its current military operations.[74] This reality has opened the door for authors to discuss the present utilities of the industry, as well as the benefits it could provide.[75] Many of its present benefits are discussed in articles associated with the global war on terror in which the scale of PMSC services has grown on account of the demands of this war. Metz and Brooks look into the future and speak of the industry's potential to contribute to conflict resolution and improve perceived weaknesses within UN peacekeeping and peace enforcement operations.[76] This literature gives strong reasons for speculation about the longevity of the industry. Any projection that PMSCs are likely to populate the conflict landscape well into the future underscores the importance of exploring the place that these actors ought to occupy in the present legal framework.

This positive outlook for PMSCs is sharply opposed by those who are less willing to embrace the emergence of PMSCs, and have documented concerns associated with them.[77] Spearin critiques the involvement of PMSCs in the fight against terrorism, citing the blatant violations of human rights committed by employees of PMSCs such as Blackwater and/or CACI International Inc in various places where they have

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[74] Singer op cit note 4 at 161; Singer 'Can't Win With 'Em' op cit note 23 at 1-5; D Isenberg 'A Government in Search of Cover: Private Military Companies in Iraq' in S Chesterman & C Lehnardt (eds) *From Mercenaries to Market* (2007) 82–93.

[75] For example, M Dunigan *V f H : S mp n ' Imp n M Effectiveness* (2011) 2, 29, 50, 152; D Shearer 'Outsourcing War' (1998) *Foreign Affairs* 68–81; D Brooks 'Messiahs or Mercenaries? The Future of International Private Military Services' in A Adebajo & C K Sriram (eds) *Managing Armed Conflicts in the 21st Century* 7 (2001) 136–137; Isenberg op cit note 65 at 3; D Wright and J C Brooke 'Filling the o id: Contractors as Peacemakers in Africa' (2007) 16 *African Security Review* 4 at 105–110.

[76] S Metz *Armed Conflict in the 21st Century: The Information Revolution and Post–Modern Warfare* (2000); D Brooks 'Messiahs or Mercenaries? The Future of International Private Military Services' (2000) 7( ) *International Peacekeeping* 129–144; A Toffler & H Toffler *War and Anti–War: M ng S n f ' G b* (1995) 286-297; T Spicer *An Unorthodox Soldier* (1999) 224-236.

[77] Scholars on this side of the debate include Engbrecht op cit note (2010); T Bruneau 'Patriots for Profit: Contractors and the Military in US National Security' (2011); S Cleary 'Angola: A Case Study of Private Military Involvement' in J Cilliers & P Mason (eds) *Peace, Profit or Plunder? The Privatisation of Security in War Torn African Societies* (1999) 141–167; and H Sanche 'Why Do States Hire Private Military Companies?' available at http://newarkwww.rutgers.edu/global/sanchez.htm [accessed on 12 October 2012].

been called to support state military operations.[78] In this regard, some of the arguments raised against them are interwoven with the usual moral distaste for traditional mercenaries. In fact, some authors have gone as far as to suggest that PMSCs are merely a reincarnation of the traditional mercenary that dominated the 1960s landscape.[79] These views resonate with earlier works, which foresaw that the rapid demobilisation of armies had the potential to create a flood of misfits and mercenaries.[80] These discussions raise the problem of the identity of PMSCs in the context of their present involvement in regions of conflict,[81] emphasising the need to further explore this question. More importantly, the use of the mercenary norm against PMSCs calls for a deeper investigation into the motives for determining the legitimacy of fighters in the present dispensation of conflict. Any call for the inclusion of PMSCs as lawful combatants would therefore have to respond to arguments as to the legitimacy of private entities to engage in hostilities.

In addition to the mercenary label used against the use of PMSCs, authors have raised concerns about the practice of outsourcing military competency, which they see as undermining state monopoly over violence and the democratic control of the public forces.[82] For example, Van Creveld has described the involvement of PMSCs as encouraging non–Trinitarian warfare like the Von Clausewitz concept of *volkskrieg*,[83] in which there is no division of labour between the private and public or civilians and the military, the consequence of which may the exacerbation of humanitarian violations during conflict.[84] Krahmann and Kinsley also suggest that acceptance of private entities as legitimate providers of coercive military services,

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[78] C Spearin 'The Emperor's Leased Clothes: Military Contractors and Their Implications in Combating International Terrorism' (200) 1(2) *International Politics* 243–264; Mlinarcik op cit note 24 at 133; Scahill op cit note 12 at 14-16 & 163.

[79] Scahill ibid; S Percy *Mercenaries: The History of a Norm in International Relations* (2007) 206-22 ; J C Zarate 'The Emergence of a New Dog of War: Private International Security Companies, International Law and the New World Disorder' (1998) 3 *Stanford Journal of International Law* 75 at 91–92.

[80] E Hoffer *The True Believer: Thoughts on the Nature of Mass Movements* (1951).

[81] S Chesterman & C Lehnhardt (eds) *From Mercenaries to Market* (2007); K O'Brien 'PMCs, Myths and Mercenaries: The Debate on Private Military Companies' (2000) 1 5(1) *Journal of the Royal United Services Institute for Defence Studies* 59–64.

[82] P Tripodi *New Wars and New Soldiers: Military Ethics in the Contemporary World* (2013); E Krahmann *States, Citizens and the Privatisation of Security* (2010) 111.

[83] D Moran & A Waldron *The People in Arms: Military Myth and National Mobilization Since the French* (2006) 154–156. *Volkskrieg* is German for 'people's war'.

[84] R J Bunker (ed) *Non–State Threats and Future Wars* (2003) 3–15.

creates tensions with the military,[85] since the unrestrained conduct of independent PMSCs conflicts with the norms that undergird the military.[86] Such provision, furthermore, has recently been monopolised by states. These discussions point to the need for a deeper exploration as to whether violence ought to remain the sole domain of the public forces, or whether provision should be made to accommodate PMSCs. This question is of relevance, given that the objective of the legal framework governing armed conflict strives to regulate the environment of conflict on the basis of present realities.

Amidst the writings by proponents and opponents of the industry lie vast amounts of literature discussing the need for oversight and monitoring measures to govern the industry. Critics emphasise the need for regulation to halt the negative consequences of these actors, such as violations of humanitarian law and human rights.[87] Advocates for the industry see regulation as a tool by means of which the operations of PMSCs can be recognised and legitimised. In both instances the call is for the establishment of appropriate domestic and international regulatory mechanisms, including private and voluntary regulatory mechanisms.[88] Many of these mechanisms fall outside the ambit of this research as they address challenges like outsourcing procedures and labour practices. One intergovernmental initiative developed under the umbrella of the Swiss government and the International Committee of the Red Cross (ICRC), the Montreux Document of 2008, makes an attempt to ensure respect for humanitarian law and human rights by states using PMSCs in areas of armed conflict.[89] It clarifies existing obligations of states in relation to PMSCs under

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[85] Particularly where the two work side by side in conflict.

[86] Krahmann op cit note 83 at 21–50, 199–150; C Kinsley *Corporate Soldiers and International Security* (2006) 105–109.

[87] C Moesgaard 'Weak International Response to the Use of Private Military Security Companies' Danish Institute for International Studies Policy Brief, (March 2011) available at http://www.diis.dk/graphics/publications/policybriefs%202011/pb2011–weak–international–response–web.pdf [accessed on 30 March 2013]; A Alexandra, D P Baker & M Caparina *Private Military and Security Companies: Ethics, Policies and Civil–Military Relations* (2008).

[88] C Walker and D Whyte 'Contracting Out War? Private Military Companies, Law and Regulation in the United Kingdom' (2005) 5 (3) *International & Comparative Law Quarterly* 651–689; K O'Brien 'What Should be and What Should not be Regulated?' in S Chesterman & C Lehnhardt (eds) *From Mercenaries to Market* (2007) 29– 8; F Schreier & M Caparini 'Privatising Security: Law, Practice and Governance of Private Military and Security Companies' Geneva Centre for the Democratic Control of Armed Forces Occasional Paper No 6, Geneva (March 2005).

[89] The Montreux Document: On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict International Committee of the Red Cross (ICRC) & Directorate of International Law Switzerland (17

international law and offers a platform for harmonising national standards as to their use based upon good practices aimed at respecting humanitarian law and human rights law. As the Montreux Document is not an international convention, but a mere proposal, its critical weakness is that it is not binding on the signatory states. As mentioned earlier in this chapter, other regulatory mechanisms suffer from similar weaknesses.[90] The research stands in contradistinction with those works of authors that view regulation as the main solution to the challenges posed by PMSCs.[91] An appropriate response to PMSCs must first address the primary issue of their identity, that is their classification under the present legal regime of armed conflict, before contemplating how the law should respond to these actors. A sole emphasis on regulatory responses risks focusing on the symptoms of a problem without tackling its underlying cause.

Finally, a number of academics affirm the adequacy of the present humanitarian legal framework in as far as PMSCs (and their position under humanitarian law) are concerned. These authors argue that that there is no lacuna in humanitarian law as far as the classification of actors is concerned, and that all actors, including PMSCs, operating in armed conflict will be considered either as combatants or civilians.[92] Given the clear dichotonomy between combatant/civilians and their corresponding rights, they assert that PMSCs do not act in a legal penumbra, where the present legal regimes are ambiguous as to how to respond to them.[93] It is certainly true that

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September 2008) 9, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf [accessed 30 November 2012]. Seventeen states including Afghanistan, China, France, Germany, Iraq, Sierra Leone, South Africa, the United Kingdom and the United States endorsed the Montreux Document. The second stage of Montreux emerged with the International Code of Conduct for Private Security Service Providers, International Legal Materials, Vol. 50, No. 1 (2011) 89-104 available at http://www.icoc–psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf [accessed 30 May 2013]. The International Code of Conduct was signed on 9 November 2010. The launch is anticipated to take place on 19 September 2013 in Geneva.

[90] Chapter 1 (section 1.4) highlights the challenges of resorting to national and private regulatory mechanism. Laura Dickinson specifically highlights the potential and weaknesses of using contracts — see Dickinson op cit note 34 at 217–238.

[91] Perrin op cit note 35 at 613–636; Dickinson op cit note 34 at 217–238.

[92] E Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88 *International Review of the Red Cross* 525–572; R Rousseau 'Are Private Military Companies Exempted from the Geneva Conventions?' Diplomatic Courrier, 23 November 2012, available at http://www.globalpolicy.org/pmscs/52093–are–private–military–companies–exempted–from–geneva–conventions.html [accessed on 12 January 2013].

[93] Gillard ibid; J Williamson 'Private Security Companies and Private Military Companies Under International Humanitarian Law' in S Gumed e (eds) *Private Security in Africa: Manifestation, Challenges and Regulation* (2007) 89–97.

humanitarian law has a clear system in which actors fall in one of its two categories of combatants or civilians. This mutually exclusive nature of the present legal framework does not, however, tackle the fundamental question regarding the appropriateness or suitability of placing contractors in one group or the other. This study hopes to interact with this issue with the aim of showing that the present legal framework stands in need of revision in as far as the status it ascribes to PMSCs engaged in hostilities is concerned.

1.8 METHODOLOGY

This research would not be able to embark on an empirical inquiry incorporating interviews with the players in question, given the inherent confidentiality that underlies the services associated with the industry, and the constraints of making interaction with PMSCs across the globe.

The study has relied on primary and secondary theoretical sources to tackle the issues that arise from the problem statement. At the primary level, it has relied upon international instruments and customary principles applicable in armed conflict and binding upon states, as found in international conventions, statutes, subsidiary legislation, case law, state position papers, government briefings, archival records, United Nations and other multi–lateral institutions' official documentation, *aides memoire*, *travaux preparatoires* to various treaty documents, military manuals and other relevant material. The focus on national instruments is limited to a few states that have developed legislation specifically to respond to the operations of PMSCs incorporated in their territories. These states are South Africa[94], the USA[95] and, to a

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[94] Eg The FMA & the PMA.

[95] Eg SMTJ, UCMJ, MEJA & ITAR. States have also attempted to use other pieces of legislation not specifically drafted in response to PMSCs to address the phenomenon. Egs in relation to the US include Alien Torts Claim Act 28 USC § 1350 (2006), War Crimes Act of 1996, Title 18, Crimes and Criminal Procedure Part I, Crimes Chapter [116] 118, War Crimes, 18 USCS § 2401 (1996), Anti-Torture Statute (18 U.S.C. § 2340A) (1994), Reporting of Offsets Agreements in Sales of Weapon Systems or Defense related Items to Foreign Countries or Foreign Firms, 15 C.F.R. § 701.1, 701.3(a) (2004).

lesser extent, the United Kingdom (UK) in as far as its legislature's proposals on possible options for regulations.[96]

At the secondary level, information on PMSCs is contained within books, journals and newspaper articles. Books remain a minority source, given the limited pool of committed academics and the PMSCs' relatively recent rise during the past 20 years. The material found in journal and newspaper articles is easily accessible electronically, owing to the more pervasive nature of the electronic medium.[97] This literature includes the writings of academics, the media and government and international agencies, civil society organisations and industry references and groups with vested interests on the subject or whose mandates intersect with the actions of contractors in war ones. Comments by these groups often reflect the author's perspective on the subject and have been evaluated against objective reports and contrasting opinions of other writers to balance the perspectives raised on a single issue.

The aim of this study is to explore the central issues for research at the international level. Thus, in answering questions related to their status within conflict as well as the principle legal framework applicable to them, reference will be made to international instruments and customary principles applicable in armed conflict. At the core of these instruments is the Geneva Conventions of 1949 and their Additional Protocols of 1977. In addition, reference is made to international instruments focusing on mercenaries (in particular the UN and Organisation of Africa Unity Mercenary Conventions) in the light of the debates that continue to suggest that PMSCs are modern day mercenaries. Also discussed is the nature of the intersection between this subject and the law of armed conflict. Given the wide interpretation on the provisions within these treaties, the study will also rely upon the opinions advanced by various authors in order to reach determinations on the issue of their identity and the definitive conclusions of the applicable law.

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[96] 'Private Military Companies' House of Commons, United Kingdom Foreign Affairs Committee, Ninth Report of Session 2001–2, HC 922, Published on 1 August 2002, available at http://www.publications.parliament.uk/pa/cm200102/cmselect/cmfaff/922/922.pdf [accessed on 12 August 2012].

[97] Digital technology in the form of online electronic databases available on the Internet has been utilized in sourcing relevant material.

In answering questions related to challenges that arise from the determination of their status, the study will rely upon materials by governmental and international agencies as well as inputs made by civil society and the industry itself. In particular, this will include reports by governmental and international agencies that provide descriptive accounts of some of the difficulties encountered by PMSCs on the ground.[98] These reports, as well as the writings of academics, provide a useful basis upon which to critique present legal deficiencies in tackling this transnational phenomenon. Further, discussions by civil society help to understand concerns around PMSC accountability and possible responses that may be offered. Finally, the inputs of persons aligned with the industry and PMSCs themselves, notwithstanding their inherent bias, will remain useful in providing a holistic picture on how these actors should be treated.

1.9 CONCLUSION AND CHAPTER SYNOPSIS

The high profile cases involving PMSCs in actual combat during the 1990s have all but disappeared. There is, however, every indication that contractors will remain a continual presence in zones of conflict. The growing support PMSCs offer to states since the advent of asymmetrical wars linked to terrorist insurgencies suggests that their presence is unlikely to fade. As long as modern conflict environments continue to exhibit a gap between the demand for and supply of security services, PMSCs will be called upon to undertake military functions alongside the public armed forces. In so doing they are likely to stir up controversies around their direct participation in hostilities and violations of humanitarian law that may result. The answer to the question of their identity and whether they should engage in hostilities in the first place is clearly provided for by the legal regime of international humanitarian law as the *lex specialis* applicable during armed conflict. Humanitarian law classifies all actors as combatants and civilians, and it is around this categorisation that the question of the status of PMSCs in armed conflict must be considered. In all of this,

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[98] Such as The Commission on Wartime Contracting in Iraq and Afghanistan, available at www.wartimecontracting.gov [accessed on 14 September 2012]; Government Accountability Office Press Summary 'Decision on Bid Protest by DynCorp International Regarding U.S. Army Contracts in Afghanistan', available at www.gao.gov/press/ dyncorp_2010mar15.html [accessed on 1 September 2012].

Chapter One has essentially served as an introductory phase for unveiling the subject matter, the concerns it raises, and for highlighting the need to explore the fundamental problem — which specifically demarcates the area of study — posed by PMSCs identity in armed conflict.

Chapter Two traces the history of private actors in war. At the same time it discusses the development of theoretical and legal constructs that inform the approach taken by the present legal regime in distinguishing those that have and do not have the right to fight. This is crucial for an understanding of present legal framework governing the conduct of war and who can wage war.

With this background in mind, Chapter Three seeks to discuss the applicable law relevant to the determination of the status of individuals during armed conflict. The rules of international humanitarian law apply differently in two specific situations: international armed conflicts and non–international conflicts. In the exceptional situations of armed conflict, international humanitarian law aspires to achieve a delicate balance between facilitating the realisation by belligerents of their military mission and minimising human suffering. It is this objective that makes it necessary to distinguish between those forces whose attack constitutes an advancement of the military mission, that is, combatants, and those who do not and ought therefore to be protected from attack, that is, civilians. Chapter Three looks at the criteria that delineate the two main exclusive categories of combatants and civilians. The classification of an actor is not an end in itself, but rather a route towards establishing accountability through a set of rights and responsibilities.

Chapter Four aims to discuss the status of PMSCs in the light of the applicable legal regime. In applying the relevant legal criteria to PMSCs, the analysis will draw on the nature of PMSCs, the actions that they are involved in and the various roles that those who work for them play. The intention of this chapter is to provide guidance on how to classify PMSCs operating in today's conflicts in a way that recognises the heterogeneity in terms of what they do and who they employ.

The implications of the determination whether PMSC personnel are combatants or civilians are explored in Chapter Five. The chapter seeks to examine the tensions that

arise from this conclusion. It will discuss the impact of the classification of PMSCs on the rights and responsibilities of their individual employees. The chapter will also highlight the challenges that the classification poses to efforts to hold these actors accountable or anyone else accountable for their acts.

Chapter Six seeks to present a proposal that aims to lift certain PMSC personnel into the ambit of lawful combatancy irrespective of their link with the state. It will also anticipate possible objections to the proposal and provide possible answers to these objections.

Chapter Seven is the conclusion.

CHAPTER TWO: HISTORICAL DEVELOPMENTS AND CONCEPTUAL FRAMEWORK

2.1 INTRODUCTION

This chapter provides an historical account of the evolution of humanitarian law as regards the involvement of private actors in conflict. The aim here is not to provide an exhaustive analysis but rather to set out observations regarding the nature of the instruments of violence in order to illustrate how private entities were used as agents of war throughout the history of war. In this sense, the chapter aims to show the recurrent nature of private violence in the history of war.[1] The approach towards PMSCs should, therefore, not be restricted by views that consider them eccentric actors that need to be consigned to the periphery in a terrain of conflict reserved for public forces.

The history of the involvement of private entities in conflict is considered in three critical periods, namely, prior to the rise of the modern nation state; during its emergence; and after the Second World War. These periods coincide with dramatic changes in the nature of armed conflict, changes which developed out of radical socio-political transformations. Also to be discussed are the factors that contributed to reliance upon these entities, their decline in favour of the public instruments of force, and their remarkable endurance amidst the more recent state-centric terrains of armed conflict. Even in instances when states have attempted to curtail the exercise of force by private elements, this curtailment has not led to their extinction. Instead, private entities have re-emerged, albeit in different forms, thereby confirming their very endurance.

The historical narrative on the changing character of the fighter and attitudes towards private violence should not be viewed in a vacuum. Equally important are the philosophical developments, and theoretical principles and concepts that

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[11] Chapter 2 (see section 2.1). The historical context provided in this section implies the need to understand PMSCs as part of a continuum of private force that has preceded the conventional armed forces that have dominated the past two Centuries.

accompanied the evolving realities of armed conflict. In particular, the chapter focuses on the just war theory, and its impact on the development of international humanitarian law with regard to who has the right to lawfully engage in hostilities and those that do not.

2.2 PRIVATE FIGHTERS BEFORE AND AFTER THE RISE OF THE STATE

PMSCs involved in hostilities are controversial because they are seen as a deviation from the norm that military confrontation takes place among adversaries that make use of public armed forces. It is this perception that partly contributes to calls for their curtailment or complete prohibition by writers who view them as an aberration from the traditional 1960s mercenary into corporate entities aided by the recent factors that sprang up with the demise of the Cold War.[2] Such debates are not appropriately framed as they ignore the historical context of war in which private actors, operating in ways quite similar to PMSCs, have always existed. In light of the fundamental question that underlies this research, that is, what position private contractors engaged in hostilities ought to occupy under humanitarian law, it is worth considering how the face of the fighter has changed during the past. To do this it is necessary to see how private forces in the past have populated the terrain of conflict and the manner in which society has responded to them. Without a doubt, it is the formation of the modern nation state that has most affected the evolution of the private fighter. This section briefly explores this gradual evolution, as well as how these private fighters have over time adapted to the changes that came with the emergence of the state and its attempts to monopolise violence.

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[2] J L Gomez del Prado 'The Privati ation of War: Mercenaries, Private Military and Security Companies (PMSC)' UN Working Group on Mercenaries and Global Research (November 2010) available at http://www.globalresearch.ca/the–privatization–of–war–mercenaries–private–military–and–security–companies–pmsc/21826 [accessed on 20 March 2013]; A Leander 'The Commodification of iolence, Private Military Companies and African States' COPRI Working Paper (November 2003) 8–13 available at http://www.sandline.com/hotlinks/Leander_03–02.pdf [accessed on 12 October 2012]; E B Ballesteros 'Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self–Determination' Special Rapporteur pursuant to Commission Resolution 1995/5 and Commission Decision 1996/113, UN ESCOR, UN Doc E/CN.4/1997/24, New York (1997) paras 68–74 available at: http://www.refworld.org/docid/3ae6b11b4.html [accessed 29 June 2013].

2.2.1 Private Force Prior to the Emergence of the Modern Nation State

The private instrumentation of force observed in the use of PMSCs today is not new. From the earliest times wars have been fought between parties that have relied upon both public and private instruments of violence. A preview of subsequent history shows an evolution in the conflict terrain from total war, where every man was a fighter and the right to combat was not confined to a privileged few, to a time when a more structured societal construct emerged and fighting was the job of professionals who either belonged to the society or were simply hired to provide services in a specific war.[3] In this regard, it is indisputable that different societies and cultures relied upon the supply of military services from private individuals who operated in different forms. [4]

Such private forces dominated the conflict landscape from the times of the notable ancient civilisations of Egypt, Babylon, Rome and Greece. Though these ancient civilisations initiated the notion of standing armies loyal to the ruler and/or empire, they also remained reliant on private armies.[5] Well-documented examples abound of these private elements, more commonly referred to as mercenaries, providing critical support in wars involving these rulers,[6] whose survival was often dependent on the

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[3] R C Barnes Jr *Military Legitimacy: Might and Right in the New Millenium* (2013) 20; H Slim 'Why Protect Civilians? Innocence, Immunity and Enmity in War' (2003) 79(2) *International Affairs* 481 at 487. In this environment, the distinction between fighters operating privately or publicly was unrecognised.

[4] J Keegan *A History of Warfare* (1993) 259; V D Hanson *Carnage and Culture: Landmark Battles in the Rise of Western Power* (2001) 82; A Mockler *The New Mercenaries: The History of the Hired Soldier from the Congo to the Seychelles* (1987) 1–18; J L Taulbee 'Myths, Mercenaries and Contemporary International Law' (1985) 15(2) *International Law Journal America: California Western School of Law* 339 at 339–340. Authors have distinguished various forms of private force including the adventurers soldier, private armies providing unique skills for rulers (eg Swiss papal guards), semi–private armies (eg the Roman Auxilia, the Gurkhas, and French Foreign Legion), and armies directly controlled by commercial entities such as under charter companies like the Dutch East India Company and British East India Company.

[5] M L Lanning *Mercenaries: Soldiers of Fortune, from Ancient Greece to Today' M Companies* (2005); M Van Creveld *The Rise and decline of the State* (1999) at 31–42.

[6] R E Dupuv & T N Dupuy (eds) *The Encyclopaedia of Military History from 3500 BC to Present* (1986) 35; M Van Creveld op cit note 5, for examples of heavy reliance upon mercenaries by kingdoms of Egypt, Ancient Greece, Biblical Israel and Rome.

mercenaries' services which were resorted to in much the same way that certain states today have turned to PMSCs when their security and survival was at stake.[7]

As it was in Europe that the early codification of humanitarian law was initiated and established, thus it is beneficial to look at elaborate accounts of the use of private forces there.[8] Following the decline and break-up of the Roman Empire and right up to the fifteenth century, the continent saw the rise of societies that were mainly administered under a feudal system where feudal leaders, supported by the nobility, ruled a geographical area often comprised of multi-ethnic societies. The scale of these societies covered entities, which today could be considered either supra-national and sub-national (such as city states), with a range of others in between. The domain was fluid and could change with transfers among monarchical dynasties through wars or royal intermarriages.

During this period rulers bought military services from private groups in exchange for large profits.[9] Of particular note was the reliance upon elite Italian mercenaries who were hired by powers for specific conflicts.[10] These hired fighters were popularly known as the *condettiere* or 'military contractors', named after contracts or *condotta* which outlined their services and payment.[11] The heavy reliance on them climaxed in the seventeenth century, when these military entrepreneurs fought against each other on behalf of rulers of religious leagues and free cities in a series of wars involving most of the countries of Europe.[12] These wars made armed conflict a

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[7] Chapter 1 (see section 1.7). The initial rise of PMSCs in the 1990s in Africa was tied to desperation for military resources against adversaries that state forces alone could not defeat.

[8] Codification of early humanitarian law treaties took place in Europe with the earliest being the First Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (First Geneva Convention) 11 LNTS 440 (9 August 1907) available at http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/120?opendocument [accessed on 12 October 2012]. A focus on developments in Europe regarding private force prior to and post this period is useful since the present study is underpinned by the context of humanitarian law.

[9] In some instances their services become core exports of entire countries; see F C Lane *Profits from Power: Readings in Protection Rent and Violence Controlling Enterprises* (1979) 55; A Mockler op cit note 4 at 1-18; C Tilly *European Revolutions, Making of Europe: 1492–1992* (1996) 21–35; M Howard *War in European History* (1976) 38–53.

[10] P W Singer *Corporate Warriors: The Rise of the Privatized Military Industry* (2003) 22–24. It is from these contracts that the mercenaries acquired the name condottieri.

[11] Singer ibid.

[12] Europe's Thirty Years' War which took place between 1618 and 16 8; see J Brauer & H P an Tuyll *Castles, Battles, and Bombs: How Economics Explains Military History* (2008) 133–135; J Thomson *Mercenaries, pirates and Sovereigns: State Building and Extraterritorial Violence in the Early Modern Europe* (1996) 61; M Van Creveld op cit note 5 at 49–51.

lucrative business and accelerated the reliance on the military entrepreneurs, as rulers increasingly depended on them for support against external adversaries, as well as to quell internal resistance that would arise as they collected taxes to support their wars.

The *condettiere* enjoyed a principal-agent relationship in which the fundamental objective was to fight in exchange for pay. As conflicts progressed, these contracts with the principles became more detailed as the roles between the principal and agent became more clearly defined in relation to various contingencies. The *condottiere* in their own right also recruited personnel to execute their obligations (predominantly to fight) under these contracts. More men flocked to the *condottiere* which guaranteed long-term stability in employment.[13] In order to attract these resources, the *condottiere* had to think in terms of a sustainable business environment where the men or 'assets' were preserved for a long haul, and not simply for short-term profits that could be acquired from a single contract. This, in turn, made the question of their military reputation critical, since *condottiere* needed to boast of a sizeable company that could deter an adversary and save them from going to war, thereby depleting these 'assets'.

The *condottieri* invited conflicting attitudes.[14] Other than the overwhelming need for additional military support, they were seen to provide certain functional advantages that made them attractive. Contractors provided quick access to a pool of trained forces that could be called upon at short notice and dismissed when no longer needed.[15] They ranked high in the estimation of feudal rulers because of the swift manner with which their forces were able to complement the rulers' own soldiers. This reliance upon these contractors was also particularly convenient, since it allowed a state to claim credit for their successful efforts or deny responsibility for their negative consequences.[16]

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[13] M Mallet & W Caferro *Mercenaries and Their Masters: Warfare in Renaissance Italy* (1974) 80–92, 134.
[14] Brauer op cit note 12 at 82–120.
[15] J A Lynn 'The Evolution of Army Style in the Modern West' (1996) 18(3) *International History Review* 505 at 511–512. Such as modern the principles employed by the modern Swiss army.
[16] Thomson op cit note 12 at 43.

Conversely, there were concerns about the disruption that these forces brought upon the domestic affairs.[17] Their contracts took into account only the relations between feudal rulers and mercenaries, and not the interests of a host of other people affected by their activities. There was no guarantee that the local population would not suffer when the contractor executed a war on behalf of his principal. A ruler was also at the mercy of these independent private agents and often could not restrain them from pursuing interests that conflicted with the overall wellbeing of his populations, such as looting and plundering. While they were convenient tools that a state could use to deny responsibility, their presence transformed the arena of conflict into one in which no one could be certain of which practices were backed by states and which were not.[18]

The use of mercenaries during these feudal times is instructive to the present dilemma facing PMSCs in modern conflicts. The use of the term 'military contractor' in contemporary media reports underlies the common perceptions that link modern PMSCs to these past private contractors.[19] As mentioned in Chapter One, today's PMSCs, just like *condottieri,* are hired by states for specific conflicts under what is effectively a principal-agent relationship.[20] The same considerations of reputation and sustainability that become important marketing tools for the *condottiere* are also relevant to the present private military and security industry. The leading players of the industry and their associations often tout reputation as a guarantor against unscrupulous behaviour. As will be shown below, PMSCs also engender the same conflicted sentiments as did the *condottiere* .

2.2.2 Decline of Private Force and the Rise of Modern State

The practice of waging war with a heavy reliance on non-state or private instruments of force was embraced during the Middle Ages. This situation began to change with the emergence of the modern nation state, often referred to as the 'Westphalian

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[17] E B Smith 'The New Condottieri and U.S. Policy: The Privati a tion of Conflict and Its Implications' (2002) *Parameters: US Army War College Quarter* XXXII 104 at 107–108.
[18] Thomson op cit note 12 at 43–44.
[19] Smith op cit note 17 at 105.
[20] Tilly op cit note 9 at 21–28.

state'.[21] The rise of the nation state saw a radical shift from private force to public armies due to a combination of factors. Chief among these was the influence of ideas that emerged during the Renaissance and Enlightenment periods around the identity of the state and how society should be organised. This influence was accompanied by changes in military strategy and a renewed determination to curb concerns associated with the private force. This section provides an overview of the impact of these factors.

The Renaissance and Enlightenment periods, which lasted from the Fourteenth to the Eighteenth Centuries, were a time of great intellectual and scientific development that challenged the dominant religious views of the day regarding how societies ought to be organised.[22] These ideas accounted for the rise of the modern state, in lieu of the former city, federation or religious states, as the predominant form of social organisation.[23] Citizenship was tied to the impersonal and abstract entity of the state and national sovereignty was now vested in the people and not the monarch or ruler. Nationalism became a consolidating force of identity revolving around the abstract notion of the state.[24] The impact of these ideas was not limited to the internal domain of the state; they also affected the interaction between states. In particular, the notion of neutrality in relations between nations began to emerge. This concept required states to remain neutral in the affairs of other states.[25]

This new social construct resulted in drastic changes in the manner in which wars were fought and its parties. The sovereign nation state came to be viewed as the guarantor of domestic order and the legitimate authority to declare war on other states.[26] War changed from personal war waged by and in pursuit of the interests of a

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[21] In reference to the Treaty of Westphalia of 1648 that ended the series of wars that had taken place in Europe over the thirty–year period preceding it.

[22] The Renaissance (French for 'rebirth') lasted from the fourteenth to sixteenth century. It was a time of intellectual development and movement of ideas, facilitated by the printing press. It was followed by the Enlightenment period, commonly known as 'the age of reason', which ran through the Seventeenth and Eighteenth Centuries, A Watson *The Evolution of International Society: A Comparative Historical Analysis* (2009) 116–123.

[23] Watson ibid; R Falk 'The Post–Westphalia Enigma' in B Hettne & B Od n *Global Governance in the 21st Century: Alternative Perspectives on World Order* (2002) 147–180.

[24] Van Creveld op cit note 5 at 64, 49, 57.

[25] Thomson op cit note 12 at 55–62.

[26] M Howard *The Invention of Peace and the Reinvention of War* (2009) 54–74.

specific ruler, into impersonal wars waged on behalf of national states.[27] As the concepts of nationalism and patriotism took hold, fighters were expected to fight for the cause of the state.[28] Private forces became morally undesirable because they did not fight for an appropriate cause.[29] On the external front, the concept of neutrality, which required states to remain neutral in the affairs of other states, made the use of private forces problematic because, despite their independence, states that used them carried the risk of being held accountable for their actions.[30]

As citizens were tied to this impersonal and abstract entity — the state — the defence of sovereignty was an obligation for all citizens. It was now expected that citizens would constitute the armed forces created to protect and further the interests of the state. Military service was considered the duty of the citizen and the professionalised citizen soldiers replaced private armies.[31] This process led to a re-categorisation of who was entitled to exercise control over violence. Under this new paradigm this was reserved for soldiers who were viewed as licensed servants authorised to fight for the state. The separation of this group from the rest of the population began to take place through various means, such as the decoration of uniforms and the military's being assigned to specific physical locations such as barracks. On the international front, this separation from other nationals began to occur through the introduction of legal categories, such as combatant and prisoners of war, which were reserved for state constituted professional fighters.[32]

In addition to these developments, the growth of centralised governments made indirect control over military resources unattractive. Using private intermediaries to execute military operations on behalf of principals had become expensive. For practical reasons, states opted to abandon this system of indirect control and to reach directly into their communities to raise forces under a model of centralised

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[27] C Tilly *Coercion, Capital and European States: AD 990–1992* (1992) 68–87, 185.
[28] D Avant 'From Mercenary to Citi e n Armies: Explaining Change in the Practice of War' (2000) 54 *International Organization* 41 at 44–45; P Paret *Understanding War: Essays on Clausewitz and the History of Military Power* (1993) 39–52.
[29] Avant ibid at 66–69; S Percy *Mercenaries: The History of a Norm in International Relations* (2007) ch 4.
[30] Thomson op cit note 12 at 55–62.
[31] Paret op cit note 28; van Creveld op cit note 5 at 160.
[32] Van Creveld op cit note 5 at 63–94; Howard op cit note 9 at 54–74.

government that oversaw the instruments of force.[33] Private actors were independent and viewed as difficult to control. The contractual bond with contractors carried little allegiance beyond the obligation to fight for pay and they could jeopardise this contractual commitment at any time.[34] They were also largely self-motivated and, in the event of a conflict of interest between the hiring state and the private agent, states were vulnerable to attack from such forces.[35]

The result of all these factors was that states consolidated various components of force within their territories under one central umbrella. Throughout the Eighteenth and Nineteenth Centuries, state building was accompanied by a deliberate effort to concentrate and control in the hands of the state the means of coercion. In time, the state's coercive ability began to overshadow that of the smaller private rivals operating within their territory. As the state grew in dominance, it increasingly delegitimised competing forms of violence within the private domain. Often this was done by forcefully disarming those not directly authorised by the state in order to enhance the state's own coercive capabilities.[36] The state sought to acquire a monopoly over violence by depriving the general population of access to the means of coercion. The result of this process was the demarcation between public instruments of violence, which were viewed as legitimate, and private instruments of violence, which were grouped under the civilian domain of the state.

By the turn of the twentieth century, states had consolidated their monopoly over violence. Military force became an integral, though distinguishable, part of the state and began to resemble the present model of the state that persists today. This model, which is based upon Max Weber's classical definition of modern statehood, suggested that a central feature of modern statehood was the monopoly over legitimate force within a given territory.[37] In addition to four other criteria for statehood, namely, a permanent population; a defined territory; a government in

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[33] Van Creveld op cit note 5 at 95–123.
[34] Lynn op cit note 15 at 517.
[35] Percy op cit note 29. They remained a real risk where such actors went on a rampage and engaged in morally indefensible behaviour during fighting.
[36] S E Finer 'State– and Nation–Building in Europe: The Role of the Military' in C Tilly *The Formation of National States in Western Europe* (1975) 158.
[37] M Weber, B S Turner, H H Gerth & W C Mills (eds) *From Max Weber: Essays in Sociology* (1991) 78.

effective control of that territory; and the capacity to enter into relations with other states. Max Weber considered a state's monopoly over violence as a fundamental condition for statehood. [38] As the discussion under this and the previous section have shown, this element was largely absent in the former entities of social organisation that existed two to three Centuries earlier.[39] Nevertheless, as the modern state was claiming monopoly over the instruments of violence, private force persisted alongside this paradigm, as the next section will demonstrate.

2.2.3 Tenacity of Private Force amidst State Dominance

As seen above, the phenomenon of national standing armies is a fairly recent development that only emerged during the Eighteenth and Nineteenth Centuries.[40] Despite that development, private force did not disappear completely but continued to interact with state instruments of violence.[41] Three examples illustrate this reality, namely: the privateers and mercantile companies of the nineteenth century; the mercenaries that operated in various parts of Africa during the middle of the twentieth century and, more recently, the emergence at the close of the twentieth of PMSCs, the subjects of this study. The first two of these examples are discussed under this section, while the last is discussed in the subsequent section. This stubborn reappearance and persistence of private actors attest to the difficulties of maintaining a legal framework based upon the monopoly of violence by the state.

During the Eighteenth and Nineteenth Centuries, privateers and mercantile companies engaged in violence across the globe. Privateers were owners of private naval vessels who undertook military operations.[42] They played a central part in wars over colonies and trade routes. As part of their remuneration they were allowed to retain goods seized from the vessels or cities they attacked.[43] Mercantile companies,

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[38] Weber & Turner Ibid at 164.

[39] Finer op cit note 36 at 86; A Giddens *The Nation–State and Violence: Volume Two of A Contemporary Critique of Historical Materialism* (1987) 56.

[40] P Paret 'The Genesis Of War' in C o n Clausewit , M Howard & P Paret (eds/trans) *On War* (1984) 3–27.

[41] Thomson op cit note 12 at 45–53.

[42] Sometimes with state authority, while at other times, without state authority.

[43] Thomson op cit note 12 at 21–25, 1, 69; R Harding 'Naval Warfare 1453–1815' in J Black *European Warfare 1453–1815* (1999) 96–118; T Alexander 'The Rise, Fall, and Rise Again of

such as the Dutch and English (British) East India Companies, were private institutions created by the state to establish and maintain trade routes and colonies around the same period. They maintained a monopoly over trade routes and were given by their home states far-reaching powers such as the right to raise armies and make war in pursuit of profit.[44] Privateers and mercantile companies operated in a period characterised by economic expansion where states required additional military support in order to access resources in distant territories. The global expansion of this period bears some similarity to the present phenomenon of globalisation and free trade, under which PMSCs have emerged.[45]

By the turn of the Twentieth Century reliance on privateers and mercantile companies had come to an end. Privateers were outlawed in the Declaration of Paris of 1856, and though mercantile companies were never banned under international law, their era ended when companies went bankrupt, were taken over by the state, or turned into purely economic corporations.[46] Their demise was primarily due to two primary concerns that continue to plague the activities of private forces — their independence and the conflict between the state interest and that of these private ventures. For example, many privateers fell out of line with the state and became pirates, undermining state efforts to consolidate power.[47] Similarly, mercantile companies were frequently at war, often without their home state's consent, resulting at times in a backlash against their home states.[48] They created problems when they engaged in piracy and wars that contradicted domestic policies and international laws.[49] There were also challenges associated with their status or identity within a given conflict, with states at times denying or accepting these entities when it suited their national interests.[50]

Privateers' (2007) 10( ) *The Independent Review* 565–577.

[44] Thomson op cit note 12 at 31–40.

[45] Chapter 2 (see section 2.2.4)

[46] Thomson op cit note 12 at 97–104; Alexander op cit note 43 at 572.

[47] Thomson op cit note 12 at 66–76.

[48] C Kinsey *Corporate Soldiers and International Security: The Rise of Private Military Companies* (2006) 38; C Orti 'Overseas Trade in Early Modernity and the Emergence of Embryonic Private Military Companies' (2007) in T Jager & K Gerhard (eds) *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospect* (2007) 11–23.

[49] Thomson op cit note 12 at 54–58, 69–76.

[50] It was not unusual for states to deny or dispute their status where one state was affected by their activities, while at the same time another was benefiting from these actions.

The demise of privateers and mercantile companies did not herald the end of society's reliance on private actors. The decolonisation period of the 1960s and 1970s saw the resurgence of private soldiers in internal wars of national liberation.[51] Private actors of this time entered these confrontations as proxies for foreign powers, governments or rebel groups. During this period, mercenaries gained particular notoriety for their roles in the violent overthrow of African regimes and efforts to undermine the African decolonisation struggles.[52] They soon attracted negative publicity as they were viewed as professional killers who operated independently of states and at the mercy of those who paid them.[53] It did not help that, in the context of colonialism, many of them were whites. This abhorrence was deepened by the fact that many of these private actors were funded by former colonial powers to undermine the right to self-determination of newly emerging states.[54] They were therefore viewed as anti-liberation and an affront to the sovereignty of the state. The developments of the 1960s altered public sentiment towards mercenaries and galvanised African countries to lobby for a stern response to what they saw as the destabilisation and undermining of their states' sovereignty of their countries.[55] The result was a number of United Nations (UN) resolutions, as well as specific treaties on the subject.[56]

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[51] Such as in countries like Yemen, Congo, Angola, Nigeria/Biafra, Commores and Seychelles; see C Wrigley 'The Privati a tion of io lence: New Mercenaries and the State' (1999) available at http://www.caat.org.uk/resources/publications/government/mercenaries–1999.php [accessed on 1 August 2012].

[52] Renowned mercenaries who were ex–soldiers like 'Mad' Mike Hoare and Bob Denard. A F Musah & J K Fayemi (eds) *Mercenaries: An African Security Dilemma* (2000) 269–271.

[53] Musah & Fayemi ibid at 269–271.

[54] Z Sal man 'Private Military Contractors and the Taint of Mercenary Reputation' (2008) 0 *New York University Journal of International Law and Politics* 854 at 874-876.

[55] Wrigley op cit note 51. This was despite the fact that some of these governments used the same mercenaries to entrench their regimes.

[56] United Nations General Assembly (UNGA) Resolution 2131, The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty A/Res/20/2131 (21 December 1965) available at http://www.un–documents.net/a20r2131.htm [accessed on 4 March 2012]; UNGA Resolution 2465, The Declaration on the Granting of Independence to Colonial Countries and Peoples A/Res/2465 (14 December 1970) available at http://www.un.org/en/decolonization/declaration.shtml [accessed on 4 March 2012]; UNGA Resolution 2625, The Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations A/Res/2625 (24 October 1970) available at http://www.un–documents.net/a25r2625.htm [accessed on 4 March 2012]; UNGA Resolution 3103, The Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes A/Res/3108 (12 December 1973) available at http://www.refworld.org/docid/3b00f1c955.html [accessed on 4 March 2012]. Though General Assembly resolutions do not constitute international law, they may indicate state practice and *opinio juris* for customary international law.

2.2.4 Emergence of PMSCs during the Post-Cold War Period

The end of the Cold War witnessed the rapid rise of the corporate private actors.[57] PMSCs emerged as a force intimately involved in military operations in Africa and other parts of the world.[58] Their rise was attributed to three main factors related to the collapse of the Cold War: the triumph of neo-liberalism as an economic system of governance; the re-alignment of military capacities that followed the end of bipolar international relations of the Cold War period; and the greater willingness by the United Nations Security Council to respond to threats on international security amidst a context of mission fatigue by western powers. [59] Each of these factors formed the basis for a demand in PMSC services, and the paragraphs that follow discuss each of these in turn.

The conclusion of the Cold War saw the triumph of capitalism and neo-liberalism, and with these the rise of the private sector.[60] In this environment, states sought to outsource security functions in order to cut down the costs associated with standing armies.[61] Reliance on PMSCs was thought to be flexible and cost effective.[62] This

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[57] Chapter 1 (see section 1.1); Kinsey op cit note 48 at 58–71; P Huber 'Military–Industrial Complex 2003' available at http://www.forbes.com/global/2003/0512/019.html [accessed on 15 April 2012]. Although public awareness of the corporate existence of private forces surfaced in the 1990s, there has always been some dependence on corporate private resources to support war efforts by states during the twentieth century. The provision of military services by corporate entities was present in small measures during the First World War and in subsequent conflicts such as the Korean War and Vietnam.

[58] Kinsey op cit note 48 at 58–71; H M Howe *Ambiguous Order: Military Forces in African States* (2004) 18–19.

[59] N D White *The Law of International Organisations* (2005) 146; H Wulf 'Good Governance Beyond Borders: Creating a Multi–level Public Monopoly of Legitimate Force' Geneva Centre for the Democratic Control of Armed Forces Occasional Paper No 10, Geneva (2006) 13–15.

[60] P Taylor *International Organisations in the Age of Globalization* (2005) 13; M C Howard & J E King (eds) *The Rise of Neoliberalism in Advanced Capital Economies: A Materialist Assessment* (2008) 196. The bankruptcy of communist Soviet Union was seen as vindicating an economic development model based upon neo–liberal free market ideologies.

[61] F Schreier & M Caparini 'Privatising Security: Law, Practise and Governance of Private Military and Security Companies' Geneva Centre for the Democratic Control of Armed Forces Occasional Paper No. 6, (March 2005) 3–6 available at http://www.dcaf.eh/_docs/occasional_6.pdf [accessed on 26 October 2012].

[62] L A Dickinson 'Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law' (2005) 47 *William and Mary Law Review* 135 at 149; J E Fredland 'Outsourcing Military Force: A Transactions Cost Perspective on the Role of Military Companies' (200) 15(3) *Defence and Peace Economics* 205 at 210; C Jordan 'Who Will Guard the Guards? The Accountability of Private Military Contractors in Areas of Armed Conflict' (2009) 35 *New England Journal on Criminal and Civil Confinement* 309 at 313.

trend was facilitated by developments in technology.[63] Information and communication technology aided the ability of prospective purchasers and sellers of these services to access them in record times.[64] Furthermore, modern conflicts relied extensively on technology, much of which was now located in the private sector. [65]

The Cold War was characterised by tensions between the North Atlantic Treaty Organisation countries and Warsaw Pact countries, supported by the two super powers of the day, the United States of America (USA) and the former Soviet Union (USSR).[66] These tensions compelled governments to maintain large contingents of troops and defence budgets.[67] As the USA and USSR lobbied support from all over the world, tensions translated into a bipolar system of international relations that pitted capitalist against socialist nations. Such support, which included massive military aid, was disbursed to states according to other ideological orientations.

The end of the Cold War meant that the super powers, as well as powerful governments that supported them, no longer faced imminent threats of aggression. Their larger arsenal of military equipment and personnel was suddenly rendered redundant. This drove such governments to embark on radical restructuring of their defence departments in order to reduce expenditure. The demise of the threat of war[68] led to a massive downsizing of the military capacity in developed states. Personnel were drastically reduced, leading to many highly skilled servicemen becoming unemployed. The size of military hardware and equipment was also

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[63] S Metz *Armed Conflict in the 21st Century: The Information Revolution and Post–Modern Warfare* (2000) 5–27. This was boosted further by the changes that were occurring on the technological front.

[64] Metz ibid at 5–27; D Shearer 'Outsourcing War' (1998) *Foreign Affairs* 68 at 74.

[65] N C Rowe 'War Crimes from Cyber Weapons' (2007) 6 (3) *Journal of Information Warfare* 15–25; Metz op cit note 63 at 5–27; P R Camacho 'Private Contractors – Private Military Corporations Danger across the Arc of Instability' Patuxent Defense Forum, St. Mary's College of Maryland (April 2008) 3–5, available at http://www.smcm.edu/democracy/_assets/_documents/camacho%20–%20article%20private%20contractors.pdf; [accessed on 26 October 2012]; S J Zamparelli 'Contractors on the Battlefield, What Have We Signed Up For?' (1999) 23(3) *Air Force Journal of Logistics* 1 at 8–14. There was a growing impetus to tap into such technical skills.

[66] D Shearer 'Private Armies and Military Intervention' (1998) 38 (316) *The Adelphi Papers* 9–10.

[67] D Brooks 'Messiahs or Mercenaries? The Future of International Private Military Services' (2000) 7 (4) *International Peacekeeping* 129 at 132.

[68] A Mcintyre & T Weiss 'Weak Governments in Search of Strength: Mercenaries and Private Military Companies' in S Chesterman & C Lenhardt (eds) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007) 67–82; I K Garcia–Pere 'Contractors on the Battlefield in the 21st Century' Army Logistician Online November—December (1999) available at http://www.almc.army.mil/alog/issues/NovDec99/MS454.htm [accessed on 4 September 2012].

drastically reduced as governments sold these off to reduce the overheads and maintenance costs associated with large defence stockpiles. Finally, as defence expenditure was reduced, military donations to dependent overseas regimes were equally decreased, tipping the scales against those that relied upon such support to suppress internal tensions.[69] As a result, these internal tensions exploded into fully armed conflict where insurgencies and rebel factions fought against cash-strapped governments no longer backed by super powers.[70] Many of these states began to look for military support outside traditional state reliance systems.[71] These circumstances provided PMSCs with new opportunities. Not only were these actors able to absorb some of the highly skilled former military servicemen, they were soon in high demand given the vacuum created by the end of Cold War geopolitics.

The demand for PMSCs in the post-Cold War era may also be viewed through two contrasting developments that took place at this time within the UN Security Council. On the one hand, members were less inclined to use the veto to block peace enforcement missions. On the other, the negative experiences that resulted when global military powers sought to support such missions made them reluctant to commit their resources.

The tendency within the Security Council during the Cold War was to block interventions against autocratic regimes in the name of furthering the greater good of communism or capitalism.[72] Calls for interventions to stop violations committed by these regimes were rebutted by either side on the basis of arguments that placed a different emphasis on the notion of human rights.[73] The voice of the victims experiencing gross violations of human rights under oppressive regimes could not be heard, and any assistance to them was frustrated by the exercise of the veto power by either superpower.[74] In the post-Cold War period these atrocities intensified as autocratic regimes, desperate to hang on to power, employed brutal means against

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[69] Wulf op cit note 59 at 9–10; Dickinson op cit note 62 at 154–159; Mcintyre & Weiss op cit note 68 at 67–82.
[70] Mcintyre & Weiss op cit note 68 at 69–80.
[71] Including countries under international embargoes, Wulf op cit note 59 at 13.
[72] Howe op cit note 58 at 1–26.
[73] D J Whelan *Indivisible Human Rights* (2011) 134. For example the former United Soviet Socialist Republic favoured socio–economic rights, while the United States placed greater emphasis on civil–political rights.
[74] Y Dinstein *War, Aggression and Self–Defence* (2005) 315.

their people.[75] The opening up of media spaces saw more coverage given to these situations, imposing increasing pressure on the Security Council to respond.[76] At the same time, the growing importance of the USA as the sole superpower and its Western allies facilitated greater cooperation within the Security Council in favour of the advancement of a global and ideological environment in which democracy and civil and political rights were respected.[77] The shocking displays of gross violations by governments could no longer be ignored and in this environment members of the Security Council became less willing to impede peace enforcement measures through the exercise of the veto power.[78]

As leading Western powers sought to fulfil the mandates of peace operations aimed at preventing gross violations of human rights in some of the affected territories, the experiences their troops encountered caused them to re-think their position regarding such missions and the support they required. The risks associated with sending national troops to areas where the lines between the civilians and combatants were increasingly blurred became clear from the fatalities experienced, such as when USA troops were massacred at the hands of civilians while attempting to intervene in Somalia.[79] These risks, as well as the fact that many of these conflict areas were of low economic or political interest to the powerful states that contributed troops and resources to such missions, served as a disincentive to the international community to sending troops to such areas. After the Somalia debacle, the UN was faced with difficulties of getting well-trained military forces from the Western states to contribute to peacekeeping and peace enforcement missions.[80] This led to a gap at the international level between the dire need for humanitarian intervention in response to acute threats to international security and the availability of resources to support such intervention — a gap that PMSCs would exploit.[81]

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[75] R I Rotberg *When States Fail* (2010) 12, 96, 108–109.

[76] S L Woodward *Balkan Tragedy: Chaos and Dissolution after the Cold War* (1995) 236; Dinstein op cit note 74.

[77] R Normand & S Zaidi *Human Rights at the UN: The Political History of Universal Justice* (2008) 316.

[78] N D White *The United Nations System: Towards International Justice* (2002) 140.

[79] T Spicer *An Unorthodox Soldier* (1999) 16, 23, 233; L Lawson 'U.S. Africa Policy Since the Cold War' (2007) 6(1) *Strategic Insights* 1 at 4, available at http://www.isn.ethz.ch/Digital–Library/Publications/Detail/?ots777=0c54e3b3–1e9c–be1e–2c24–a6a8c7060233&lng=en&id=39744 [accessed on 30 May 2013].

[80] Spicer ibid at 148.

[81] D Wright & JC Brooke 'Filling the o id: Contractors as Peacemakers in Africa' (2007) 16( )

The account of the activities of the PMSC, Executive Outcomes, illustrates the interplay of these factors and how they facilitated the emergence of a private entity with force capabilities that could drastically tip the advantage in a conflict from one party to another.[82] During the Cold War the defence forces of South Africa's apartheid regime supported Angolan rebel forces, União Nacional para a Independência Total de Angola[83] (UNITA), in their bid to topple the Marxist Angolan government of the Movimento Popular de Libertação de Angola (MPLA). In line with the bipolar nature of international relations that characterised the day, the interests of South Africa intersected with those of the USA, while the Angolan government was backed by the Soviet Union.[84] The collapse of the Soviet Union ended support for the apartheid regime by Western powers and removed the barriers used to block negotiations over democratisation.[85] With the advent of democracy in in South Africa in 1994, many of the personnel of South Africa Defence Force's (SADF) 32 Battalion left and joined the Executive Outcomes.

This company entered into contracts to provide the much-needed support to the Angolan government, which no longer received support from the former Soviet Union in its war against the UNITA rebels. In this war, Executive Outcomes personnel found themselves fighting alongside, and training, their former enemies in the Marxist government of Angola, against their former allies, UNITA rebels.[86] As a result, UNITA suffered massive defeats and it is doubtful whether the Angolan government could have subdued the rebels without the assistance of this particular PMSC. Later, Executive Outcomes was contracted by the Sierra Leonean government to stop the Revolutionary United Front (RUF) rebels. As part of its remuneration, Executive Outcomes was granted certain rights to the country's

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African Security 105 at 105, 110.

82 Howe op cit note 58 at 187–242; H Howe 'Private Security forces and African stability: the Case of Executive Outcomes' (1998) 36 *The Journal of Modern African Studies* 307–331.

83 Portuguese for 'National Union for the Total Independence of Angola'.

84 S Cleary 'Angola: A Case Study of Private Military Involvement' in J Cilliers & P Mason *Peace, Profit or Plunder? The Privatisation of Security in War–Torn African Societies* (1999) ch 8.

85 Mcintyre & Weiss op cit note 68 at 67–81; K Govern & E Bales 'Taking Shots at Private Military Firms: International Law Misses Its Mark (Again)' (2008) 32 *Fordham International Law Journal* 55 at 63, 84.

86 I Douglas 'Fighting for Diamonds: Private Military Companies in Sierra Leone' in J Cilliers & P Mason (eds) *Peace, Profit or Plunder? The Privatisation of Security in War Torn African Societies* (1999) ch 9.

diamond mines.[87] After the withdrawal of Executive Outcomes, government forces were quickly pushed back, forcing it to call in another PMSC, Sandline International, to rescue it.[88] Faced in a democratic South Africa with growing discontent about Executive Outcomes' links to apartheid and the political implications of its military incursions into Africa, the company was liquidated. However, the liquidation of such PMSCs has not rendered the incidence of PMSCs extinct.[89] Instead, the industry has grown in different forms, providing vital security services in the global war against terror and in other unstable terrains of armed conflict.[90]

2.3 PHILOSOPHICAL FOUNDATIONS OF IHL AND THE LEGITIMACY OF THE FIGHTER

Now that the involvement of private actors in conflict has been documented, this section will investigate the evolution of international humanitarian law with respect to the role of these actors and explore the philosophical underpinnings of that evolution. The key philosophy underlying this history is the just war doctrine. This philosophy has framed the conduct of war, including who has the right to participate in conflict and who does not. The just war doctrine is divided into three parts: *jus ad bellum*, or the rights of parties to declare and go to war; *jus in bello,* or the right

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[87] Cleary op cit note 84 at 307–331.

[88] L Thomas & R Ibbs 'Report of the Sierra Leone Arms Investigation' presented to the House of Commons, Foreign and Commonwealth Office (July 1998) available at http://collections.europarchive.org/tna/20080205132101/fco.gov.uk/files/kfile/report.pdf [accessed on 14 September 2012].

[89] J Palou–Loverdos & L Armendri 'The Privatiation of Warfare, iolence and Private Military and Security Companies: A Factual and Legal Approach to Human Rights Abuses by PMSC in Iraq' Report prepared for the UN Working Group on the Use of Mercenaries, Geneva (October 2011) 18–23, available at http://nova.cat/wp–content/uploads/2011/12/Informe_PMSC_Iraq_Nova_ok.pdf [accessed on 21 May 2013]. The demand today continues to be driven by similar factors that is, the need to cater to security shortages due to the inability or unwillingness by public security institutions to provide the necessary supply.

[90] G R Lucas Jr 'New Rules for New Wars: Military Ethics and Irregular Warfare' Dunbar Lecture delivered at Millsaps College Jackson (February 2010) 24–26, available at http://www.usna.edu/Ethics/publications/documents/DunbarLectureMillsapsCollegeFebruary2010NewRulesforNewWars%5B1%5D.pdf [accessed on 30 May 2013]; D Brooks 'Messiahs or Mercenaries? The Future of International Private Military Services' (2000) 7 *International Peacekeeping* 129–144. One can only speculate on the potential of future PMSC use. Ideas have been mooted in the past regarding the privatisation of UN Peace Forces as a solution to the multiple challenges that face deployment of state troops for the purposes of Chapter VI and VII of the United Nations Charter (UN Charter) 1 UNTS XVI (24 October 1945) available at http://www.refworld.org/docid/3ae6b3930.html [accessed 11 July 2013].

conduct expected of belligerent parties during the course of an armed conflict; and *jus post bellum* or the rights that accrue to the parties after cessation of armed conflict. Since the study is concerned with the context of armed conflict, discussions that follow will focus on *jus ad bellum* and *jus in bello.*[91]

2.3.1 A Brief History of the Just War Theory

Military accounts of ancient civilizations and cultures that occurred before the emergence of modern humanitarian principles and concepts were governed by cultural and religious codes.[92] These codes and cultural practices provided a valuable base for the fundamental concepts that would be later developed to address the manner in which conflict had to be executed.[93] It was only during the time of Greek city-states and the Roman Empire, however, that key concepts present in the just war philosophy began to concretise.[94] The Greek philosopher, Aristotle, coined the term 'just war' as a secular notion justifying the right of a state to engage in self-defence.[95] His notion was not altruistic, since wars of self-defence also included wars motivated by desire for conquest and slaves. Like Aristotle, the Roman senator, Cicero, justified self-defence, but rejected the approval of wars motivated by the acquisition of slave labour.[96] Both the Greeks and Romans affirmed the right of a

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[91] L May *After War Ends: A Philosophical Perspective* (2012) 221; E Patterson *Just War Thinking: Morality and Pragmatism in the Struggle Against Contemporary Threats* (2007) 8.

[92] J H Currie, C Forcese & V Ossterveld *International Law: Doctrine, Practice, and Theory* (2007) 5 8; K Ögren 'Humanitarian Law in the Articles of War Decreed in 1621 by King Gustavus II Adolphus of Sweden' (1996) 313 *International Committee of the Red Cross* 438–442; E Bello *African Customary Humanitarian Law* (1980). For example, the Greek belief in Athena promoted nobility during war. Confucian tradition in China urged fair play. Finally, African societies spared vulnerable groups such as women, children or the disabled during conflict. Often compliance with these rules was aided by superstitious and informal sanctions such as loss of reputation.

[93] For example some delegates to the Diplomatic Conference Conference for the Establishment of International Conventions for the Protection of War Victims 1974-77 recalled that the principle of distinguishing civilian from combatants was enshrined in Islamic law, see Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) 192 (Swiss Federal Political Department 1978) 26 May1977 CDDH/SR10; M Sassòli, A Bouvier, Carr S & ICRC (eds) *How Does Law Protect In War* (1999) 97–100.

[94] G I A D Draper 'Grotius' Place in the Development of Legal Ideas About War' in H Bull, B Kingsbury & A Roberts (eds) *Hugo Grotius and International Relations* (1990) 177.

[95] Aristotle *Politics* quoted in P Christopher *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* (1950) 10–11; B Orend *The Morality of War* (2006) 10.

[96] Orend ibid at 11.

state to employ just force.[97] They did not, however, develop clear rules on how such force had to be used, that is, *jus in bello*, and as a result plunder, enslavement and the indiscriminate killing of foreign non-combatants were common.

These Graeco-Roman ideas contributed to the theological principles that undergirded the just war doctrine of the Middle Ages. In particular, the conversion of the Roman Emperor Constantine and adoption of Christianity as the state religion revolutionised thinking about war. In this context, the early Christian writers laid the foundation for St. Augustine's writings that evoked a restraint in warfare based upon the just war doctrine.[98] Augustine believed that killing through war was justified if certain prerequisites were met, namely, a right inward disposition; a just cause; right authority; right intent; the prospect of success; proportionality between the good and evil that results; and war as a last resort. These pre-requisites formed part of the two main components of the doctrine: *jus ad bellum* and *jus in bello*. Augustine's interpretation of the conduct of war, however, was largely inclined towards the right to *jus ad bellum*.

Later writers, such as Aquinas, Vitoria and Ames, re-affirmed and developed the three core prerequisites of the just war doctrine promulgated by Augustine, namely, legitimate authority, just cause and right intention.[99] In this regard, Aquinas understood legitimate authority to vest in the sovereign's public authority, and rejected the proliferation of private armies.[100] Although Aquinas, like Augustine, condemned the slaughter of non-combatants, his understanding of *jus in bello* remained heavily dependent on *jus ad bellum*. The justness of resorting to war determined the limits of such conduct and, by the same token, waging unjust wars was deemed criminal.[101] Religious notions of guilt and innocence prevalent at this time blurred the application of *jus in bello* as a separate component of the just war doctrine. *Jus in bello* was linked to internal dispositions synonymous with social and religious morality that pre-occupied these early theologians. The objective of a just

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[97] Aristotle op cit note 95; T Robert & S Broughton *The Magistrates of the Roman Republic: Volume 1:509–100 BC* (1952) 34.
[98] J M Mattox St. Augustine and the Theory of Just War (2006) 14.
[99] M H Keen *The Laws of War in the late Middle Ages* (1965) 69.
[100] Orend op cit note 95 at 16.
[101] L Friedman *Introduction to the Law of War: A Documentary History*, Vol 3 (1972) 10–11.

war was to regulate these issues and violence in itself was not regarded as an evil where the war sought peace in accordance with such religious norms.[102]

Writers subsequent to Aquinas began to develop the distinction between the *jus ad bellum* and *jus in bello* components, and to clarify the distinction between combatant and non-combatants upon which much of *jus in bello* now stands.[103] Vitoria recognised the need for such a distinction to cater for a situation where both belligerents perceived their cause to be just, rightly or wrongly, and therefore the need to have rules to provide for the innocent in this uncertainty.[104] He declared that certain persons could not be lawfully targeted because they were innocent. On this basis, children because of their inherent harmlessness and vulnerability were 'obviously innocent'. Other groups, such as women, civilians and clerics, were 'presumed innocent'.[105] Such innocence could be acquired or lost by the act of taking up arms. By distinguishing between 'obviously innocent' and 'presumed innocent', he showed how innocence may be acquired or lost.[106]

itoria 's justification of innocence and harmlessness still drew on religious and charitable grounds. It was Ames, the last of these influential theologians, who first suggested that the reasons for the distinction between innocent/harmless people and fighters were more functional than based upon religion or charity. Thus, non-combatants, such as women, could lose their immunity if they engaged in war-like functions.[107] By this approach, Ames linked the medieval just war doctrine based on religious motivation to the secular theories articulated by the esteemed jurists of the Renaissance and Enlightenment periods. By this time, the moral weight of the church had diminished with the social ideas and restructuring of society that emerged during

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[102] S P Lee *Ethics and War: An Introduction* (2011) 43. It was an act of charity to kill in such situations. This reasoning endorsed the notion of collective guilt pervasive in the holy wars.
[103] R S Hartigan *The Forgotten Victim: A History of the Civilian* (1982) 49–50; G I A D Draper 'The Status of Combatants and the Question of Guerilla Warfare' (1971) 5 *British Year Book International Law* 173. Restraints in war began to surface as part of a culture of chivalry among designated military classes such as knights.
[104] T Meron 'Common Rights of Mankind in Gentili, Grotius, and Su r e ' in T Meron *War Crimes Law Comes of Age* (1998) 122; Hartigan ibid at 312 –313; F De Vitoria, A Pagden & J Lawrance (eds) *F De Vitoria Political Writings* (1991) 312–313.
[105] F de Vitoria *On the Law of War* (1557) in A Pagden & J Lawrance (eds) *Political Writings* (1991) 293, 314–315.
[106] De Vitoria ibid at 135, 319.
[107] J T Johnson *Ethics and the Use of Force: Just War in Historical Perspective* (2013) 17–21.

the Renaissance and Enlightenment periods. These ideas challenged the dominant religious views and located the just war theory in the secular realm. The leading international law theoreticians of these times, Hugo Grotius, Emmerich de Vattel and Jean-Jacques Rousseau, provided the underlying reasoning that informs the present laws of war. [108]

Grotius' *De Jure Belli ac Pacis (The Law of War and Peace)*[109] located the just war tradition under the theory of natural law. This theory asserted that in order for the human species to survive, all action had to be in accordance with natural law.[110] The foundation of just war shifted from the medieval theological perspective to a secular reasoning as to natural events and human actions, even though a few references to charitable concerns as guiding factors remained. Under this new foundation, the right to make war was given to states by the law of nature rather than by divine authority. In terms of *jus in bello*, non-combatancy was based upon the actions of humans during war — supporting the need to examine the function of a person in war as a basis for their categorisation.[111] Individuals retained their innocence so long as they did not perform military acts. This was a rejection of the theological idea of collective guilt influenced by *jus ad bellum*, or the surrender of the concept of *jus in bello* based upon religious morality.[112] In this context, the functions ascribing non-combatants (women, children, the elderly, clergy) were applied equally to belligerents, irrespective of which side of the war one fell on. In this sense Grotius facilitated a transition from the theological just war theory to modern humanitarian law's secular foundations.

By the time of Vattel, positivism had gradually displaced natural law as the reigning methodology of international law.[113] It challenged any remaining references to a just

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[108] B Conforti 'The Doctrine of "Just War" and Contemporary International Law' (2002) *Italian Year Book of International Law* 3 at 5; T McCormack & A McDonald (eds) *Yearbook of International Humanitarian Law Volume 6* (2003) 5.
[109] A foundation upon which modern international law has developed.
[110] What is consistent with the natural law is right, and what is not in keeping with the natural law is wrong.
[111] J G Gardam *Non–Combatant Immunity as a Norma of International Humanitarian Law* (1993) 59.
[112] H Grotius & R Tuck (eds) *The Rights of War and Peace* (1625/2005) 1439–1445.
[113] B Reynolds 'Natural Law versus Positive Law: The Fundamental Conflict' (1993) 13 ( ) *Oxford Journal of Legal Studies* 441 at 443. This theory rested on the belief that law (and its legal rules) ought to be seen as separate from ethics/norms.

war doctrine steeped in religion.[114] In line with the positivist tradition, a ttel's *The Law of Nations* recommended the 'voluntary law of nations' as the basis for international law. This was based upon rules that states conscientiously followed in order to secure their common advantage.[115] The voluntary law of nations did not prohibit war[116] but limited it on the basis of rules expressed in voluntary agreements among nations.[117] These rules constrained the demands of military necessity with an assessment on the means necessary for attaining that end. Vattel pointed to principles, such as humanity and forbearance, as the means to restrict violence against enemy citizens who offered no resistance.[118] He supported this by alluding to the limitations that faced the sovereign when levying troops from among his/her subjects.[119] Although the sovereign could levy troops from all subjects, individuals unable to bear arms[120] or whose function was unrelated to fighting,[121] were exempt.[122] Thus, the distinctions between combatant and non-combatant derived from the fact that a person's action posed no resistance, and therefore the belligerent had no right to exercise violence against them.

Like Grotius and Vattel, Rousseau believed war to be an activity of states where it was necessary to distinguish combatants from non-combatants. He pointed to the concepts of 'innocence', 'harmlessness' and 'the bearing of arms' as the primary means to separate these groups, and formulated the famous dictum that distinguished between the 'soldier', who carries a weapon, and a 'man', who has laid down his weapons.[123] Moreover, he formed the initial step towards unambiguously articulating

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[114] J von Elbe 'The Evolution of the Concept of the Just War in International Law' (1939) *American Journal of International Law* 665 at 682 quoting E De Vattel *The Law of Nations* (1797) 380.
[115] De Vattel ibid at 589.
[116] De Vattel op cit note 114 at 591. According to de Vattel the violation of the *law of nations* could form grounds for a *just* war.
[117] De attel op cit note 11 at 586. De attel later propounded this 'voluntary law of nations' as the primary means for denouncing unjust wars.
[118] De Vattel op cit note 114 at 353–388; C McKeogh *Innocent Civilians: The Morality of Killing in War* (2002) 102. Particularly because they did not bear arms (such as clergymen).
[119] J Turner 'The Meaning of Non–Combatant Immunity in the Just War / Limited War Tradition' (1971) 39 (2) *Journal of the American Academy of Religion* 151 at 167–168.
[120] For example, children
[121] For example, the clergy
[122] De Vattel op cit note 114 at 400.
[123] J J Rousseau & N K Singh (eds) *Of the Social Contract, or Principles of Political Right* (2006) 54; D Richmond–Barak 'Complementing IHL: Exploring the Need for Additional Norms To Govern Contemporary Conflict Situations' An International Conference, Jerusalem (June 2008) 10–12, available at http://law.huji.ac.il/upload/Richmond_Barak_Private_Military_Contractors.pdf [accessed on 30 June 2012].

the understanding that war is waged between states, not men.[124] His understanding was informed by his own period, in which the state had consolidated much of the instruments of violence. Rousseau's understanding of this new paradigm informed Clausewit 's theory on the nature of war and its constituents. Clausewit 's *On War* saw war as a continuation of a political intercourse between states, where states used their military forces, an organ subordinated to political control, to compel the enemy into submission by destroying its forces.[125] This premise distinguished between the soldier, whose neutralisation was essential for these purposes, and civilians. Thus, participation in war was restricted only to those considered a part of the state's instruments of force.[126]

The brief history articulated above reveals an evolution of the just war doctrine in phases that correspond to different historical periods. During the early Graeco-Roman period, the *jus ad bellum* and *jus in bello* components had not emerged. Though these components began to appear in the Middle Ages, *jus in bello* remained heavily influenced by *jus ad bellum* and theological notions of morality. Developments in the Renaissance and Enlightenment gave birth to a secular reasoning that informs the present-day position, where instruments of the state are the primary agents of war and the distinction between combatants and non-combatants emanates from the nature of their activities in war. This evolution is important to understand since the presence of PMSCs raises questions that intersect with the rationales of these different periods of time. PMSCs enter into conflict areas as entities independent of the state and motivated by profit. As section 2.3.1 below shows, much of the criticism in this regard is linked to *jus ad bellum,* and the evolution to separate the two components becomes relevant.

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[124] Rousseau ibid. It is legitimate to kill a soldier but as soon as he surrenders his arms, he becomes a mere man. Like Grotius and de Vattel, Rousseau therefore established a link between the status of individuals during conflict and their activity.

[125] Paret op cit note 28; M Howard 'The Influence of Clausewit ' in C von Clausewitz *On War*, eds & trans M Howard & P Paret (1989) 27–44; van Creveld op cit note 5 at 33–50.

[126] M Van Creveld op cit note 5; C von Clausewitz *On War,* eds & trans M Howard & P Paret (1989) 27–45, 90–95. This distinction between soldiers, the people and its political system more accurately reflected the Clausewitzian/Trinitarian balance between the people, army and government.

2.3.2 *Jus Ad Bellum* (The Right to Wage War)

As mentioned earlier, a major part of the just war doctrine is *jus ad bellum* or the 'right to war'. *Jus ad bellum* has the following key principles: legitimate authority, just cause, right intention, last resort, reasonable hope of success and proportionality; and formal declaration (announcement of intention). While each of these is important, three of them, namely, a legitimate authority, just cause, right intention, are most relevant to questions raised regarding PMSCs.

2.3.2.1 The Principle of Legitimate Authority

According to the principle of legitimate authority, a war cannot be just unless authorised by the right authority. The question of what constitutes legitimate authority is subject to debate. During the times of the Greeks and Romans, such authority lay in the domain of the political leadership and not private individuals.[127] In the Middle Ages legitimate authority was interpreted through a theological lens where divine authority was placed upon a sovereign ruler. The sovereign was a single person, a monarch or religious leader, whose authority was linked to their primary role to defend order and provide security. As earlier mentioned, the Renaissance shifted sovereignty from individuals to the political entity of the state.[128]

Contemporary conceptions of legitimate authority have limited it to entities 'duly constituted' or 'widely recognised' as having this. 'Duly constituted' has been taken to mean the state as the political community through which citizens can collectively express their voice and further their interests. Renowned commentator, Walzer, has favoured this interpretation of legitimate authority, one that ties it to the state as that

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[127] Aristotle op cit note 95; Robert & Broughton op cit note 97. Both affirmed the intrinsic value of the state as the proper authority to employ just force, eg, with the Romans this was vested in the Senate.

[128] Chapter 2 (see section 2.3.1). The private interest of the ruler was distinguished from the interests of the state. At the same time authority within the political structure of the state became disconnected from the theological reasoning that characterised the Middle Ages; J T Johnson *Morality and Contemporary Warfare* (1999) 52–53; R D Sloane 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War' (2009) 3 *The Yale Journal of International Law* 47 at 57–60; A F Lang Jr 'Authority and the Problem of Non–State Actors' in E Heinze & B J Steele (eds) *Ethics, Authority and War: Non–State Actors and the Just War Tradition* (2009) 47 at 49; Richmond–Barak op cit note 123.

'political community'.[129] Tying legitimate authority to the state has shaped international law, and more specifically, humanitarian law, in two particular ways. The first is that out of this paradigm the state is viewed as the primary entity of international law to the exclusion of other actors; and the second, that the lawful exercise of violence has been construed as the sole preserve of the state.

This position is reflected in the present international law and can be seen from a reading of customary law and treaties. Even though questions continue to be raised about the impact of globalisation on state authority,[130] customary law makes it clear that states retain ultimate authority on the international platform.[131] This view is demonstrated when one considers the basic question of what qualifies something as international law.[132] While the response to this may suggest that non-state actors are increasingly involved in making and implementing law,[133] their involvement appears to be conditioned upon state consent.[134] More specifically in terms of war, this authority at international and national level remains within the exclusive domain of the state. At the international level, the vast majority of humanitarian law treaties limit the legitimacy to make wars to the state, and focus mainly upon inter-state conflicts.[135] The recent extension of this authority has also been confined to

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[129] M Walzer *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (2006) 88–101.

[130] D B Hollis 'Private Actors in International Law: Amicus Curiae and the Case for the Retention of State Sovereignty' (2002) *British Columbia International & Comparative Law Review* 235 at 235–236. The decentralisation influence brought about by globalisation diminishes the influence of the state as other actors (international organisations, multi–nationals etc) exercise greater influence in the creation and implementation of international law.

[131] D B Hollis 'Why State Consent Still Matters — Non State Actors, Treaties and the Changing Sources of International Law' (2005) 23 *Berkeley Journal of International Law* 137–175.

[132] Ideally 'what' makes international law binding and 'who' is making the law; A P Rubin *Ethics and Authority in International Law* (1997) 24–25.

[133] J E Alvara 'The New Treaty Makers' (2002) 25 *British Columbia International & Comparative Law Review* 213. Sub–state actors, supranational actors and extra national actors have emerged as potential sources of authority in addition to states.

[134] Article 38 of the Statute of International Court of Justice, 3 Beven 1179 (1945) 3 Bevans 1179, 59 Stat 1031, TS 993, 39 AJIL Supp 215 (1945) available at http://www.refworld.org/docid/3deb4b9c0.html [accessed 23 June 2013] provides for the sources — treaties, custom and general principles of law. International lawyers explain how these sources become rules upon 'the general consent of the state'. I Brownlie *Principles of Public International Law* (1995) 4.

[135] M Sassòli & AA Bouvier op cit note 93 at 73–75; Common Article 1 of the Four Geneva Conventions of 1949, namely Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) 75 UNTS 31 (August 1949) available at http://www.refworld.org/docid/3ae6b3694.html [accessed 11 July 2013]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) 75 UNTS 85 (August 1949) available at http://www.refworld.org/docid/3ae6b37927.html [accessed 11 July 2013]; Geneva Convention

organisations that benefit from the pooled authority of the state such as the UN and NATO. Moreover, the concept of collective security restricts the use of force to states or state-established institutions. [136] At national level, the state is also generally seen as the sole authority responsible for security so that any movement of security from the public to the private sphere is viewed as a challenge to the basic idea that lethal force is the sole reserve of the state. The conceptualising of legitimate authority as synonymous with the state has implications for the rise of non-state actors like PMSCs as instruments of force during conflict. It raises the question of whether the participation of PMSCs in conflict challenges the principle that states alone possess the legitimacy to engage in war.

2.3.2.2 The Principles of Just Cause and Right Intention

As noted above, the principles of just cause and right intention are fundamental elements of the just war theory.[137] According to the principle of just cause, war is only permissible to confront a real and certain danger, that is, to protect innocent life and preserve conditions for human existence.[138] The principle of right intention means that, when waging war, a state must do so for the right motives. There can be no ulterior motives (such as racial or ethnic hatred) when advancing a just cause, and the driving intention to go into a just war should be the advancement of good and establishment of peace. The principle of just cause should not be confused with that of right intention. Just cause is about the basic principles for which one is fighting. Right intention ascribes the immediate causes for which persons should lawfully enter warfare. It has more to do with the immediate goals and the means by which

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Relative to the Treatment of Prisoners of War (Geneva Convention III) 75 UNTS 135 (August 1949) available at http://www.unhcr.org/refworld/docid/3ae6b36b4.html [accessed 8 October, 2012]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) 75 UNTS 287 (August 1949) available at: http://www.refworld.org/docid/3ae6b36d2.html [accessed 11 July 2013]. The Article reads as follows: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.' States are the primary addressees. Thus, humanitarian law was born to regulate belligerent inter–state relations and where the central subject was the state and implementation and sanction of the treaties was addressed to the state.

[136] Article 42 (on Security Council measures) and Article 51 (on individual and collective self–defence) of the Charter of the UN Charter, 1 UNTS XVI (24 October 1945) available at http://www.refworld.org/docid/3ae6b3930.html [accessed 11 July 2013].

[137] D Fisher *Morality and War: Can War Be Just in the Twenty–First Century?* (2011) 5, 39, 65–66.

[138] Fisher ibid at 69. For example, self–defence, the protection of the innocent, and protection against threats to international peace are understood to constitute just cause.

these basic principles are achieved, that is, whether these are right, moral, fair, etc. It is therefore possible for a party to engage in a just cause but with the wrong intentions.[139]

Making a judgement as to the motivation for going to war and concluding what is just and within the right intention is difficult.[140] Furthermore, the principle of right intention raises crucial questions around the motivation drawing actors into war. The questions of just cause and right intention are relevant to the involvement of PMSCs in conflict. Private contractors are drawn to war for pecuniary motives or profit, and it is this aspect that is seen as conflicting with the principles discussed here.[141] As far as the just cause principle is concerned, questions are raised as to whether a state, in hiring these actors, essentially shifts war making from a activity involving democratic accountability to a profit-making discipline, undermining the principle.[142] In relation to the principle of right intention, it is suggested that PMSCs lack the right intention because they fight for financial gain rather than out of just causes related to their state.[143] This raises the question of whether the character of an actor, and in particular their non-conformity with these *jus ad bellum* principles, ought to be taken into account when determining their treatment during war. Chapter Six discusses the pitfalls of this assumption in relation to PMSCs.

2.3.3 *Jus in Bello* (The Law in Waging War)

Jus in bello describes what may happen or is permitted in war. It consists of two main principles, [144] namely, the principle of proportionality and the principle of

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[139] For example, a state could promote freedom or democracy in an autocratic state through the use of force hoping ultimately through the democratic process to install a regime that is friendly to it.

[140] P Giddy 'Character and Professionalism in the Context of Developing Countries — the Example of Mercenaries' (2006) 4 *Ethics & Economics* 1 at 11, 13.

[141] S Engbrecht *America's Covert Warriors: Inside the World of Private Military Contractors* (2010) 206. Arguably in the case of PMSCs the fact that the financial reward is far above that of soldiers suggests that it is a factor behind acceptance of a contract.

[142] A R Markusen 'The Case Against Privati i ng National Security Governance' (2003) 16 ( ) *An International Journal of Policy, Administration and Institutions* 471 at 474.

[143] C C Fabre 'In Defence of Mercenarism' (2010) 0 *British Journal of Political Science* 539 at 551–554.

[144] H M Hensel *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (2013) 84. *Jus in bello* also includes the principle of right intention. In this case the principle of right intention relates the immediate intentions of the actor when executing war.

discrimination.[145] Current rules of international humanitarian law draw extensively on these principles. Proportionality is about ensuring that the good that can be secured through war outweighs the evil that will most likely occur.[146] It calls for a balance between the direct and concrete military gains from such action, and the harm that results from such action.[147] This principle is reflected in various admonitions within modern humanitarian law treaties, such as that belligerent parties should incapacitate, not kill, combatants when faced with an option;[148] indirect effects on civilians must be justified by the principle of proportionality;[149] and belligerent forces must avoid inflicting unnecessary suffering on enemy soldiers.[150]

Proportionality implies the need to distinguish between persons who are legitimate targets and those that are not. This forms the core of the second principle of *jus in bello,* the principle of discrimination or non-combatant immunity, which is of particular relevance to the identity of PMSCs during armed conflict. At the core of the principle of discrimination is the question of defining who qualifies as a non-combatant. This principle lies at the heart of the rules and regulations of humanitarian law in as far as they oblige the parties to the conflict, when executing military operations, to distinguish between combatants and non-combatant personnel.[151] A just war must refrain from directly targeting innocent people.[152] Force must be directed against unjust aggressors, and actively targeting non-combatants is illegitimate.[153] Central to the application of this principle is the question of who is a combatant and who a non-combatant. Traditionally this distinction has been taken to denote the dividing line between members of the armed

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[145] W Smit *Just War and Terrorism: The End of the Just War* (2005) 26. Sometimes referred to as the principle of just conduct or the principle of non–combatant immunity.
[146] D Chan & C Card *Beyond Just War: A Virtue Ethics Approach* (2012) 34; Lee op cit note 102; D Rodin & H Shue (eds) *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008) 4–8..
[147] Articles 57 & 58 Additional Protocol I; J M Henckaerts, L Doswald–Beck, C Alvermann & International Committee of the Red Cross (eds) *Customary International Humanitarian Law* (2005) 46–50 rule 14 of the Customary International Humanitarian Law Study (CIHL Study); C A Ford & A Cohen (eds) *Rethinking the Law of Armed Conflict in an Age of Terrorism* (2012) 208.
[148] Article 40 of Additional Protocol I; J M Henckaerts, L Doswald–Beck, C Alvermann & International Committee of the Red Cross (eds) *Customary International Humanitarian Law* (2005) 225–230 rule 47 of the Customary International Humanitarian Law Study.
[149] Articles 57 & 58 of Additional Protocol I 147; Henckaerts et al ibid.
[150] Articles 35 & 36 of Additional Protocol I; Henckaerts et al op cit note 148.
[151] Articles 48 of Additional Protocol I; Henckaerts et al op cit note 148.
[152] Article 85 of Additional Protocol.
[153] Article 48, 57 and 58 of Additional Protocol I.

forces and civilians, and hence who is a legitimate target.[154] Unfortunately, the complexities and evolving realities of conflict present challenges to this categorisation.

The principles of discrimination and proportionality have remained at the heart of humanitarian law milestones until present.[155] They are reflected in various treaty provisions.[156] The central objective of these sets of rules is to bring a measure of humanity to armed conflict by balancing military necessity against the suffering of non-combatants.[157] This balance has been expressed in the development of two separate branches of humanitarian law treaties: the Geneva Protocols on the protection of victims of armed conflict, and The Hague Conventions that regulates the means and methods of warfare.[158] This evolution of these branches show that *jus in bello* has not remained stagnant but has widened to accommodate new combatants and expand the protection of victims.[159]

2.3.4 Relationship between *Jus Ad Bellum* and *Jus In Bello*

Much of the criticism raised against the use of private force during war (that is, the domain of *jus in bello*) stems from whether or not it is right to use such instruments in war (that is, the domain of *jus ad bellum*). It is therefore beneficial to explore the

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[154] R Norman *Ethics, Killing and War* (1995) 159.

[155] These milestones began with Henri Dunant's witness of the Battle of Solferino (1859) leading to the formation of the International Committee of the Red Cross (ICRC) in 1864, the drafting of the First Geneva Convention (1864) and the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (Saint Petersburg Declaration) (1868) available at http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/130 [accessed on 12 October 2012].

[156] Such as: prohibition of certain means of warfare; the prerogative under Article 50 of Additional Protocol I to observe a distinction between combatants and non–combatants;[156] the criminalisation of intentional attacks upon non–combatants; the express obligation upon combatants to use proportional force to achieve their end; and the need to ensure that prisoners of war are treated well since once captured, they cease to be a threat.

[157] Sassòli & Bouvier op cit note 93 at 67.

[158] F F Martin *International Human Rights and Humanitarian Law: Treaties, Cases, and Analysis* (2006) 530; F De Mulinen *Handbook on the Law of War for Armed Forces* (1987) 2–6. Geneva Law addressed the protection of victims of armed conflict. The Law of Hague regulated the conduct of hostilities among belligerents and the means and methods of warfare.

[159] The First Geneva Convention (1864) only provided for the protection of the wounded and sick soldiers on land. Subsequent treaties have expanded this to include protection of soldiers at sea (see Geneva Convention I & II), prisoners of war (see Geneva Convention III) and civilians (see Geneva Convention III); W H von Heinegg & V Epping (eds) *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen* (2007).

interaction between these two components of the just war theory. In this regard, the history of the theory covered in section 2.3.2 is informative and helps one understand the changing interface between *jus ad bellum* and *jus in bello*.

As earlier noted, the medieval understanding of just war tied *jus in bello* treatments to theological notions that were subordinate to, and at the same time merged with, *jus ad bellum.*[160] Opposing belligerents were not equal and their treatment in war was dependent on their right standing under *jus ad bellum.* The age of classical thinkers substituted this with a secular understanding of the just war doctrine.[161] There was greater discretion to wage war, which prompted a growing focus on the development of *jus in bello.*[162] This led to collective effort to mitigate the suffering during war and led to several milestones in humanitarian law.[163] At the same time acceptance of the reality of war fostered an understanding of *jus in bello,* as completely separate from *jus ad bellum.* In this perspective, *jus ad bellum* arguments could not be used to support *jus in bello* conduct.[164] Belligerents were accorded equal treatment in war irrespective of their right to wage war.

The catastrophe that followed the twentieth-century's world wars gave rise to intense international efforts to diminish the possibility of war. This led to the creation of the UN Charter and its general prohibition of force subject to a few exceptions.[165] This general prohibition gave rise to a new kind of *jus ad bellum.* There was an increased focus by states and jurists on developing this *jus ad bellum.*[166] At the same time,

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[160] Chapter 2 (see section 2.3.1).
[161] Chapter 2 (see section 2.3.1). J T Johnson 'The Just War Idea: The State of the Question' (2006) 23 *Social Philosophy & Policy* 167, 177.
[162] I Brownlie *International Law and the Use of Force by States* (1963) 67; Dinstein op cit note 74 at 67.
[163] G Best *Humanity in Warfare* (1980) 4–5.
[164] Dinstein op cit note 74 at 156.
[165] Collective & Self–defence (Article 51 of the UN Charter), Chapter VII UN Security Council Operations against threats to peace and security and in relation to wars of national liberation in pursuit of the right to self–determination (see 1970 UNGA Declaration on Principles of International Law (Resolution 2625 (XXV)).
[166] In this regard, the Kampala Declaration (Resolution RC/Res.6) adopted at the ICC Review Conference, 13th plenary meeting on 11 June 2010 (available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf, accessed on 11 November 2013) by consensus, is a trend in this direction. Amongst other things, the Declaration defines the 'crime of aggression', in what could be considered as renewed focus on *jus ad bellum*. Of relevance to this study is the fact that sending of armed groups and mercenaries into the territory of another state may meet the requirements of aggression; F Kalshoven & L Zegveld *Constraints on the Waging of War* (2001) 25.

international lawyers were worried about paying attention to *jus in bello* as this could undermine the new aspirations to prohibit war and be construed as a lack of faith in the ability of the newly established UN to maintain international peace and security.[167] Moreover, the UN Charter itself was not clear on the relationship between this new *jus ad bellum* and *jus in bello.* For example, it was not certain whether *jus in bello* was to be applied equally between those that rightfully exercised force (for example, UN peace enforcement forces or states exercising their right to self-defence) and unjust aggressors that had contravened *jus in bello.*[168] Though some provisions of humanitarian law treaties adopted at this time reaffirmed the applicability of humanitarian law in all conflicts,[169] other provisions raised doubts as to the equality of belligerents in *jus in bello.*[170]

The ambiguity inherent in these treaties has since given rise to a state practice characterised by the confluence of the two components of the just war theory.[171] Various reasons have been used to inject *jus ad bellum* rationale into the interpretation of the *jus in bello* rights that pertain to belligerents. For one, it has been suggested that an unjust aggressor should not benefit from *jus in bello* rights.[172] It has

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[167] Yearbook of the International Law Commission, Summary Records and Documents of the First Session including the report of the Commission to the General Assembly, 4 UN GAOR Supp No10, UN Doc A/925 International Law Commission, New York (1949) 281, available at http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1949_v1_e.pdf [accessed on 31 October 2012].

[168] This lack of clarity necessitated the promulgation of Guidelines for UN Forces Regarding Respect for International Humanitarian Law, UN Doc ST/SGB/1999/13 (6 August 1999); M S Mcdougal & F P Feliciana *Law and Minimum World Public Order* (1961) 134.

[169] Such as Common Articles 1 and 2 to the Four Geneva Convention and Additional Protocol I.

[170] Article 1–2 of the Four Geneva Conventions and Preamble of Additional Protocol I. For example Article 1(4) of Additional Protocol I conferred upon some non–state parties certain *jus in bello* rights eg prisoner of war status, but not to others.

[171] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (the Wall)* ICJ 131 (9 July 2004) available at http://www.refworld.org/docid/414ad9a719.html [accessed 23 June 2013]. The ICJ's advisory opinion here only dealt with the *jus ad bellum* and failed to examine the issues of *jus in bello*.

[172] Brownlie op cit note 162 at 406–408; H Lauterpacht 'The Limits of the Operation of the Law of War' (1956) 30 *British Year Book International Law* 206 at 212; 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia' International Criminal Tribunal for the Former Yugoslavia (ICTY) 39 ILM (8 June 2000) 1272, available at http://www.icty.org/sid/10052 [accessed on 31 October 2012]. Evidence of this logic is present in recent conflicts such as the 1999 NATO air strikes against Serbian forces in response to Serbia's war of aggression and targeting of Albanian civilians, as well as Israel's war with He bollah in 2006; J Mouawad & S Erlanger 'Israel Bombards Lebanon After He bollah Hits Haifa with Missiles' *The New York Times* 17 July 2006 at 1 available at http://www.nytimes.com/2006/07/17/world/middleeast/17mideast.html?pagewanted=all&_r=0 [accessed on 31 October 2012]; S M Hersh 'Watching Lebanon: Washington's Interests in Israel's War' *The New Yorker* 21 August 2006 at 28, available at

also been asserted that *jus in bello* rights may be vitiated where *jus ad bellum* stakes are high under what has been labelled as the doctrine of supreme emergency.[173] An extension of this thinking is evident within the recently developed concept the responsibility to protect and humanitarian intervention.[174] This emerged after the United Nations failure to prevent genocide in Rwanda and Bosnia and, crimes against humanity in Kosovo and East Timor, the idea of the Responsibility to Protect the civilian population of states when governments are unwilling or unable to accomplish their obligations, emerged. Ultimately the concept militarises the humanitarian space, essentially giving rise to a *jus ad bellum* justified by violations of *jus in bello*.

The use of these reasons to break down the separation between the two components has been criticised since it subordinates *jus in bello* to *jus ad bellum,*[175] making the application of *jus in bello* susceptible to fluid and politicised debates around *jus ad bellum.*[176] The participation of PMSCs in war raises the same considerations. Their nature as actors operating independently outside the state system and driven by financial motivations appears to contravene *jus ad bellum,* where one may be tempted to diminish their *jus in bello* treatment. This raises the fundamental issue as to whether the legality of their use as pertaining to *jus ad bellum* ought to influence the apportioning of rights and obligations within the context of *jus in bello.* The discussions in Chapter Six explore this question in more detail.[177]

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http://www.newyorker.com/archive/2006/08/21/060821fa_fact [accessed on 31 October 2012].

[173] The phrase 'supreme emergency' was first coined by Churchill; see W Churchill 'Be Ye Men of alo ur' *BBC News* 19 May 1940, available at http://www.winstonchurchill.org/learn/speeches/speeches–of–winston–churchill/91–be–ye–men–of–valour [accessed on 12 October 2012]. It was later adapted by Walzer; Walzer op cit note 129; L Alexander 'Deontology at the Threshold' (2000) 37 *Sand Diego Law Review* 893; D Statman 'Supreme Emergencies Revisited' (2006) 117 *Ethics* 58–79.

[174] With the U.N.'s backing, Canada convened the International Commission on Intervention and State Sovereignty. The panel's report**,** 'The Responsibility to Protect' released in December 2001, puts the term on paper for the first time.

[175] *In Re Altstotter & Others (The Justice Trial)* US Military Tribunal, War Crimes Reports Vol 7, Nuremburg, Germany (4 December 1947) 1; *Trial of Alfried Felix Alwyn Krupp von Bohlen Und Halback and Eleven Others* US Military Tribunal, Nuremburg, UN War Crimes Commission, Law Reports of Trials of War Criminals, Volume X (17 November 1947–30 June 1948) 130–159.

[176] Lauterpacht op cit note 172 at 220.

[177] Chapter 6 (see section 6.2.3).

2.4 CONCLUSION

This chapter has traced the evolution of the fighter, observing the role and treatment of private instruments of force during distinct historical periods. Societies have throughout history relied upon private force prior to and after the emergence of the state and the rise of the national armed forces. From the times of ancient empires to the Middle Ages, rulers resorted to private force, like the *condottiere,* to support their military campaigns. The factors behind this reliance were rooted in the demand for additional forces to supplement their armies, much like the supply and demand gap that saw the emergence of PMSCs. The relationship between these rulers and the private groups was framed by the delivery of military services in exchange for pay. Similarly, like modern PMSCs, this relationship was marked by concerns around their independence and the conflict between their motivation and the wider interest of societies that they operated. Just like the interests of the contract between the *condottiere* and the ruler did not address problems of looting and plunder by these actors, the contracts with PMSCs have been criticised for not covering fundamental humanitarian and human rights values.

The emergence of the state during the Renaissance and Enlightenment saw far-reaching changes in the organisation of society and, more particularly, in the face of the fighter. State nationalism became a consolidating force of identity that led to changes in the reasons for war and who would fight them. War was no longer personal and a pursuit of the interest of a specific ruler, but a project of national interest. The defence of state sovereignty became an obligation of citizens, which culminated in the creation of professionalised citizen soldiers replacing private armies. These shifts were accompanied by changes in military strategy that militated against reliance on private forces. The result was that states embarked on deliberate efforts to concentrate in themselves the means of coercion, culminating in the present position where the instruments of violence are an integral, though distinguishable, part of the state.

Despite these developments, private force did not entirely disappear. It continued to endure in various forms as the state consolidated the monopoly over violence. New

situations demanded their services because the state was either unwilling or did not have the capacity to provide the needed security. This was evident in the prominent rise of privateers and mercantile companies during the Eighteenth and Nineteenth Centuries that undertook military operations around the globe, sometimes on behalf of the state, and at other times independent of the state. Similarly, in the second half of the twentieth century, mercenaries were hired to fight in wars where they operated independently of the state, rendering combat services in exchange for pay. Like their counterparts in earlier periods, the defining character of these actors was the provision of military services in exchange for financial benefits. More recently, the end of the Cold War created instability in several countries and saw the rise of neoliberalism, which promoted the privatisation of security services in a world where there was an increased demand for such services. The result was the emergence of the present PMSCs, who stepped in to fill this gap.

The ongoing reliance upon private security agents during war raises two perennial concerns — *what* they are doing and *why* they are doing it. These questions are linked to the dominant philosophy governing war, the just war doctrine, and its key principles and concepts. The doctrine has evolved from its inception within Graeco-Roman norms to its present form where it is made up of two main components — *jus ad bellum* and *jus in bello.* The core principles rooted in the *jus ad bellum* — legitimate authority, just cause and right intention – carry underlying tones that are relevant to PMSCs These raise questions about the independence of these actors from state authority and their pecuniary motivation for entering conflict. On the other hand, the principles within *jus in bello,* such as non-discrimination and proportionality and associated concepts like innocence and harmlessness, are critical towards understanding the roles that should be ascribed to them on the basis of their functions and activities during conflict.

In addition, the evolution of just war doctrine was accompanied by a chronological context (including the post-World War II period) where the two components of *ad bellum* and *in bello* were initially indistinct, then distinct but in confluence and finally, distinct and separate. While the introduction of a positive *jus ad bellum* during the post-World War II period created uncertainties around the need to maintain this distinct and separate division, modern jurists are clear as to the need to

unshackle the application of *jus in bello* from *jus ad bellum,* if the full compliance of humanitarian law and its objectives of minimising suffering in conflict is to be attained. This conclusion is of critical relevance to PMSCs since many of the criticisms levied against them are rooted in *ad bellum* arguments and susceptible to the tensions between *jus ad bellum* legitimacy on the basis of the moral value or justness of a war, and *jus in bello* principles rooted in the protection of harmless individuals. The identity and treatment of PMSCs during armed conflict should therefore be embedded solely in *jus in bello* and the approach it takes towards distinguishing combatants and non-combatants. The next chapter will examine these main categories and how classification under either one has implications on the rights and obligations that attach to an individual.

CHAPTER THREE: THE FUNDAMENTAL DISTINCTION BETWEEN COMBATANTS AND CIVILIANS

3.1 INTRODUCTION

As discussed in the previous chapter, state reliance on private force has existed throughout history. Its present manifestation, in the form of PMSCs, points to an enduring reality that warrants further examination under the current legal regime governing armed conflict. The discussion on the philosophical foundations of the law in Chapter Two presented a background on the conceptual framework upon which the current legal regime is based. Chapter Three continues the discussion but focuses more intently on the present rules that make up *jus in bello*, or, what is more commonly referred to as international humanitarian law. The intention is to demonstrate the prerequisites used by the law to categorise each actor and regulate their conduct. This introductory section outlines the sources of contemporary international humanitarian law that will form the basis of subsequent discussions. In addition, it clearly delineates the two distinct contexts within which the law applies — international and non-international armed conflict — since the applicable legal regime will differ substantially, depending upon which type of conflict is in focus.

The relevant rules pertaining to international humanitarian law, which is a branch of international law, are found in treaties, customary law and the 'general principles of humanitarian law'. Humanitarian law treaties were codified much earlier that those governing other branches of international law.[1] The core of the international treaty framework is based on the four Geneva Conventions of 1949[2] and their Additional

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[1] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (Geneva) 75 UNTS 135 (22 August 1864) available at http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/120?opendocument [accessed 8 October 2012]. The first treaty was adopted in 1864. This codification has also been more consistent than other branches of International Law, with subsequent treaties replacing and expanding the content of earlier ones.

[2] The Four Geneva Conventions, namely Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) 75 UNTS 31 (12 August 1949) available at http://www.refworld.org/docid/3ae6b3694.html [accessed 11 July 2013];

Protocols of 1977.[3] Subsequent discussions in this chapter are founded upon the relevant provisions of these treaties. In addition, customary international law, which stems from the behaviour of states in conformity with norms, forms a vital source of the framework.[4] Finally, the 'general principles of law' are recognised as a source of contemporary international law and, by extension, international humanitarian law.[5] More specifically, the general principles of humanitarian law complement the other sources of international law, namely treaties and customary law.[6] A close relationship exists between international humanitarian law treaties, customary international humanitarian law and the general principles of humanitarian law. Gaps in one are addressed by reference to the other.[7] In providing a basis for understanding the identity of PMSCs, this chapter focuses primarily on the core treaties. These have elaborate provisions on combatants and civilians. They have also been widely ratified and often reflect customary international law. In addition, the treaties provide more certainty in the unstable context of armed conflict where customary law may be

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Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) 75 UNTS 85 (12 August 1949) available at http://www.refworld.org/docid/3ae6b37927.html [accessed 11 July 2013]; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) 75 UNTS 135 (12 August 1949) available at http://www.unhcr.org/refworld/docid/3ae6b36b4.html [accessed 8 October, 2012]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) 75 UNTS 287 (12 August 1949) available at http://www.refworld.org/docid/3ae6b36d2.html [accessed 11 July 2013].

[3] Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Victims of International Armed Conflicts (Additional Protocol I) 1125 UNTS 3 (8 June 1977) available at http://www.refworld.org/cgi–bin/texis/vtx/rwmain?docid=3ae6b36b4 [accessed 1 October 2012]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non–International Armed Conflicts (Additional Protocol II) 1125 UNTS 609 (8 June 1977) available at http://www.refworld.org/docid/3ae6b37f40.html [accessed 11 July 2013].

[4] Article 38(1)(b) of the Statute of the International Court of Justice (ICJ) (18 April 1946) United Nations, available at http://www.refworld.org/docid/3deb4b9c0.html [accessed 23 June 2013] provides the definition of custom. There are particular difficulties when it comes to international humanitarian law where practice could be assumed to mean actual engagement in war. To identify general practice, statements on the behaviour of belligerents as well as military manuals are important, though not conclusive.

[5] These are derived from common principles that exist across domestic legal regimes, eg, good faith, proportionality and others are based upon logic rather than a specific legal rule.

[6] J Pictet & International Committee of the Red Cross *Principles of International Humanitarian Law* (1967) 13–27: such as the principles of distinction, necessity or prohibition of unnecessary suffering. They are not a separate source but instead are evident in the treaties, customs and general principles of the law.

[7] J M Henckaerts 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87(6) *International Review of the Red Cross* 179 at 201. Treaties codify customary law, with gaps in one being addressed by reference to the other. Difficulties of inferring *opinio juris* and *lato senso* in the context of armed conflict are resolved by reference to treaties.

contentious. That said, if the treaties are silent, or carry ambiguous meanings, discussions regarding custom and general principles of law remain relevant. [8]

The rules of international humanitarian law apply only during armed conflict. They do not govern situations, such as internal disturbances and tensions, where violence may be present but armed conflict has not broken out. Such situations remain within the scope of human rights law and the domestic legal regime. Two types of armed conflicts feature in the treaties: international armed conflicts and non-international conflicts. International armed conflicts occur between two or more states.[9] Additional Protocol I broadened this category to include wars of national liberation.[10] Non-international armed conflicts occur among various factions (which may include the state) within the territory of a given state. The majority of the treaty provisions apply to international armed conflicts.[11] The rules applicable to PMSCs will therefore differ in relation to the context of the armed conflict in which they are contracted to provide their services.

This chapter builds upon previous discussions by outlining how the approach taken by international humanitarian law towards the regulation of the behaviour of persons in zones of conflict is determined by the identity of an actor found on the battlefield. The first part demonstrates this approach with respect to international armed conflicts, where the treaties make express reference to two distinct groups, namely, combatants and civilians. Discussions therefore look at the criteria that delineate the boundaries between these two exclusive categories. The classification of an actor is not an end in itself, but rather a route towards establishing accountability through a set of rights and responsibilities that attach to private contractors depending on the

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[8] Martens Clause: First recognised in Nuremburg (The Trial of the German Major War Criminals, Proceedings of the International Military Tribunal Sitting Nuremburg, Germany, HMSO, London, 1950, Part 22, 450). The ICJ invoked those considerations in the *Corfu Channel Case (United Kingdom v. Albania): Merits* International Court of Justice (ICJ) (9 April 1949) available at http://www.refworld.org/docid/402399e62.html [accessed 23 June 2013]; Y Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (2010) 8–9. Martens Clause provides for the application of 'elementary considerations of humanity' in special situations where treaties and customary international humanitarian law may not apply.

[9] Common Article 2 to the Four Geneva Conventions of 12 August 1949 supra note 2.

[10] Article 1(4) of Additional Protocol I supra note 3.

[11] Five major treaties (the Four Geneva Conventions and Additional Protocol I) apply to international armed conflicts and contain over 600 elaborate articles. In contrast, less than 20 articles — Common Article 3 to the Geneva Conventions and those found in Additional Protocol II — are applicable to non–international armed conflicts.

category to which they belong. This relationship between identity and rights and responsibilities is discussed further below. A similar trajectory is taken in relation to non-international armed conflicts. The discussions here are to highlight the critical difference between international armed conflicts and in this context, where there is no equivalent reference to the combatant.

An attempt will be made to tie the conclusion that emerges from the criteria that inform the classification of actors in international armed conflicts to the historical concepts discussed earlier in Chapter Two. These concepts inform the dividing line between combatants and civilians. This chapter will also explore the challenges that arise where persons performing combatant-like functions are classified as civilians under the law. This chapter will serve as a precursor to Chapter Five, in that it briefly articulates the challenges that arise out of the participation of civilians in armed conflict.

3.2 INTERNATIONAL ARMED CONFLICTS

Common Article 2 of the Geneva Conventions provides that an international armed conflict involves a confrontation between two or more states.[12] In these instances the critical element of the definition of international armed conflict is the crossing of a recognised territorial border by organised armed groups based in a foreign territory, whether or not they belong to an effective government.[13] It is therefore quite possible, when this element is either affirmed or nullified, for a non-international armed conflict to evolve into an international one, or vice-versa.[14] By virtue of Common Article 2(1), the Geneva Conventions apply to 'all cases of declared war or

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[12] Examples of such conflicts in the past twenty years include the Gulf War of 1990–1991; the 1990s conflicts in the DRC which saw five states drawn into that territory; the Ethiopia–Eritrea war of 1998–2000; the wars fought in the Balkans when the former Yugoslavia disintegrated during the 1997 to 1999 period; the US invasion of Afghanistan in 2001; the US invasion of Iraq in 2003; the Israel–Lebanon conflict of 2006; and the Ethiopian and Kenyan invasions of Somalia during the past decade.

[13] *Malaysia, Osman v Prosecutor* Law Reports Volume 1 Appeal Cases (1969) 430– 55; 'Israel, Applicability of the Convention to Occupied Territories' in M Shamgar 'The Observance of International law in the Administered Territories' (1971) 1 *Israel Yearbook on Human Rights* 262–277.

[14] E Wilmshurst (ed) *International Law and the Classification of Conflicts* (2012) 470. At the onset of the invasion by United States forces in 2001, Afghanistan was the scene of an international armed conflict. Later on the conflict became a non–international armed conflict.

any other armed conflict, which may arise between two or more High Contracting Parties, even if the state of war is not recognised by one of them'.[15]

Since the adoption of Additional Protocol I, international armed conflicts are not limited to inter-state confrontations; they also encompass conflicts between states and certain non-state actors. Article 1(4) of the Additional Protocol I extends the field of application in Article 2 to conflicts between government forces and non-state actors fighting in the exercise to their right to self-determination. Situations targeted by Article 2 can include[16] armed state-to-state conflicts as well as conflicts in which non-state actors are fighting against colonial domination, alien occupation and racist regimes in exercise of their rights to self-determination as enshrined in the United Nations (UN) Charter[17] and the Principles Concerning Friendly Relations among States.[18]

Finally, it should be mentioned that the determination of what constitutes an international armed conflict has been complicated by situations where a state provides external support to one of the parties, or alternatively, where multinational forces enter a territory embroiled in an internal conflict pursuant to a peace enforcement mandate. The first instance, which has been referred to as the internationalisation of a conflict, demands evidence of external support even though

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[15] *The Brig Amy Warwick, The Schooner Crenshaw, The Barque Hiawatha, The Schooner Brilliante* Supreme Court of the United States ('*The Prize Cases*') 67 US 635 (1982).

[16] Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May – 12 June 1971, Report on the Work of the Conference, ICRC, Geneva (August 1971) 119 para 601 *Prosecutor v Dusco Tadic´* International Criminal Tribunal for the Former Yugoslavia (ICTY) (*Appeal Judgement Case*) No IT–94–1–A (15 July 1999) paras 67–70, 96, available at http://www.refworld.org/docid/40277f504.html [accessed 11 July 2013]; *The Prosecutor of the Tribunal Against Jean–Paul Akayesu* International Criminal Tribunal for Rwanda (ICTR) (*Sentencing Judgment*) ICTR–96–4–T (2 October 1998) para 601, available at http://www.refworld.org/docid/402790524.html [accessed 11 July 2013]; *The State v Sagarius and others* South West Africa Division South Africa Law Reports Volume 1 (1983) 833–838.

[17] Charter of the United Nations (UN Charter) 1 UNTS XVI (24 October 1945) available at http://www.refworld.org/docid/3ae6b3930.html [accessed 11 July 2013].

[18] UN General Assembly Resolution 3103 (XXVIII) on the Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes A/Res/3108 adopted on 12 December 1973; UN General Assembly Resolution 2465 on the Declaration on the Granting of Independence to Colonial Countries and Peoples A/Res/2465, adopted on 14 December 1970; Declaration of Principles of International Law Concerning Friendly Relations and Co–operation Among States in Accordance with the Charter of the United Nations (Principles Concerning Friendly Relations Among States) (24 October 1970) available at http://www.refworld.org/docid/3dda1f104.html [accessed 11 July 2013]

the leading cases on the issue, *Prosecutor v Dusco Tadic'*[19] and the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),*[20] indicate that there is divergence of opinion as to where the threshold of such support lies.[21] That said, the approach taken regarding the applicable treaties in all cases of external interference in a given state's territory, whether by a state or multinational state forces, is to differentiate between those cases where such forces confront government forces or fight against rebels.[22] The law pertaining to international armed conflicts is applicable where foreign support clashes with government forces. If the fighting is with non-governmental groups, it is the law of non-international armed conflict that applies.[23]

International armed conflicts are governed in detail by the following treaties:

- The Hague Regulations concerning the Laws and Customs of War on Land as annexed to the Fourth Hague Convention of 1907;[24]
- The four Geneva Conventions and;
- Additional Protocol I.

These treaties strive to achieve a delicate balance between facilitating the realisation of the military mission of belligerents and minimising human suffering by ensuring that warring parties conduct operations within certain humanitarian boundaries.[25] This assumes that the objective of belligerents is to overpower the enemy and win

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[19] *Tadic* supra note 16 para 67–70.

[20] *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua vs. United States of America) ICJ (*Nicaragua Case*) (14, 27 June 1986) available at http://www.icj–cij.org/docket/index.php?sum=367&p1=3&p2=3&case=70&p3=5 [accessed on 30 January 2013].

[21] C Gray 'Bosnia and Her e govina: Civil War or Inter–State Conflict Characterization and Consequences' (1996) 6 *British Yearbook of International Law* 155–197; T Meron 'Classification of Armed Conflict in the Former Yugoslavia, *N g* ' Fallout' (1998) 92(2) *American Journal of International Law* 236–242.

[22] *Tadic* supra note 16 para 72; *Nicaragua* supra note 20 para 219; H P Gasser 'Internationali e d Non–International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon' (1983) 33(1) *American University Review* 145–161; D Schindler 'The Different Types of Armed Conflicts According to the Geneva Conventions & Protocols' (1979) 163 *Collected Courses* 119–163.

[23] D Shraga 'The UN as an Actor Bound by International Humanitarian Law' in L Condorelli, A M La Rosa and S Scherra (eds) *The United Nations and International Humanitarian Law* (1996) 333.

[24] Hague Convention (IV) Respecting the Laws and Customs of War on Land (Hague Convention IV) and Its Annex: Regulations Concerning the Laws and Customs of War on Land (Hague Regulations) (18 October 1907) available at http://www.refworld.org/docid/4374cae64.html [accessed 12 July 2013].

[25] Further the core treaties of IHL enjoy an almost universal ratification, and have been domesticated equally as widely, including recently in South Africa through the Implementation of the Geneva Conventions Act 8 of 2012 M Sassòli & A Bouvier (eds) *How Does Law Protect In War* (1999) 67.

the war, and that this is sufficiently met through the elimination or neutralisation of the military threat posed by the adversary.[26] From this it becomes necessary to distinguish between those forces whose attack constitutes an advancement of the military mission who thus ought to be attacked from those who are not advancing a military agenda, but who ought to be protected from attack.[27] This dichotomy is reflected in the distinction between combatants and civilians. The central distinguishing characteristic is that combatants have the right to participate in direct hostilities and civilians do not.[28] The basic principle that runs throughout these treaties is the distinction between combatants and civilians.[29] This vital distinction forms the cornerstone of the law's approach towards regulating the actions of actors by apportioning rights and responsibilities in terms of their behaviour during armed conflict.[30] The following sections explore the relevant treaty provisions regarding who is a combatant, and who is a civilian.

3.2.1 Combatants

The parameters of who is a combatant developed over time as evidenced in the development of international treaties. The genesis of these treaties, the Brussels Conference of 1874,[31] took place against the backdrop of the Franco-Prussian War of 1870-1871.[32] It was the first multilateral conference to consider the law of land

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[26] Dinstein op cit note 8 at 2–3, 4–7.

[27] D Fleck (ed) *The Handbook of International Humanitarian Law* (2008) 35–41. The whole system of humanitarian law is based upon the concept of distinction and will break down with any blurring of the combatant/civilian dichotomy.

[28] A Roberts & R Guelff (eds) *Documents on the Laws of War* (2000) 27. The rationale of the laws of war is that armed hostilities should be between organised armed forces and not entire societies, hence the efforts to maintain a distinction between legitimate military targets from civilian objects and people not involved.

[29] J M Henckaerts, L Doswald–Beck, C Alvermann & International Committee of the Red Cross (eds) *Customary International Humanitarian Law – Volume I: Rules* (2005) 3–19.

[30] J M Spaight & F D Acland *War Rights on Land* (1911) 37.

[31] Brussels Declaration Concerning the Laws and Customs of War, Brussels (27 August 1874) available at http://www.icrc.org/ihl/INTRO/135 [accessed on 12 October 2012]. Convened by Tsar Alexander II to codify and humanise the customs of land warfare, Article 11 of this Declaration distinguished combatants and non–combatants. Though the Declaration was never adopted, it may be seen as an addition to customary law. See the comments by the Government of the Solomon Islands 'Written Observations on the Request by the General Assembly for an Advisory Opinion' (1996) 7 *Criminal Law Forum* 299 at 307.

[32] 'A Treatise on the Juridical Basis of the Distinction between Lawful Combatant and Unprivileged Belligerent' Judge Advocate General's School, (1959) 31, 6 available at http://www.loc.gov/rr/frd/Military_Law/pdf/treatise.pdf [accessed on 21 September 2012].

warfare as well as the question of who should be considered a combatant. Although it did not result in a binding treaty among states, its text was carried forward into the First Hague Peace Conference of 1899 and subsequently into the Hague Convention on the Laws of War on Land of 1907.[33] Combatancy was applied to armies, militia and volunteer corps that met specific requirements.[34] These requirements were incorporated into Hague Convention IV of 1907, which remains binding today. Article 1 and Article 2 of the Hague Regulations annexed to the Hague Convention IV address the question of combatancy.[35] It is useful to reproduce these Articles in their fullness, starting with those of Hague Convention IV, in order to build a constructive understanding of the persons that may be considered to be combatants.

> Article 1
>
> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army or form part of it, they are included under the denomination 'army'.
>
> Article 2
>
> The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

Hague Convention IV codified the law taking into account the experiences that emerged from the Franco-Prussian War.[36] The provisions of Article 1 made it clear that the members of a state's armed forces were combatants. In addition, Article 2 brought to an end the debate in the Brussels and Hague Conferences regarding the status of irregular forces. The criteria set out here represented a compromise between

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[33] Convention with Respect to the Laws and Customs of War on Land (1899 Hague Convention) 32 Stat 1803 (29 July 1899).
[34] Article 1 of the Hague Convention
[35] Hague Regulations supra note 24.
[36] H Strachan & S Scheipers (eds) *The Changing Character of War* (2011) 403.

smaller countries that wished to see irregular forces operating outside the armed forces included as combatants, and powerful states opposed to such an extension that were aware of the menace that such forces could pose to conventional military techniques.[37] Combatancy to such forces was restricted to those who complied with the requirements specified therein. A wider concession was granted under Article 2 to *levee en masse,* a group that remained narrowly defined to include civilians who represented the last line of defence of a state that was experiencing an invasion but had no time to formally incorporate such civilians into its armed forces. These provisions are considered as part of customary international humanitarian law and thus binding upon those states that are not party to the Hague Convention IV.[38]

The provisions of Articles 1 and 2 of the 1907 Hague Convention IV were replicated in Article 4 of the Geneva Convention III outlining the groups of persons entitled to be considered as prisoners of war.[39] The focus of this treaty on the protection of prisoners of war intersected with the legal regime under the law of the Hague Convention, which sought to govern the conduct of hostilities by outlining who may fight, their means/methods of warfare and the relationship between such belligerent forces (particularly the right to accord opponents prisoner of war status). Article 4 is an attempt to reflect the wish of states to extend humanitarian protection of prisoner of war status to a wider class of individuals, while at the same time preserving the limits on combatancy.[40] The categories of those considered as prisoners of war go beyond combatants to include other persons who, owing to their proximity with combatants, deserve similar treatment upon capture.[41] For the purposes of this section, only those groups that are combatants are highlighted.

> Article 4A (1)-(3) Geneva Convention III
>
> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the

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[37] G I A D Draper 'The Status of Combatants and the Question of Guerrilla Warfare' (1971) 5 *British Year Book of International Law* 173 at 181.

[38] The International Military Tribunal at Nuremburg held that the rules of Hague Convention IV were recognised by all civilised nations as customs of war. *International Military Tribunal at Nuremburg Annual Digest and Reports of Public International Law Cases Case No 92* (1946) at 206.

[39] Article 4 of Geneva Convention III supra note 2.

[40] Draper ibid at 190.

[41] Commentary to Article 4 A (2) of the Geneva Convention III in J S Pictet, J de Preux, F Siordet, A P de Henney & International Committee of the Red Cross (ed) *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (1960) 51–56.

> following categories, who have fallen into the power of the enemy:
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
> (a) That of being commanded by a person responsible for his subordinates;
> (b) That of having a fixed distinctive sign recognizable at a distance;
> (c) That of carrying arms openly;
> (d) That of conducting their operations in accordance with the laws and customs of war.
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power.
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

These provisions reiterate the thinking within the Hague Regulations to include members of the armed forces, irregular forces (militia and volunteer forces) that meet specified conditions and inhabitants of territories that spontaneously take up arms to resist an invasion by enemy forces.[42] In addition, Article 4 added to the group of irregular combatants individuals who had fallen into the power of the enemy on the basis of the experience of partisan activity that emerged during World War II, when belligerents resorted to using organised resistance forces operating inside or outside their territories.[43] In doing so, they affirm the trend towards recognising certain irregular forces whose reality was affirmed by developments during World War II which were characterised by pandemonium and disorder as governments of conquered territories ceased to function, and various militia and organised formations continued armed resistance against occupying powers.

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[42] Geneva Convention III does not abrogate the provisions of the Hague Regulations – see 'Final Record of the Diplomatic Conference of Geneva of 19 9' Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims, Geneva (21 April–12 August 1949) Vol II-B, 267-68; J L Kun 'The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision' (1951) 5 *The American Journal of International Law* 37 at 61.

[43] Provided that these complied with the four criteria introduced by Article 2 of the Hague Regulations supra note 24.

The law of war with regard to combatancy did not cease to evolve with the Geneva Conventions. The need to recognise additional realities in relation to the involvement of irregular forces induced further expansion as to who qualified to be a combatant. These realities were captured by the new provisions reflected in Article 43 and Article 44 of Additional Protocol I, both of which operate concurrently alongside the provisions of Article 4 of Geneva Convention.

> Article 43
>
> 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 recognised by an adverse Party. Such armed forces shall be subject to an internal disciplinary system, which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
>
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
>
> 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

> Article 44(3)
>
> 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 such 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).

The wars of national liberation lie at the centre of the provisions within Articles 43 and 44 of the 1977 Additional Protocol I. A different kind of irregular fighter, the guerrilla[44] began to emerge in the period preceding the adoption of Additional

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[44] A Cassese 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law' (198) 3 *University of California Los Angeles Pacific Basin Law Journal* 55 at 56, 69.

Protocol I. Formations pursuing self-determination advocated for enhanced rights under international humanitarian law. They were not insensible to the fact that guerrilla fighters frequently did not meet the qualifications laid down in Article 4 of the Geneva Convention. III Additional Protocol I extended the scope of international conflicts and the right to combatancy to include these non-state forces where they fulfilled certain conditions. Furthermore, Article 44(3) relaxed the requirements for combatancy to accommodate these guerrillas, recognising that because of the nature of their operations, they could not always comply with the strict requirements of distinguishing themselves as provided for under Article 4 of Geneva Convention III.[45] This development, and the plenipotentiary discussions that accompanied Additional Protocol I, demonstrated the tension between calling for strict requirements for combatancy that suited traditional armed forces, that had previously dominated past conflicts, as well as for more relaxed criteria to draw into the framework of the laws of war new irregular forces that were emerging.[46]

In summary, the parameters of combatancy are set out in the provisions of Article 4 of Geneva Convention III[47] and, Articles 43 and 44 of Additional Protocol I, which remain concurrently applicable to international armed conflicts. From a collective reading of these provisions, it is possible to deduce that in order to be a combatant, one must fall under one of the following groups:

1. A member of the armed forces of a party.[48]
2. A member of irregular armed forces (volunteer or militia group) who belongs to one of the belligerent parties and who is part of a group that fulfils the following conditions: are under responsible command, wear a distinct sign, carry arms openly, respect the laws and customs of war.[49]
3. A member of irregular armed forces,[50] who is under a command responsible to a party and subject to an internal disciplinary system and who, at the time

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[45] H P Gasser 'A Brief Analysis of the 1977 Geneva Protocols' (1985–1986) 19 *Akron Law Review* 525 at 530.
[46] Pictet et al ibid at 41.
[47] Article 1 & 2 of the Hague Regulations supra note 24, are replicated in the provisions of Article 4 of Geneva Convention III.
[48] Article 1 of the 1907 Hague Convention IV supra note 24; Article 4A(1) of the 1949 Geneva Convention III; Article 41(3) of Additional Protocol I.
[49] Article 1 of the 1907 Hague Convention IV; Article 4A(2) of the 1949 Geneva Convention III supra note 2.
[50] Article 43 of Additional Protocol I supra note 3.

of his/her capture, [51] normally distinguishes himself/herself from civilians,[52] or, in exceptional situations distinguishes himself/herself by carrying arms openly during military engagement, and while remaining visible to the enemy.

4. Inhabitants of a non-occupied territory that spontaneously take up arms to resist invading forces, or what is commonly referred to as *levee en masse.*[53]

The above discussion has provided a brief background as to how the treaties have evolved to bring about these distinct groups. The next section expounds on each of the groups, briefly highlighting the specific requirements to be met in order to fall within them.

3.2.1.1 Members of the Armed Forces

As mentioned earlier, both Article 3 of the Hague Regulations and Article 4 of Geneva Convention I make it clear that 'members of the armed forces' are combatants. There is, however, no definition of the term 'armed forces' in these provisions. At the time of its use in Article 3 of Hague Convention IV, it was generally agreed that the term signified 'a country's military forces, especially army, navy and air force'.[54] Delegates to the conference that preceded the adoption of Geneva Convention III felt that, since this aspect had not raised any concerns during the Second World War, there was no need to define the term further,[55] and the reference to it in Article 4A(1) of Geneva Convention III was consistent with Article 3 of Hague Convention IV. This denoted a coordinated group of people under arms

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[51] Article 44(5) of Additional Protocol I supra note 3.
[52] Article 44(3) of Additional Protocol I supra note 3.
[53] Article 4 A (6) of Geneva Convention III supra note 2.
[54] Commentary on Article 4 A (1) in Pictet et al op cit note 41 at 51–52; G P Noone 'The History and Evolution of the Law of War Prior to World War II' (2000) 7 *Naval Law Review* 176 at 207; M Bothe, K J Partsch & W A Solf *New Rules for Victims of Armed Conflicts of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982) 232–240.
[55] 'Final Record of the Diplomatic Conference of Geneva of 19 9' Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims, Geneva (21 April–12 August 1949) Vol II-B, 267-268, available at http://www.loc.gov/rr/frd/Military_Law/RC–Fin–Rec_Dipl–Conf–1949.html [accessed on 12 October 2012]; Report on the Work of the Conference of Government Experts (1947) 106.

and signified a country's military forces, especially army, navy and air force.[56] The definitional lack of the term within Article 4A(2) of Geneva Convention III is partially addressed by Article 43(1) of Additional Protocol I,[57] in which a circular definition of 'armed forces' is given as consisting of 'organised armed forces, groups and units … under a command responsible … and subject to an internal disciplinary system, which … shall enforce [international humanitarian law]'. 'Organised' and 'under a command responsible' has been taken to mean that the armed forces' engagement is of a collective character in which the members of units form a part of a hierarchy in order to be subordinate to a responsible command.[58] The ICRC (International Committee of the Red Cross) Commentary to the Article also makes it clear that in the light of this reasoning, and since the responsible command is linked to 'a Party', it is not possible to wage a private war, for example, through terrorist methods associated with hostage taking that has no direct link to military operations.[59]

Article 43(1) of Additional Protocol I maintains that the prerogative of the parties to the conflict, mainly states, is to lawfully raise and deploy armed forces as their agents in their international relations. This reflects the basic relationship in international law predominant at that time between the state (as a subject of international law) and its armed forces (as its organ), and the members of armed forces (as combatants).[60] There is a lack of explicit detail around the process of becoming a member of armed forces. In a sense, states have the discretion to determine who falls within their national armed forces. That said, it is generally agreed that formal incorporation is the decisive criterion for creating a legal

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[56] Commentary on Article 4 A (1) in Pictet et al op cit note 41 at 51–52; UN Convention on the Safety of UN Personnel and Associated Personnel, UN Doc. Annex to Resolution 49/59 (9 December 1994) 358; US Military Assistance Command, Vietnam, Directives No. 381–346, Military Intelligence: Combined Screening of Detainees, 27 December 1967 in H S Levie (ed) *International Studies: Documents on Prisoners of War* (1979) 748–751.

[57] C Pilloud, Y Sandoz, C Swinarski & International Committee of the Red Cross (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) para 1676. Article 4 A (4) of Geneva Convention III is still of relevance as Additional Protocol I did not set it aside.

[58] ICRC 'Third Expert Meeting on the Notion of Direct Participation in Hostilities' Summary Report, Geneva (October 2005) 46; Pilloud et al ibid at 515–527.

[59] Pilloud op cit note 57 at 512–515.

[60] K Ipsen 'Combatants and Non–Combatants' in Fleck op cit note 27 at 66.

relationship between the state and its armed forces.[61] Each state sets the conditions under which such formal incorporation arises, so that individual persons are integrated into the structure of its armed forces. In most cases, soldiers are formally recruited, subordinated under military discipline, command and control, and vested with combat status by a sovereign act of jurisdiction.[62] In short, incorporation requires a formal affiliation that is sanctioned by domestic laws of the state.

While the law gives a state some flexibility as to whom it may incorporate into its armed forces, it requires that the state maintain a command over its forces responsible for subordinates, discipline and respect for international humanitarian law. Some commentators read this addition to mean that the criteria applicable to militia in Article 4A(2) of Geneva Convention III, are applicable to the members of the armed forces.[63] In other words, once domestic laws have sanctioned the incorporation of individuals into the armed forces, it is assumed that those armed forces will comply with the conditions of Article 4A(2). The armed forces are essentially required to distinguish themselves, be subject to a command responsible to that party, and maintain an internal disciplinary structure that respects international humanitarian law.[64] Dinstein is in support of this position, and cites the United Kingdom case of *Mohammed Ali et al v Public Prosecutor,*[65] in which a member of the armed forces who engaged in sabotage while wearing civilian clothes forfeited his/her right to lawful combatant status.[66] Although other commentators

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[61] C Hoppe 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 *The European Journal of International Law* 989 at 991. Incorporation refers to the formal granting of regular military ranks or special commissions; C Schaller 'Private Security and Military Companies under the International Law of Armed Conflict' in T Jager & G Kummel (eds) *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects* (2006) 352; Y Sandoz, C S Zimmermann & B Zimmermann *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 515.

[62] *Military Prosecutor v. Omar Mahmud Kassem and Others* Military Court Sitting in Ramallah Israel (13 April 1969) as reported in E Lauterpacht (ed) *International Law Reports* (1971) 470–483.

[63] Y Dinstein 'Unlawful Combatants' in F L Borch & P S Wilson (eds) *International Law and the War on Terror* (2003) 105; N Berman 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (200) 3 *Columbia Journal of Transnational Law* 1 at 40.

[64] Commentary on Article 4 A (2) in Pictet et al op cit note 41 at 52–56; Commentary to Article 43 of Additional Protocol I in Pilloud et al op cit note 57 *at* 505–518; Ipsen ibid at 71.

[65] *Bin Haji Mohamed Ali and another v. Public Prosecutor* Judicial Committee of the Privy Council (UK) 1 AC 430 at 449–50 (29 July 1968 [1969]) available at http://www.icrc.org/ihl–nat.nsf/39a82e2ca42b52974125673e00508144/383128666c8ab799c1256a1e00366ad3!OpenDocument [accessed on 12 October 2012].

[66] Y Dinstein 'The Distinction Between Unlawful Combatants and War Criminals' in S Rosenne, Y Dinstein & M Tabory *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 105.

disagree,[67] it is difficult to see how the law would require anything less of the armed forces, while placing additional demands upon militia and volunteer forces. This would create an uneven battleground between combatants, a suggestion that undermines the objective of international humanitarian law of maintaining equality among belligerents. The exclusion from combatant status of certain groups, such as spies and saboteurs who may be members of the armed forces, due to the nature of their operations and how these undermine the fundamental obligation to distinguish themselves from civilian population, further supports the view that the conditions that pertain to militia are equally applicable to members of the armed force. In line with this reasoning, it has been suggested that the use of the criteria in Article 4A(2) of Geneva Convention III is indicative of what the drafters believed to be the minimum characteristics inherent in the regular armed forces of a state.[68]

3.2.1.2 Irregular Forces Fulfilling Certain Conditions

To be considered a combatant on the basis of Article 4A(2) of Geneva Convention III one must be part of a group that belongs to a party to the armed conflict and must meet the four conditions laid down therein.[69] The term 'belonging to' and 'a part of' should be contrasted in the light of the two possible ways that such irregular forces interact with a party to a conflict. In Article 4A(1) of Geneva Convention III such militia forms a 'part of' the armed forces. Under Article A(2) of Geneva Convention III the militia belongs to a party to the conflict. In the first instance, the militia or volunteer corps are incorporated into the armed forces and fall under the denomination 'army'.[70] This group need not demonstrate that they fulfil the criteria of 'belonging'. It is implicit that these individuals form part of the state's armed forces. In the second instance, they are separate and distinct from the armed forces,

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[67] See, eg, A Rogers 'Combatant Status' in E Wilmshurst & S Breau (eds) *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 114–115.

[68] Pictet et al op cit note 41 at 51–56; Bothe, Partsch & Solf op cit note 54 at 234–235.

[69] Commentary to Article 4A(2) of Geneva Convention III in Pictet et al op cit note 41 at 51–55.

[70] M N Schmitt 'War, International Law, and Sovereignty: Re–evaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2005) 5 *Chicago Journal of International Law* 511 at 525–529.

but 'belong to a [p]arty' to the conflict, requiring one to elaborate on the meaning of this phrase.[71]

'Belonging to a party' distinguishes those individuals that are fighting on behalf of a state and those who are simply fighting on a territory where an international armed conflict may be taking place, without an attachment to any of the belligerent parties. Two approaches have been taken to determine whether such forces belong to a party. The first is a low threshold test where 'belonging to a party' amounts to confirming whether the state expressly or tacitly accepts that the forces are fighting on its behalf.[72] The test of 'belonging' revolves around an examination of the motivations or intention of the group and the reaction of the state to ascertain whether the group is fighting for the state, and the state expressly or tacitly accepts this fact. The second approach in the case developed the 'overall control' test, and used this to determine 'belonging'.[73] According to this test the nature of the link between a state and an armed group for the purposes of 'belonging' required the state party to be in control of the militia group, and this group to exhibit a sense of ' dependence and allegiance' by the group to the state. The first approach is much easier to fulfil since it demands only acceptance (tacit or express) by the state and not 'overall control' as understood in the *Tadic* case.[74]

The approach adopted by the ICTY (International Criminal Tribunal for the former Yugoslavia) ruling in the has been criticised as mixing tests designed for different purposes. In this case the primary task of the Tribunal was to qualify an armed conflict as international or non-international for the purposes of determining the applicable treaties. In developing a test for these purposes, it relied upon the ICJ

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[71] The text adopted requiring this condition is a reflection of what was agreed in the Special Committee meeting that deliberated on the need for such militia to 'belong' to a party to the conflict, see Final Record of the Diplomatic Conference of Geneva of 1949, Vol II-A, 425–426 & 478–479; The Report on the Work of the Conference of Government Experts (1947) 106-107, saw this 'belonging' or association with a state party as a way to bring these forces legally within the scope of the conventions; Schmitt ibid at 525–529.

[72] K del Mar 'The Requirement of "Belonging" under International Humanitarian Law' (2010) 21(1) *European Journal of International Law* 105 at 111–113; W T Mallison & S V Mallison 'The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict' (1977) 9 *Case Western Reserve Journal of International Law* 39 at 50–52.

[73] supra note 16 para 94.

[74] 'Overall control' amounts to control exercised by a state over groups to the extent that the state 'organises, coordinates or plans the military actions' of the groups. *Tadic* supra note 16 para 127.

Nicaragua case, which addressed the question of state responsibility, and the 'effective control' test adopted in this case with its own 'overall control' test. In this sense, the approach adopted in convolutes the requirements for 'belonging' necessary for ascertaining the classification of actors as combatants, with a test related to the qualification of conflicts under international humanitarian law.[75] It is more likely that the appropriate test for ascertaining combatancy is that outlined in the first approach.[76] The ICRC Commentary to Article 4(B) of Geneva Convention III supports this approach. According to it, resistance movements were assumed to fight 'on behalf' of a party if a *de facto* relationship with the party existed.[77]

In summary, therefore, the requirements of 'belonging' will be met in the case of individuals who are a part of an armed group, which has a *de facto* relationship with a state.[78] This *de facto* relationship can be discerned where such groups support or display a degree of allegiance to the state, and such support or allegiance is expressly or tacitly accepted by the state.[79] The *de facto* relationship with the state must, however, be balanced by a degree of independence of the armed group from the state so as not to be considered as a part of its armed forces.[80] Some scholars have argued this to mean the group's showing a degree of dependence upon, and support for the state, but a lack of duty of allegiance to it.[81]

Being a part of an irregular force that meets the requirements of 'belonging' is not enough for an individual to have access to the right to combatancy. In order to

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[75] A Cassese 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649 at 650–651.

[76] An example where the requirement of 'belonging' was considered by a court not to have been sufficiently demonstrated is the case of *Military Prosecutor v. Abu–Kabar et al.* Sh/330/68 2 SJMC 45 (1972), reprinted in 7 *Israel Yearbook on Human Rights* (1977) 9, at 265—266. The court found that in order for an armed group to be considered an 'organi ed resistance movement' it had to show that it was an 'organi ed resistance group that belong[ed] to a Party to the armed conflict'.

[77] Pictet et al op cit note 41 at 57.

[78] Pictet et al op cit note 41 at 52.

[79] R Kolb *Ius in Bello* (2003) 160.

[80] As discussed in this Chapter (section 3.2.1.2) militia may be a part of the state's armed forces (Article (A)(1) of Geneva Convention III) or 'belong to' but independent of the state (Article A(2) of Geneva Convention III). In the former case they are automatically considered as part of the organs of the state.

[81] Draper op cit note 37 at 36–37.

qualify as combatants, such individuals must meet the additional criteria of Article 4A(2) of the 1949 Geneva Convention III,[82] namely:

- Belong to an organised group;
- Being commanded by a person responsible for subordinates;
- Have a fixed distinctive sign;
- Carry arms openly; and
- Conduct operations in accordance with the laws of war.

Commentators have been divided over which of these conditions ought to be met by the entire group, and which of them ought to be fulfilled by individuals. It is suggested that the first two conditions (that is, being commanded by a person responsible for subordinates and conducting operations in accordance with the laws of war) are to be met by the group collectively.[83] The last three conditions (that is, having a fixed distinctive sign and carrying arms openly and conducting operations in accordance with the laws of war are to be met by both the individual and the group.[84] This distinction is important, in the light of the legal effect upon the individual of the failure of the group to meet some of the conditions. For the purposes of this section, each of these conditions is examined below.

a) Organised Group

Article 4A(2) of Geneva Convention III implies that such irregular forces are to be organised. Article 43(1) of Additional Protocol I takes cognisance of this and expressly introduces the term 'organised' while reiterating the principles outlined in Article 4A of Geneva Convention III.[85] 'Organised' underlies the expectation that the fighting units have a collective character and maintain some structure under a parent group.[86] Only individuals that are a part of an umbrella parent group will be able to

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[82] Mirrored in Article 1 of the 1907 Hague Convention IV.
[83] Draper op cit note 37 at 196–197.
[84] Ibid.
[85] This additions need to be viewed from the perspective that the provisions of Article 43(1) are intended to supplement those of Article 4A of Geneva Convention III, and not override them. This means that in addition to the specific conditions provided in relation to irregular forces falling under Article 4A of Geneva Convention III, these irregular forces need to be organised.
[86] W T Mallison & S Mallison 'The Juridical Status of Irregular Combatants under International Humanitarian law of Armed Conflict' Concerning International Conflicts' *Case Western Reserve*

claim combatancy. Irregular forces that operate independently of such an umbrella will have the same legal position as marauders who engage in violent acts without the control of or subjection to specific orders from an umbrella organisation. Such individuals will be debarred from combatancy, despite the fact that they may carry political motives that resonate with one of the parties to the conflict. As persons that engage in violence as individuals they will be treated as offenders of the penal provisions of the state in whose territory they operate.

b) Commanded by a Person Responsible for his/her Subordinates

The phrases 'commanded by' and 'having at their head' in Article 4A(2) of Geneva Convention III and Article 1 of Hague Convention IV, respectively, mean the same. The phrases generally mean that the units of irregular forces must be responsible to a higher authority responsible for ensuring compliance with international humanitarian law. This authority could be civilian or military, and appointed or elected.[87] While the commander does not have to be a commissioned military officer, there must be some acknowledgement of his/her position by the government of the state party in order to establish his/her 'belonging to a party'.[88] The essence of this condition is to subordinate such irregular forces to a specific authority,[89] and ensure they abide by similar standards to those expected of the members of the state armed forces.[90] Thus, the importance of this condition lies in the fact that compliance with the other conditions depends largely upon the existence of such an authority in the first place. The condition should therefore be read alongside that of Article 43(1) of Additional Protocol I which requires an 'internal disciplinary system', since the internal disciplinary regime of the group working together under these conditions guarantees the fulfilment of the other conditions in practice.

Journal of International Law 39 at 50–52.

[87] Draper op cit note 37 at 200–201.

[88] This is particularly in view of the fact that the introduction of the term in Article 43(1) of Additional Protocol makes it clear that the groups and units are 'under a command responsible to … [a state] Party for the conduct of its subordinates …'

[89] ICRC op cit note 58 at 78–81.

[90] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) 192 (Swiss Federal Political Department 1978) 26 May1977 XIV, 295, essentially such forces should possess the discipline that prevails in the military; L Oppenheim and H Lauterpacht (eds) *International Law, Volume II* (1944) 209–210; Pictet et al op cit note 41 at 61–62.

c) Fixed Distinctive Sign Recognisable at a Distance

The phrases 'fixed distinctive sign' and 'settled distinctive badge' in Article A(2) of Geneva Convention III and Article 1 of the Hague Convention IV respectively, mean the same. The requirement for a 'distinctive sign' needs to be read alongside Article 44(7) of Additional Protocol Iand its recognition of the established practice of wearing uniforms among regular combatants.[91] It is suggested that this Article reflects customary international law, affirming that members of the armed forces are expected to wear uniforms.[92] The ICRC Commentary to Additional Protocol I suggests that imposing a similar requirement on irregular forces may not have been desirable taking into account the special situation that such forces may find themselves when fighting in an occupation-like situation, where compliance in this regard would undermine their fight for self-determination.[93] Hence the compromise agreed to was to have a 'distinctive sign' in place of 'uniforms'.[94] While the requirement for a 'fixed distinctive sign' may be slightly more relaxed, the intent is the same, namely, to ensure that such forces distinguish themselves from the local civilian population as combatants, as well as from the adversarial forces. In this sense, the requirement is important because it fulfils the obligation to distinguish oneself from the civilian population and expresses the loyalty of forces to one particular party.[95] This means that the sign must be sufficiently distinct from that of the civilian population, and fixed, that is, constantly worn and not conveniently removed in order to blend with the civilian population.

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[91] T Pfanner 'Military uniforms and the law of war' (200) 86 *International Review of the Red Cross* 93. Note humanitarian law does not specifically prescribe to the wearing of uniforms but instead requires the affixing of a distinctive sign.

[92] Fleck op cit note 27 at 76.

[93] The idea is that such persons should not be treated as common criminals for simply failing to wear uniforms. See L Doswald–Beck 'Private Military Companies under International Humanitarian Law' in S Chesterman & C Lehnardt *From Mercenaries to Market the Rise and Regulation of Private Military Companies* (2007) 115–116.

[94] Pictet et al op cit note 41 at 54–55.

[95] J B Scott (trans) *The Proceedings of the Hague Peace Conferences* (1920) 107–108; D Medina 'Changing Uniforms for Changing Conflicts?' (2009) 15 (5) *Royal United Service Institute Journal* 58–62.

d) Carrying Arms Openly

This condition is essentially related to the obligation to distinguish oneself from the civilian population.[96] Combatants are expected to carry their arms openly. The obligation is also a reflection of the loyalty[97] and the sense of belonging of the individual combatant to a party to the conflict. At the minimum, the arms should be carried in a way similar to that by the regular members of the armed forces. While the requirement 'openly' should not be taken to mean that such irregular forces must always carry arms 'visibly', as there is a recognition that surprise constitutes a critical element through which war is engaged,[98] it is generally agreed that 'openly' rules out any circumstances when concealment would amount to treachery or an illegal ruse.[99] Given the diverse circumstances to which this test can be applied, the ultimate guiding factor lies in the realisation of purposes of the law of war, i.e. avoiding the suffering of the innocent civilian population.

e) Conducting Operations in Accordance with the Laws and Customs of War

The criteria required to respect the laws and customs of war arose from the need to ensure that militia are subordinate to a party to the armed conflict and abided by similar standards as those expected of the members of a state's national armed forces.[100] According to Draper, this was to ensure that militia committed to the same standards of treatment of captured soldiers belonging to the adversary.[101] 'Compliance with laws and customs of war' should be read alongside the obligation to maintain an internal disciplinary system,[102] since the existence of the one ensures

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[96] Scott ibid at 107–108.
[97] M Ruud 'The Term Combatant: An Analysis' (1985) 2 *Military Law & Law of War Review* 425 at 450.
[98] R W Tucker *The Law of War and Neutrality at Sea* (2005) 60–63.
[99] Draper op cit note 37 at 204.
[100] Oppenheim & Lauterpacht ibid at 209–210; Pictet et al op cit note 41 at 61–62.
[101] Draper op cit note 37 at 199–205; It is not unreasonable to expect an equal measure of compliance to the rules of war by militia on the basis of an interpretation of the principle of good faith laid down in Articles 26 & 31 the Vienna Convention on the Law of Treaties.,
[102] Final Record of the Diplomatic Conference of Geneva of 1949, Vol III, 58 & 62, Nos 84 & 92; Commentary to Article 43(1) of Additional Protocol I in Pilloud et al op cit note 57 at 505–18. The requirement in Article 4A(2)(d) of Geneva Convention III has been replaced by that of an internal disciplinary system in Article 43(1) of Additional Protocol I; Schmitt op cit note 70 at 523–524.

the realisation of the other. 'Compliance with the laws and customs of law' attaches to the group, meaning that all forces that meet the combatant requirements are collectively bound by international humanitarian law, irrespective of whether the individual members chose to comply with these laws.[103]

3.2.1.3 Irregular Forces in Exceptional Circumstances

The provisions of Article 44(3) of Additional Protocol I relax the extent to which irregular fighters may distinguish themselves from the civilian population during exceptional circumstances. These radical changes take into account the emergence of guerrilla fighters in the wars of national liberation in the 1960s and 1970s.[104] Article 44(3) of Additional Protocol I starts by restating the obligation upon fighters to distinguish themselves from civilians. The fighter must, at the minimum, distinguish himself/herself from the civilian population by means of appropriate attire or distinctive insignia throughout the entire military operation.[105] This may be taken to mean that such a fighter in normal circumstances of military operation would be expected to comply with the standards required to distinguish himself/herself from the civilian population, as outlined in Article 4A(2) of Geneva Convention III. The second sentence of Article 44(3) of Additional Protocol I then proceeds to relax this requirement in 'exceptional circumstances', where the fighters 'owing to the nature of hostilities' cannot be expected to distinguish themselves from the civilian population to the same extent. To this extent it raises two issues: when the exceptional circumstances for this relaxation occur; and the degree to which the obligation to distinguish oneself from civilians is relaxed.

The primary subject of Article 44(3) of Additional Protocol I is the guerrilla who, in certain exceptional situations, cannot distinguish himself/herself and still retain any chance of success. Such exceptional circumstances occur where 'owing to the nature

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[103] Draper op cit note 37 at 195–197.
[104] G H Aldrich 'Prospects for United States Ratification of Additional Protocol I to the 19 9 Geneva Conventions' (1991) 85 *American Journal of International Law* 1–20.
[105] Pilloud et al op cit note 57 at 528; *Ex Parte Quirin Et al* Supreme Court of the United States 317 US 1 (19 2) 1; W H Ferrell III 'No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict' (2003) 178 *Military Law Review* 94 at 110, 132–133; H P Gasser 'An Appeal for Ratification by the United States' (1987) 81 *American Journal of International Law* 912 at 920.

of hostilities' it cannot be expected that such combatants distinguish themselves. The phrase 'owing to the nature of hostilities' has been taken to imply circumstances such as occupation, national wars of liberation and other situations of asymmetrical warfare where the balance of power is very much in favour of one of the parties,[106] and military predicaments leave no other choice to the party but not to comply with the full obligation to distinguish oneself.

Article 44(3) of Additional Protocol I lays out minimum conditions that a combatant should respect in order to protect civilians in these exceptional circumstances. These include the obligation to 'carry his arms openly: a) during each military engagement, and b) during such a 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'. In other words, the combatant in this situation does not need to affix a distinctive sign or decorate a uniform. All that is required of him/her is that he carries his arms during the battle itself — whether this is in offensive or defensive military engagements. During offensive action the combatant must incontestably carry his/her arms openly (particularly when surrounded by civilians).[107] This, however, does not rule out ambushing an adversary under the camouflage of a natural or artificial environment.[108] In terms of the obligation to be visible, a combatant should know that he/she is visible to the adversary and thus the obligation to carry arms will only apply when they are in the range of the natural vision of an adversary (e.g. where the guerrilla can open fire and his/her adversary is immediately threatened).[109] The acceptance and recognition of this risk distinguishes such fighters from terrorists, who deliberately conceal their arms and identity prior to launching an attack.[110]

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[106] Gasser ibid at 106; G Cadwalader 'The Rules Governing the Conduct of Hostilities in Additional Protocol I to the Geneva Conventions of 1949: A Review of Relevant United States References' (2011) *Yearbook of International Humanitarian Law* 134 at 136–140.
[107] Pictet et al op cit note 41 at 52–60; Ferrell III ibid at 110, 132–133; Gasser op cit note 106 at 920.
[108] Pictet et al op cit note 41 at 52–60; Draper op cit note 37 at 202–205. This does not include ambushing the enemy in civilian clothing which would be considered as perfidy.
[109] A J Roach 'Ruses and Perfidy Deception during Armed Conflict' (1991) 23 *University of Toledo Law Review.* 395 at 403–410, 418.
[110] *Pius Nwaoga v. State* Nigeria Supreme Court (3 March 1972) International Law Reports (1972) 494–497; *Malaysia, Osman* supra note 13 para 430–455*;* Aldrich op cit note 105 at 16.

3.2.1.4 *Levée en Masse*

According to Article 4A(6) of Geneva Convention III, inhabitants of a non-occupied territory who spontaneously take up arms to resist invading forces qualify for combatant status. This is a last-ditch defence by a state in danger of being overrun by an enemy and with no time to organise and incorporate its civilian population into its armed forces within the meaning of Article 4A(2) of Geneva Convention III. In this sense, participants in a *levée en masse* qualify as the only armed actors excluded from the civilian population, while at the same time lacking the necessary organisation, command and distinctive attire/insignia to qualify as either armed force or militia forces.[111] They are therefore neither civilians nor members of the armed forces.

Due to the spontaneous nature of the occurrence, the *levee en mass* can be only for a brief period before the state authority is either defeated or able to duly incorporate them into its armed forces.[112] Though included in Article 4A of Geneva Convention III, the phenomenon of *levee en mass* hardly occurred during World War II. It is of little significance today where such a spontaneous uprising is unlikely in the face of an invasion employing modern weaponry.[113]

3.2.2 Civilians

The forgoing discussion makes it clear that combatants are made up of individuals who are either a part of the armed forces,[114] irregular forces that fulfil the four criteria laid out in Article 4A(2) of Geneva Convention III,[115] irregular forces who under exceptional circumstances comply with the minimum conditions to distinguish

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[111] Final Record of the Diplomatic Conference of Geneva of 1949, Vol III, 58-59; R R Baxter 'So–Called Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs' (1951) 28 *British Year Book of International Law* 323 at 343.

[112] Pictet et al op cit note 41 at 67–68; Omar Mahmud Kassem and others supra note 63 para 470–483.

[113] This view should be contrasted with that in ICTY IT–03–68–T para 136, suggesting that the term is still relevant today.

[114] Chapter 3 (section 3.2.1.1).

[115] Chapter 3 (section 3.2.1.2).

themselves from civilians[116] and *levee en masse.*[117] While international humanitarian law provides elaborate criteria to define which persons fall within the bracket of combatants, it does not define civilians. Instead, and in keeping with the desire to maintain two mutually exclusive classes of persons, international humanitarian law defines a civilian in the negative to be any person 'who does not belong to one of the categories of persons referred to in Article 41(1), (2), (3) and (6) of [Geneva Convention III] and … Article 3 of [Additional Protocol I'. It can thus be seen that civilians are those persons who do not meet the requirements for combatancy, as described above.

This approach to defining civilians seeks to avoid the creation of a middle qualification that could potentially straddle both categories. Everyone who is not a combatant is a civilian, including unprivileged belligerents who unlawfully participate in hostilities. The complementarity of the two categories is important because it excludes people who may fight but not be fought against or others who may be attacked but not be able to defend themselves. A position where persons can be sanctioned without the privilege to retaliate would undermine the fabric of international humanitarian law.[118] There are thus no quasi-combatants that engage in hostilities while remaining protected from those hostilities or do not engage in hostilities while still being vulnerable to attack. The protection of the civilian population can only be guaranteed by providing a sharp division between combatants, whose predominant activity is to engage in direct hostilities, and civilians who are expected to refrain from engaging in such hostilities. It is in this spirit that the latter part of Article 50(1) removes any room for ambiguity by requiring that 'in case of doubt [as to] whether a person is a civilian, that person shall be considered a civilian'.

Article 50(2) of Additional Protocol I makes it clear that any number of persons defined as civilians constitute the 'civilian population'. This addition is not superfluous to the definition provided in Article 50(1), but serves as an important

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[116] Chapter 3 (section 3.2.1.3).
[117] Chapter 3 (section 3.2.1.4).
[118] Sassòli & Bouvier op cit note 25 at 159–60. Based upon the fundamental rule outlined in Article 48 of Additional Protocol I.

guiding factor in the application of the principle of proportionality in situations where the presence of non-civilians among civilians does not deprive the latter of the character of a member of the civilian population.[119] Such non-civilians may not be attacked unless necessary precautions have been taken to minimise harm to civilians in the population.

Within this broader notion of civilians, the Geneva Convention IV refers to 'protected civilians'. According to Article 4(1) of this treaty such protected civilians include 'those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals'. Thus, a protected civilian is one who finds himself/herself in the hands of an adversarial power, whether this is because they are in enemy territory or under enemy occupation. This definition of a protected civilian is in line with the traditional inter-state structure of the law where civilians belonging to the adversary were perceived as more vulnerable than other civilians within the conflict zones and deserving of additional benefits expressed in Geneva Convention IV in relation to their treatment if interned for security reasons.[120] Other civilians, such as nationals of a state not party to the Geneva Conventions, nationals of a neutral state, or a state that has normal diplomatic representation with the belligerent states and nationals of the belligerent power controlling a specified territory, are excluded from the notion of protected civilians.

3.2.3 Rights and Responsibilities of Combatants

The distinct activity undertaken by combatants in contrast to civilians is that of taking a direct part in hostilities. More particularly, combatants have the right to engage in this activity and, more specifically, lawfully to kill individual members of the adversarial forces. Only combatants have the right to participate directly in hostilities. Article 43(2) of Additional Protocol I expressly reflects this general

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[119] Article 50(3) of Additional Protocol I.

[120] In Article of Geneva Convention I, the term 'protected person' is defined in line with traditional inter–state war and does not cover persons who are in power of belligerents that they are nationals; *Prosecutor v Ivica Rajic (aka Victor Andric)* Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence International Criminal Court for the Former Yugoslavia Case No IT 9512 (13 September 1996) paras 34–37.

principle:[121]

> Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

Combatants may not be punished for their mere participation in hostilities, in situations that have come to be known as combatant privilege or 'the licence to kill or wound enemy combatants and destroy military objectives'.[122] This privilege is to provide combatants with immunity from domestic prosecution for acts committed in accordance with international humanitarian law,[123] which may constitute crimes under the national criminal law of the parties to the conflict.[124] The flip side of the right to participate in hostilities is that able-bodied, non-surrendering combatants are liable to attack by enemy combatants using lawful means and methods of warfare.[125] This is sometimes known as 'combatant attack liability'.[126] This means that members of state armed forces (except medical and religious personnel)[127] and the irregular forces outlined in Article 4A(2) of Geneva Convention III and Article 44(3) of Additional Protocol I are generally regarded as legitimate military targets unless they surrender or otherwise become *hors de combat*. They are still, however, protected against prohibited means and methods of warfare, even while fighting.

Article 4A of Geneva Convention III and Article 44(1) of Additional Protocol I state that in the event of surrender (willingly or due to becoming *hors de combat*) or capture by the enemy, combatants acquire the secondary status of prisoner of war. Article 44(1) of Additional Protocol I clearly reflects this principle: '[a]ny

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[121] R R Baxter 'The Duties of Combatants and the Conduct of Hostilities' in Henry Dunant Institute & Unesco (eds) *International Dimensions of Humanitarian Law* (1988) 108–109; G S Corn & M L Smidt 'To Be or Not to Be, That is the Question: Contemporary Military Operations and the Status of Captured Personnel' (1999) *The Army Lawyer* 14.

[122] UN General Assembly Resolution 2675 (XXV) on the Basic Principles for the Protection of Civilian Populations in Armed Conflict A/RES/2675, adopted on 9 December 1970, makes a distinction on the basis of the right of combatants to take part in hostilities; Inter–American Commission on Human Rights 'Report on Terrorism and Human Rights' OEA/Ser.L/ /II.116 Doc. 5 rev. 1 corr (22 October 2002) para 68, available at http://www.cidh.org/terrorism/eng/toc.htm [accessed on 12 October 2012].

[123] *Pius Nwaoga* [1972] 1 All Nigeria Law Reports (Part 1) 149; Commentary to Article 99 of the Geneva Convention III in Pictet et al op cit note 41 at 470 –471.

[124] Berman op cit note 64 at 9–13.

[125] A P V Rogers *Law on the Battlefield* (2004) 31.

[126] Dinstein op cit note 63 at 66.

[127] Article 4C of Geneva Convention III.

combatant, as defined by Article 43, who falls into the power of an adverse Party shall be a prisoner of war'. As a prisoner of war, he/she is entitled to be protected and treated according to the treatment given to a prisoner of war.[128] As the paragraphs that follow show the right to prisoner of war status may, however, be affected by the extent to which an individual or the irregular group that he is part of, complies with the conditions set out of for combatancy.

In the case where an individual is part of an irregular group expected to meet the conditions under Article 4A(2), the fate of the individual will be linked to the group in which he operates. The legal consequences of an individual's status will be dependent on the group's willingness to comply with conditions stipulated under Article 4A(2) of Geneva Convention III. If group members meet all the conditions all the time, but the individual fails to observe those conditions required of an individual (that is, affixing a distinctive sign, carrying arms openly and under acting in accordance with the laws of war), the individual does not lose combatant status or his prisoner of war status.[129] He/she may be the subject of a criminal trial for failure to abide by these obligations, but he/she remains a prisoner of war under post-capture trial, in the same legal position as a member of the armed forces facing a criminal charge. When, however the majority of the group fails to abide by these conditions (that is, affixing a distinctive sign, carrying arms openly and acting in accordance with the laws of war), the members of the group (or most of them) fails to access combatancy, and the individual (not being a combatant) will not be entitled to prisoner of war status.[130] Because they are not 'legal' combatants they will be exposed to the consequences that face unlawful combatants.[131]

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[128] Protected in the sense that they may not be penalised for having taken part in hostilities. Treatment refers to the various guarantees ascribed to such persons under Geneva Convention III. According to Article 4B of Geneva Convention III, Article 28(2) of Geneva Convention I, and Article 44(5) of Additional Protocol I, such combatants are entitled to both protection and treatments accorded to prisoners of war; Commentary to Article 4(A) of the Geneva Convention III in Pictet et al op cit note 41 at 505–518.

[129] If the combatant status of the group is contested the individual will be deprived of prisoner of war status, see Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) 192 (Swiss Federal Political Department 1978) 26 May1977, XIV 333, CDDH/III/SR33 para 72 and 361-362; Draper op cit note 37 at 197–199.

[130] Draper op cit note 37 at 197–199.

[131] Chapter 3 (section 3.5.3).

With respect to guerrilla forces that access combatancy under the second sentence of Article 44(3), a different approach to prisoner of war status will arise between those individuals that fall under the first sentence, that is, those operating under ordinary circumstances and under a normal obligation to distinguish themselves from civilians (as expected of regular and irregular forces under Article 4A of Geneva Convention III), and those that fall under the second sentence, that is, those operating under the more relaxed criteria for distinguishing oneself in exceptional circumstances. In the former case, individuals will not be excluded from combatant and prisoner of war status for failing to comply with the normal obligation to distinguish themselves from the civilian population, but may however, attract punishment for the violation of the laws of war (for example, perfidy).[132] In this latter case, individuals who violate the conditions imposed by the second sentence of Article 44(3) of Additional Protocol I will lose their combatant status and, consequently, their right to prisoners of war *status*. In this situation they nevertheless retain the right to prisoner of war *treatment* with its procedural guarantees.[133] Thus, an individual distinguishing himself/herself during exceptional circumstances[134] is entitled to prisoner of war status and may not be punished for taking part in hostilities. On the other hand, members who do not distinguish themselves, will get the *treatment* of a prisoner of war only, and remain liable to be tried and punished for not carrying arms openly at the stipulated times.

The purpose of interning them as prisoners of war is not to punish them but to hinder their participation in hostilities.[135] As a prisoner of war the combatant enjoys immunity from prosecution for lawful acts of war and for consequences arising therefrom. Lawful acts include killing able-bodied, non-surrendering enemy combatants without recourse to unlawful means and methods of warfare.[136] Prisoners

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[132] J J Paust 'War and Enemy Status After 9/11: Attacks on the Laws of War' (2003) 28 *Yale Journal of International Law* 325 at 330–331; Trials of War Criminals Before the Nuremburg Military Tribunal Under Control Council Law No 10 (1948) 757, 1236, 1249.

[133] N Bar–Yaacov 'Some Aspects of Prisoner–of–War Status according to the Geneva Protocol I of 1977' (1985) 20 *Israel Law Review* 243 at 262.

[134] Outlined in the second sentence of Article 44(3).

[135] A combined reading of Article 21 & Article 118 of Geneva Convention III makes it clear that such persons are only to be interned and must be released and repatriated at the close of hostilities; A J Esgain & W A Solf 'The 19 9 Geneva Conventions Relating to the Treatment of Prisoners of War: Its Principles, Innovations and Deficiencies' (1963) 1(3) *North Carolina Law Review* 537–596; N Rodely *The Treatment of Prisoners under International Law* (1987) 374.

[136] Part II (General Protection of Prisoners of War) of Geneva Convention III supra note 2.

of war, however, are not immune from other prosecutions, including for war crimes, crimes against humanity and/or genocide. Even in these instances, however, they remain prisoners of war subject to trial for the contravention of international humanitarian law.[137] Prisoners of war must at all times be treated humanely and be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Reprisals against them are prohibited. Article 13 of Geneva Convention III provides for these and other basic guarantees. After the cessation of active hostilities, prisoners of war shall be released and repatriated without delay, save in those instances where they have committed an offence and the detaining power has the right to institute judicial or disciplinary measures against them.[138]

In terms of their responsibilities, combatants are under an obligation to observe international humanitarian law when executing hostilities.[139] This essentially means that they need to respect the fundamental obligation to distinguish themselves from the civilian population. [140] It also means they must execute military operations in a manner that complies with the principles governing the conduct of hostilities, which require them to distinguish between armed adversaries and civilians.[141] In the first instance, the obligation to distinguish themselves from civilians restricts military confrontation among belligerents and is fundamental to the protection of civilians. The preceding paragraphs have briefly shown that all combatants, except those captured by the exceptional circumstances of Article 44(3) of Additional Protocol I, are duty-bound to distinguish themselves from civilians during military operations.[142] Even those under the exceptional circumstances of Article 44(3) are expected to

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[137] J J Paust & A P Blaustein 'War Crimes Jurisdiction and Due Process: The Bangladesh Experience' (1978) 11 *Vanderbilt Journal of Transnational Law* 1 at 32.
[138] Part III (Judicial Proceedings) of Geneva Convention III.
[139] As evident in the condition Article 4A(2)(a)–(d) of Geneva Convention III that obligates them to distinguish themselves from civilians and to conduct operations in accordance with the laws and customs of war.
[140] Article 4A(2)(b)–(c) of Geneva Convention III supra note 2 and Article 48 of Additional Protocol I; This was stressed in Resolution 12 of the XXth International Conference of the Red Cross in Stockholm (1965) which stressed the need to distinguish at all times between persons taking part in hostilities and those that do not; This principle was affirmed in UN General Assembly Resolution 2444 (XXIII) on the Respect for Human Rights in Armed Conflicts, 19 December 1968
[141] Article 4A(2)(b)–(c) of Geneva Convention III and Article 48 of Additional Protocol I.
[142] N Hayashi 'The Role of Judges in Identifying the Status of Combatants' (2006) 2 *Acta Societatis Martensis* 69 at 73.

comply with certain conditions that aim to separate them from the civilian population.[143]

In the second instance, since international humanitarian law is premised upon the weakening of the military potential of the adversary,[144] it is fundamental that combatants distinguish military personnel/objects from civilians/civilian objects that may not be attacked. This basic rule outlines the principle of distinction within Article 48 of Additional Protocol I which provides that:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives.

This rule applies to the both offensive and defensive operations of the combatant and, essentially, mandates combatants to target enemy combatants and military objectives. This is not always an easy task, given the fluidity with which certain objects can change from being civilian to military objects, for example, where the military takes over religious centres or schools. It is not possible, therefore, to list exhaustively what amounts to military objects or civilian objects, though Article 52(3) of Additional Protocol I gives a list of examples of objects presumed to be civilian in nature. As for military objects, Article 52(2) of Additional Protocol I provides a two-pronged cumulative test to be met before classifying an object as such: first, the object must contribute effectively to the military action of one side; and secondly, the object's destruction, capture or neutralisation has to offer a definite military advantage for the other side. The criteria must be met in terms of the circumstances prevailing at the time. Without this time limitation the principle of distinction would be of no consequences, since any object could potentially become a military objective.

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[143] See the second sentence of Article 44(3) of Additional Protocol I, which requires such forces to carry arms openly when launching an attack and during deployment.

[144] Hence Article 48 provides a basic rule requiring combatants to distinguish between civilians and combatants and military objects and civilian objects.

The principle of distinction leads to a number of principles (such as military necessity, precaution and proportion) within the dense framework of rules in Additional Protocol I, which combatants must comply with when conducting hostilities.[145] It is already clear that in this case civilians or civilian objects, that is, those objects not contributing to military action at any given time, may not be attacked.[146] The means and methods of warfare likely to cause severe damage to the environment are thus prohibited, since they threaten the immediate or long-term survival of the civilian population.[147] In addition combatants are prohibited from initiating attacks whose purpose is to terrorise the civilian population;[148] from using indiscriminate weapons that the combatant is unable to direct;[149] or weapons that may cause unnecessary suffering or superfluous injury to the adversary;[150] from using the civilian population as shields to military objectives;[151] and from employing reprisals against civilian objects.[152] If it is apparent that civilians may be affected during an attack, precautionary measures, such as warning them, verifying the objects, or choosing the least harmful means that will minimise civilian casualties, must be taken.[153] This principle may further require combatants to remove the civilians from the vicinity of military objectives,[154] avoid locating military objectives within civilian areas,[155] or take measures to protect civilians under their control against the dangers of military operations.[156]

3.2.4 Rights and Responsibilities of Civilians

The main distinguishing characteristic between civilians and combatants lies in the nature of their activities. Civilians do not take a direct part in hostilities. The parties to a conflict are obligated to protect civilians during international armed conflict.

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[145] Articles 48–71 of Additional Protocol I.
[146] Articles 48–71 of Additional Protocol I.
[147] Article 51 of Additional Protocol I.
[148] Articles 48, 51(2) and 85(3) of Additional Protocol I.
[149] Article 35 and 36 of Additional Protocol I.
[150] Article 35 and 36 of Additional Protocol I.
[151] Article 52 of Additional Protocol I.
[152] Articles 51(6), 52(1), 53(c), 54(4), 55(2) & 56(4) of Additional Protocol I.
[153] Articles 57 & 58 of Additional Protocol I.
[154] Article 58(a) of Additional Protocol I.
[155] Article 58(b) of Additional Protocol I.
[156] Article 58(c) of Additional Protocol I.

Civilians have the right to be respected by opposing belligerent forces in line with the rules on the protection of the civilian population against the effects of hostilities, as contained in Articles 48-71 of Additional Protocol I and customary international humanitarian law.[157] These Articles prohibit attacks and reprisals against civilians as long as they do not take part directly in hostilities. This prohibition is clearly affirmed in Article 51(1) – (2) of Additional Protocol I:

> 1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.
> 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.

Civilians are, therefore, immune from attacks that are deliberate, indiscriminate or excessively injurious.[158] The general protection afforded to civilians is qualified in two respects: first, in relation to all civilians and their obligation to refrain from participation in hostilities;[159] and secondly, in relation to the special category of 'protected civilians' when they pose a threat to public security.[160]

In relation to the first respect, international humanitarian law is clear that civilians, unlike combatants, do not have the right to take a direct part in hostilities.[161] In case of doubt as to whether a civilian's conduct qualifies as direct participation in hostilities, the general rule of civilian protection will remain applicable. The standard of doubt applicable in this respect is not the strict standard applicable in criminal proceedings (*beyond reasonable doubt*) but an objective reflection of the certainty from the attackers' perspective that the civilian is participating in direct hostilities.

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[157] Partly based upon the Hague Regulations 1907.
[158] Henckaerts et al op cit 29 at 37–40; Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May – 12 June 1971, Report on the Work of the Conference, ICRC, Geneva, August 1971, II, Protection of the Civilian Population against the Dangers of Hostilities, Submitted by the ICRC, Geneva, January 1971W H Parks 'Law of War Status of Civilians Accompanying Military Forces in the Field' Memorandum of Law for the Office of the Judge Advocate General US Army (May 1999).
[159] Article 51(3) of Additional Protocol I.
[160] Article 5 of Geneva Convention IV.
[161] *State v Petane* Cape Provincial Division 3 November 1987, South African Law Reports Volume 3 (1988) 51–67.

The case in point on this matter is *Prosecutor v Gali,*[162] an ICTY Trial Chamber judgment where the issue at hand was whether it was reasonable to believe that the attacker thought a civilian to be a combatant. The test of reasonableness was interpreted to refer, not to the attacker's subjective belief regarding the position of the civilian, but rather to an objective point of view that the attacker regarded the target as a combatant. In practice, such a determination would have to take into account the intelligence available to the decision maker, the urgency of the situation, and the harm likely to result to the operating forces or to persons and objects protected against direct attack from an erroneous decision.

While civilians do not have the right to participate in hostilities, this does not necessarily imply an international prohibition of such participation. Nothing within the international humanitarian law treaties expressly prohibits or criminalises the direct participation of civilians in hostilities. This has left international humanitarian law with a lack of clarity with regard to the consequences of civilians engaging in direct participation in hostilities. Some commentators believe that such civilians will be liable for war crimes.[163] Others insist that nothing in international humanitarian law criminalises such action.[164] What is clear is that if civilians taking a direct part in hostilities 'usurp', as it were, the right of combatancy they become liable to attacks for the duration of their direct participation. This is clearly articulated in Article 51(3) of Additional Protocol I, which states that 'civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'. Such civilians forfeit their immunity for so long as they participate directly in hostilities.[165] Further, in the event of capture, such detained civilians are

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[162] *Prosecutor v Stanislav Galik* ICTY Case No. IT–98–29–A (5 December 2003) available at http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp46–e/galic.htm [accessed on 12 October 2012].

[163] M N Schmitt 'Direct Participation in Hostilities and 21st Century Armed Conflict' in H Fischer & D Fleck (eds) *Crisis Management and Humanitarian Protection* (2004) 506.

[164] ICRC op cit note 58 at 9–10. This is not expressly included in the list of grave breaches contained in Articles 50/51/130/147 of Geneva Conventions I–IV respectively or the serious violations listed in Article 85 of Additional Protocol I.

[165] US Military Manual, Field Manual 27–10, The Law of Land Warfare (1956) Para 247, available at http://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare–1956.pdf [accessed on 12 October 2012]. State practice as expressed in military manuals like this recognises the applicability of Geneva Convention IV (the Civilian Convention) to unlawful combatants. It defines persons protected by Geneva Convention I to include 'all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war'.

not entitled to prisoner of war status[166] and will not be immune from domestic prosecution for the consequences of their direct participation under domestic criminal jurisdiction.[167]

3.2.5 Exceptions to the Line between Combatants and Civilians

The preceding sections have endeavoured to show how the legal framework classifies actors within international armed conflicts in two mutually exclusive categories of combatants and civilians. In so doing it provides rights and responsibilities that correspond with the categories in an attempt to avoid a situation where an actor is classified as a combatant, but possesses the protection that pertains to civilians. That said, it is important to highlight a few groups that sit as exceptions to this dichotomy, where the rights accorded to the individual does not neatly align with their classification or the nature of their activities. Three specific groups are presented in this regard: non-combatant members of the national armed forces of state, persons accompanying the members of the armed forces, and unprivileged belligerents such as spies and mercenaries. It is worthwhile to briefly examine each of these groups and the rights/responsibilities that would attach to persons who belong to them.

3.2.5.1 Non-Combatant Members of the Armed Forces

Article 1 of Hague Convention IV, Article 4A of Geneva Convention III and Articles 43 and 44 of the Additional Protocol I, make it clear that combatants include members of the armed forces. However, Article 1 of the Hague Regulations makes it clear that not all the armed forces are, in fact, combatants. It provides that: '[t]he armed forces of the belligerent parties may consist of combatants and non-

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[166] The minimum legal guarantees in Customary International Law as recognised in Common Article 3 and Article 75 of Additional Protocol apply upon capture in addition to the non–derogable human rights binding on a state.

[167] *Prosecutor V. Zejnil Delalic* ICTY Judgement (*The Celebici Case*) Case No. IT–96–21–T (16 November 1998) para 271, available at http://www.icty.org/x/cases/mucic/tjug/en/cel–tj981116e.pdf [accessed on 12 October 2012]. This is the majority view of experts also recognised in jurisprudence of the ICTY. Unlawful combatants are protected by Geneva Convention IV if the Article 4 requirements are met, ie, the person in question is a protected person as defined in Article 4.

combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war'. This means that 'non-combatants' are also present among the armed forces.[168] This is affirmed in Article 43(2) of Additional Protocol I, which refers to 'members of the armed forces … (other than medical personnel and chaplains) … [that] are combatants'. These categories of the armed forces are non-combatants since their social function has little to do with fighting. This underlies the historical emphasis on classifying actors in armed conflict on the basis of the nature of their activity.[169] Thus, all members of the armed forces of a state, except medical and religious personnel, are as a matter of principle presumed to be combatants.[170] Commentators have also suggested that in addition to medical and religious personnel, a state may by domestic law designate additional members of its armed forces as non-combatants.[171]

Non-combatants are not authorised to take part in armed hostilities or combat activities.[172] Since they do not engage in direct hostilities, they are, like civilians, entitled to protection from direct attack by enemy combatants. Their close proximity to combatants and their voluntary acceptance of this risk as members of the armed forces means that there are limits to the protection they can be afforded. Even so, the principles of precaution and proportionality applicable in those instances where an adversary has to target military objectives populated by the presence of non-combatants is relevant to these actors. Finally, even though they are non-combatants, they remain members of the armed forces and in the event of capture are entitled to prisoner of war status. They will, therefore, be entitled to the treatment corresponding to prisoners of war and entitled to repatriation when hostilities cease.

3.2.5.2 Persons Accompanying the Armed Forces

In addition to regular and irregular forces, Article 4(A)(4) of Geneva Convention III includes persons that are not combatants, but are, upon capture, nevertheless entitled

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[168] Ipsen op cit note 60 at 81–84.
[169] Chapter 2 (section 2.3.3); Ipsen op cit note 60 at 81–84.
[170] Article 43(2) Additional Protocol I.
[171] Ipsen op cit note 60 at 81–84.
[172] Ipsen op cit note 60 at 81–84.

to prisoner of war status. These persons are civilians and 'accompany the armed forces without actually being members thereof'. They receive the exceptional treatment accorded to combatants of prisoner of war status. Article 4(A)(4) of Geneva Convention III provides a list of examples of such persons, including 'civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or other services responsible for the welfare of the armed forces'. Of interest in this list is the term 'supply contractors' which applies to people supplying goods[173] and not those instructed to employ coercive force beyond self-defence as demonstrated by current examples of modern PMSCs. The list is not exhaustive and may possibly be construed in a dynamic way to cover the wide spectrum of modern services provided to the military.[174]

What is critical for those civilians falling under this group is the ability to show that they 'have received the authorisation from the armed forces that they accompany'.[175] The fact of this authorisation makes it clear that the individuals falling in this category are tied to persons hired by the state.[176] Further, those who have given them authorisation 'shall provide them for that purpose with an identity card similar to the annexed model'.[177] Thus under Article 4(A)(4), a state is required to issue a model identity card (annexed to Geneva Convention III) to individuals falling within its ambit as evidence of such authorisation.[178] Commentators have discussed the significance of this document and the authorisation that flows from it within the context of two fundamental questions. Does the failure to physically carry the identification document indicate an absence of authorisation? Does the issuance of the identification document indicate the authority contemplated, or should it be

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[173] C Hoppe 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 *The European Journal of International Law* 991 at 1007.

[174] Report on the Work of the Conference of Government Experts (1947) 112-113 suggests that the list is only an indication and the provision could cover other categories of persons as evident in references to the authoritative text of Article 13 of the Hague Regulations 1907.

[175] Final Record of the Diplomatic Conference of Geneva of 1949 op cit note 56.

[176] L Cameron 'International Humanitarian Law and the Regulation of Private Military Companies' Conference on Non–State Actors as Standard Setters: The Erosion of the Public–Private Divide, Basel Institute on Governance (February 2007) 2, available at http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Cameron.pdf [accessed 23 February 2012].

[177] Article 4A(4) of Geneva Convention III.

[178] Under Article 4(A)(4) of Geneva Convention III states are required to issue a model identity card to individuals as evidence of authorisation from a state; the card specifically asks parties to complete the following statement: 'Accompanying the armed forces as … ' — see Commentary on Article 4(A)(4) of Geneva Convention III in Pictet et al op cit note 41 at 61–64.

construed alongside other documentation or interactions? As to the first question, some assistance can be obtained from examining the intention of the drafters. According to the drafters, the 'possession of an identity card was a supplementary safeguard for the person concerned, but not an indispensable prerequisite for being granted prisoner of war status'.[179] The card itself does not create the legal status, but merely serves to prove this status.[180] The legal conditions for authorisation are set by each state independently. In the event of any doubt, the individual is presumed to be a prisoner of war, pending a determination by a competent tribunal.[181] As regards the second question, states cannot confer this status upon civilians they have hired simply by issuing them with an identity card. There has to be some nexus between the civilian and the armed forces he/she accompanies.[182] It is still, however, not clear what examples would amount to authorisation under these provisions.[183]

It has already been mentioned that this group of civilians is entitled to prisoner of war status should they be captured by the adversary. As civilians, but unlike other combatants, they are not entitled to participate in hostilities, despite the status bestowed on them upon capture. They are therefore not allowed to engage in combat beyond personal defence.[184] Since they do not participate in hostilities, they are entitled to protection generally accorded to civilians. The obligation to protect this civilian group is also less binding than that accorded to the general civilian population.[185] Though Article 58 of Additional Protocol I[186] requires such forces to

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[179] Final Record of the Diplomatic Conference of Geneva of 1949, Vol II-A, 417; Article 79 of Additional Protocol I concerning journalists. Previously, under Article 13 of the Hague Regulation of 1907 supra note 24, an ID–card was constitutive. At present possession of an identity card does not itself confer a protected status; Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, ICRC, Geneva (1947) 113.

[180] Schaller op cit note 61 in T Jager & G Kummel (eds) Private Military and Security Companies. Chances, Problems, Pitfalls and Prospects (2006) 349–350.

[181] Article 45(1) of Additional Protocol I; Pilloud et al op cit note 57 at 550–554.

[182] 'Report of the Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions' Organised by the University Centre for International Humanitarian Law, Geneva (29–30 August 2005) 12, available at http://www.geneva–academy.ch/docs/expert–meetings/2005/2rapport_compagnies_privees.pdf [accessed 12 April 2013].

[183] E C Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88(863) *International Review of the Red Cross* Number 525 at 537.

[184] Gillard ibid at 536–538.

[185] L L Turner and L G Norton 'Civilians at the Tip of the Spear' (2001) 51 *Air Force Law Review* 1 at 30–31. The United States Army and Air Force accept that civilians who perform duties directly supporting military operations may be subject to direct, intentional attack.

[186] Article 58 of Additional Protocol I was to address the obligations of a state towards its own nationals within its territory, or in the case of territory under its control towards the civilian population. However, Article 58 is broad enough to extend to civilians accompanying the military.

take necessary precautions to protect civilians from the dangers of military operations to the 'maximum extent feasible', the use of the phrase 'maximum extent feasible' suggests that considerations of military necessity should be factored in.[187] At the same time, this phrase may suggest that such civilians should only be deployed in support of military operations where the threat is not high and where they can be protected from such threats.[188] With the exception of this qualification, such civilians enjoy the full range of protective rights under Geneva Convention IV, Additional Protocol I, and customary international humanitarian law.

3.2.5.3 Unprivileged Combatants: Spies and Mercenaries

Spying is accepted as a legitimate tactic during armed conflict. However, spies if captured while engaged in espionage and while not wearing uniform, are excluded from the fundamental right of lawful combatants —entitlement to prisoner of war status. The reason for this may be the fact that their activities violate the fundamental obligation of combatants to distinguish themselves from the civilian population.[189] This may be deduced from the fact that spies captured while wearing uniform may be accorded prisoner of war status. A spy in uniform, however, appears an unlikely situation since the essence of espionage is to conceal oneself effectively from the enemy for the purposes of accessing privy information. In this situation, spies will not only be denied prisoner of war status, but may also be subject to drastic penal sanctions of the enemy state. That said, they remain unprivileged combatants, as described by Mallison and Mallison:

> [m]embers of the armed forces who are engaged in espionage still retain their status as lawful but unprivileged combatants who may have drastic penal sanctions, including the death penalty, imposed upon them if captured under the limited circumstances enunciated.[190]

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[187] Pilloud op cit note 58.
[188] Pilloud op cit note 58. Thus a complete withdrawal of certain civilians considered essential to the military effort may not be required in all instances. The ICRC Commentary also suggests that the obligation to remove civilians arises only where the risk of attack is greatest and that the obligation could be met by the making available of shelters that provide protection against the effects of weapons.
[189] *Ex Parte Quirin Et al* supra note 106.
[190] W T Mallison & S V Mallison op cit note 72 at 27.

Although mercenaries may be contracted by a state, they do not belong to its armed forces, and can therefore not be considered as combatants— along the same lines as spies. The ordinary meaning of a mercenary depicts a person hired to supply military services for a party in an armed conflict. In addition, a common perception of mercenaries is one of 'dogs of war' and 'freelance soldiers' who, for large amounts of money fight for dubious causes.[191] The first legal definition of a mercenary is found in Article 47 of Additional Protocol I. The definition comprise a set of six cumulative elements.[192] For a person to qualify as a mercenary they must meet all of the following requirements:[193]

- be recruited to fight in armed conflict;
- take direct part in hostilities;
- be motivated for private gain;
- not be a national of a party to the conflict;
- not be a member of the armed forces of any of the parties to the conflict; and
- not be sent on official duty by a state not involved in the conflict.

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[191] C Soanes & A Stevenson (eds) *Oxford Dictionary of English* (2003). The Oxford Dictionary defines 'mercenary' as 'primarily concerned with making money at the expense of ethics'; K O'Brien 'Military–Advisory Groups and African Security: Privatised Peacekeeping' 1998 5(3) *International Peacekeeping* 78 at 81. The traditional notion of a mercenary is 'a soldier willing to sell his military skills to the highest bidder, no matter what the cause'.

[192] Pilloud et al op cit note 57 at 571–582; A F Musah and J K Fayemi (eds) *Mercenaries: An African Security Dilemma* (2000) — reflecting the contest between West and the developing countries in Africa during the negotiations that unfolded. The problem in Africa during the 1960s was that many of the so called 'white' mercenaries were being used by former colonial masters to destabilise former colonial territories – UN Commission on Human Rights Resolution 1995/5 On the Use of Mercenaries as a means of Impeding of the Rights of People's to Self-determination ESCOR Supp (No 4) at 48, UN Doc E/CN4/1995/50 (1995), adopted on 17 February 1995; UN General Assembly Resolution 2131 on The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty A/Res/20/2131, adopted on 21 December 1965; UN General Assembly Resolution 2465, The Declaration on the Granting of Independence to Colonial Countries and Peoples A/Res/2465, adopted on 14 December 1970; UN General Assembly Resolution 2625, The Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations A/Res/2625, adopted on 24 October 1970; UN General Assembly Resolution 3103 (XXVIII) The Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes A/Res/3108 adopted on 12 December 1973; Use of Mercenaries as a Means of io lating Human Rights and Impeding the Exercise of the Rights of People's to Self-Determination Commission on human Rights 61st Session, UN Doc E/CN4/2005/14, adopted on 8 December 2004.

[193] Article 47 of Additional Protocol I; Article 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, UN General Assembly Resolution 44/34A/RES/44/34 available at http://www.refworld.org/docid/3b00eff31f.html [accessed 29 June 2013]; Article 1 of the Organisation of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa, 3 July 1977, CM/817 (XXIX) Annex II Rev.1, available at http://www.refworld.org/docid/514ae5c82.html [accessed 29 June 2013]; F J Hampson 'Mercenaries: Diagnosis Before Proscription' (1991) 22(3) *Netherlands Yearbook of International Law* 3 at 29–30.

The first two elements make it clear that mercenaries must come into a territory with the intention of taking part in a conflict and actually participating directly in hostilities. Activities that do not fall within direct participation in hostilities, such as training, would bar one from being considered a mercenary.[194] The third element is thwarted by the difficulties of reading the internal motivation of mercenaries, that is, why the individual is actually on the battlefield. This element reflects a concern with the commodification of violence and the fear of combatants whose allegiance is only to profit or private good,[195] rather than to the public good that national armed forces are traditionally assumed to espouse. The last three elements make it possible for states to circumvent the entire Article 47 by giving such individuals nationality or officially including them in the armed forces of a state.[196] The difficulty of any persons meeting the cumulative elements of the definition of a mercenary has prompted one commentator to suggest that 'any mercenary who cannot exclude himself from this definition deserves to be shot — and his lawyer with him'.[197]

Mercenaries as defined in Additional Protocol I do not have the right to combatant or prisoner of war status. Article 47, in explicitly removing international humanitarian law protection for mercenaries falling within its definition, creates a new class of unprivileged combatants.[198] Although Additional Protocol I makes it clear that mercenaries do not have the right to prisoner of war status as other lawful combatants. Article 75 of Additional Protocol I states that such persons are entitled to the minimum protection afforded to any person present within armed zones. Thus mercenaries, in the event of capture, will have the right to basic humanitarian treatment and protections provided to all persons who are not otherwise entitled to more favourable treatment.[199]

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[194] Chapter 3 (section 3.5.1) which discusses what constitutes 'direct participation in hostilities'.
[195] G Abraham 'The Contemporary Legal Environment' in G Mills, J Stemlau & United States Institute of Peace (eds) *The Privatisation of Security in Africa* (1999) 97; H C Burmester 'The Recruitment and the Use of Mercenaries in Armed Conflicts' (1978) 72(1) *American Journal of International Law* 37 at 37. A mercenary is motivated essentially by the desire for private gain.
[196] Y Dinstein 'Comments on Protocol I' (1997) 320 *International Review of the Red Cross* 515–519; K Govern & E Bales 'Taking Shots at Private Military Firms: International Law Misses Its Mark (Again)' (2008) 32 *Fordham International Law Journal* 55 at 80. Article 47 risks becoming virtually irrelevant to armed conflicts.
[197] G Best quoted in D Shearer *Private Armies and Military Intervention* (1998) 18.
[198] Dinstein op cit note 8 at 50–51.
[199] Henckaerts et al op cit 29 at 3–19 & 394.

3.3 NON-INTERNATIONAL ARMED CONFLICTS

The preceding sections have looked at the classification of actors operating in the context of international armed conflicts. The legal framework applicable in this context expressly provides for the classification of all actors as either combatants or civilians. Such actors will be combatants because they are members of the armed forces or part of irregular forces that meet the requirements of Article 4A of Geneva Convention III, or the more relaxed requirements that are applicable in exceptional circumstances referred to in Article 44(3). If they fail to meet these requirements for combatancy, they will be civilians. Their classification in one group or the other will result in corresponding rights and obligations. For example, combatants will possess the right to participate in hostilities, and will remain legitimate targets to the adversary. Civilians, on the other hand, have a right to be protected from hostilities provided they refrain from directly participating in hostilities. This correlation between the status of an actor and their rights/obligations is qualified by a few exceptions where actors may be civilians and attract the rights normally associated with combatants, or *de facto* combatants but are ineligible from accessing combatant rights.

As earlier mentioned, international humanitarian law contemplates two sets of armed conflicts — international and non-international armed conflicts. Both are governed by a distinct legal framework. This section focuses on the legal regime applicable in non-international armed conflicts, and the designation of actors in this context. Non-international armed conflicts take place within the territory of one state among factions or between such factions and the state. When compared with the vast number of treaty provisions relating to international armed conflicts, non-international armed conflicts have far fewer articles with much less detail.[200] The

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[200] Only Common Article 3 of the Four Geneva Conventions and Additional Protocol II are applicable in this situation — see statements made by the Commission of Experts Appointed to Investigate Violations of International Humanitarian Law in the Former Yugoslavia, UN Doc S/1994/674, para 52; 'Declaration of Minimum Humanitarian Standards' Adopted by a Meeting of Experts, Organised by the Human Rights Institute of Abo Akademi in Turku/Abo, Finland, UN Doc E/CN4/sub2/1991/55, 2 December 1990.

explanation for this disparity stems from the fact that international humanitarian law evolved during times when the primary subject of international law was the state, and the predominant form of conflict was state-to-state.[201] Regulating the internal affairs of a state was fraught with tensions between according rights to entities that have taken up arms against the state for humanitarian purposes on the one hand, and contravening the sovereignty of states and their domestic legal provisions on the other.[202] It was inconceivable at this stage that a state would willingly cede the privileges associated with this monopoly over violence[203] to other actors representing factional interests.[204] In addition, there was a desire by the international community not to be seen as providing an avenue for international recognition of such non-state actors.[205]

The dilemma of extending rights to persons engaged in hostilities in the context of internal conflicts has been likened to the predicament of preserving *jus in bello* regardless of the introduction of *jus contra bellum* that followed the adoption of the UN Charter.[206] As previously discussed,[207] the question here was whether the commitment towards developing detailed rules in armed conflict would undermine the new impetus to outlaw war in the first place. Similarly, in internal conflicts the behaviour of persons that have taken arms against the state contravenes the core of the domestic legal structure, and is contradictory to the idea of granting such persons minimum rights during their ongoing conflict with state forces. However, just as the rules of *jus in bello* are necessary to minimise the suffering of victims on both sides of an armed conflict, despite the contravention of *jus ad bellum,* so it was also

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[201] Sassòli & Bouvier op cit note 25 at 88–91.
[202] Which often outlaws violence against the state.
[203] S P Huntington *The Soldier and the State: The Theory and Politics Of Civilian–Military Relations* (1957) 37. While all professions are to some extent regulated by the state, the military profession is monopolised by the state.
[204] M W Doyle & E C Luck (eds) *International Law and Organisation: Closing the Compliance Gap* (2004) 193.
[205] Oppenheim & Lauterpacht op cit note 90 at 209–210. Article 3 provides that its application shall not affect the legal status of the Parties. The Record of the Diplomatic Conference at Geneva in 1949 shows that without that clause it would not have been possible to secure the acceptance of Article 3 – Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) 192 (Swiss Federal Political Department 1978) CDDH//427, VII 61, CDH/SR49 para 11 (26 May1977).
[206] Expressly prohibiting war with certain limited exceptions eg Article 42 (Security Council) and Article 51 (self–defence) of the UN Charter; C Greenwood 'The Relationship Between *Jus Ad Bellum* and *J In* ' (1983) 9 *Review of International Studies* 225; Dinstein op cit note 8 at 20–26.
[207] Chapter 2 (section 2.3.4)

necessary to accord minimal rights to those engaged in hostilities, as well as to protect the vast majority of a state's population caught up in violence of internal conflicts.[208]

Common Article 3 of the four Geneva Conventions and Additional Protocol II gave clarity on the question of sovereignty, something that had previously ensured that minimal provisions be applied in internal conflicts. Article 3 contains minimum standards for the protection of victims in such situations.[209] These brief rules, however, are inadequate to deal with the range of humanitarian concerns demanded in non-international armed conflicts[210] and have been supplemented by Additional Protocol II. This Protocol responds to the gaps in Common Article 3 by extending principles relating to the conduct of hostilities and other rules articulated in Additional Protocol I to non-international armed conflicts.[211] The provisions of Common Article 3 and Article 1 of Additional Protocol II confirm the existence of two types of internal conflicts, [212] these being any internal conflicts where the minimum rights under Common Article 3 apply;[213] and internal conflicts which meet a certain threshold where Additional Protocol II provisions apply.[214] The application

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[208] M Walzer *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (2006) 127. The moral status of individual soldiers on both sides is very much the same. They fight out of lawful obedience to their states.

[209] 'Final Record of the Diplomatic Conference of Geneva of 19 9'op cit note 56. 'By All Available Means: The Russian Federation Ministry of Internal Affairs Operation in the illage of Samashki' Report by the Memorial Human Rights Center, Moscow (7–8 April 1995) available at http://www.memo.ru/hr/hotpoints/chechen/samashki/engl/ [accessed on 10 April 2013]. The intention to make Article 3 a minimum humanitarian provision is clear from the Record of the Conference. It provides for the minimum humane treatment of those not taking active part in hostilities, prohibiting certain actions (torture and violence to life etc).

[210] For example, the applicability of the general principles on the conduct of hostilities. Moreover, Article 3 leaves states with wide discretion, which can be abused; M H Hoffman 'Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non–International Armed Conflicts' (1990) 278 *International Review of the Red Cross* 383–403.

[211] Part IV of Additional Protocol II. Such as the principles of distinction, military necessity, proportionality and the right to humanitarian relief.

[212] *Prosecutor v. Jean Paul Akayesu* International Criminal Tribunal for Rwanda (*Judgement*) Case No ICTR–96–4–T (2 September 1998) paras 602–603; Article 8(2)(d) & (f) of the Rome Statute of the ICC.

[213] As put in Common Article Three of the Geneva Convention: simply to all 'armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties'; *Nicaragua* supra note 20 para 219; *Prosectuion of Osvaldo Romo Mena* Appeal Court of Santiago, Third Chamber, Case Lumi Videla Role No. 13.597–94 (26 September 1994) [originally in Spanish — unofficial translation].

[214] Article 1(1) of Additional Protocol II states: 'The scope of Additional Protocol II is clearly defined under Article 1: "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions … without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of [Additional Protocol I] and which take place in the

of the rules, therefore, rests upon the qualification of that conflict as one governed either by the more detailed rules within Additional Protocol II or the bare minimum rules provided under Common Article 3.[215] Furthermore, in both instances customary international humanitarian law extends the application of basic principles of international armed conflicts to internal conflicts by using analogies between the two to fill gaps within non-international conflicts.

3.3.1 Distinguishing Features in Non-International Armed Conflicts

A fundamental feature that distinguishes international armed conflicts from non-international armed conflicts lies in the absence of an explicit reference to the terms 'combatant' and 'civilian'. The reluctance to refer to 'combatant' in the same way as contained in international humanitarian law instruments dealing with international armed conflicts, signifies an unwillingness by governments to convey rights to their citizens when they contravene serious domestic criminal provisions by engaging in hostilities against the state. Nevertheless, if citizens not engaged in hostilities are to be protected, it is essential that those conducting military operations have a basis for distinguishing between their countrymen who form legitimate targets from those that do not. In this regard, the applicable legal regime addressing non-international armed conflicts is found in Article 3 common to the Four Geneva Conventions (Common Article 3) and Additional Protocol II. As mentioned earlier, Common Article 3 applies to all internal armed conflicts, while Additional Protocol II applies to internal armed conflicts that meet a certain threshold, as defined therein.[216] An examination of both provisions reveals that though the legal framework applicable in non-international armed conflicts does not expressly provide for 'combatants' and 'civilians', it alludes to the existence of distinct groups.

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territory of ... [a] Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protoco"'; *Jean Paul Akayesu* supra note 213 at para 602–603.

[215] *Iva Jajic (aka Victor Andric)* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991 Case No. IT–95–12–R61 (13 September 1996) paras 584–608; *S Kadic (et al.) v. Radovan Karadzic* US Court of Appeal ILM vol. 34(6) (13 October 1995) paras 1595–1614.

[216] Article 1(1) of Additional Protocol II confines the scope of the treaty to armed conflicts between 'armed forces … or organised armed groups … under responsible command, exercise … control over a part of … territory … [and] carry out sustained and concerted military operations'.

Common Article 3, often referred to as a treaty within a treaty, was the first attempt by international humanitarian law to address the situation of non-international armed conflicts. It is helpful to reproduce certain portions of the Article:

> In the case of armed conflict not of international character occurring in the territory of one of the … Parties, each Party … shall be bound to apply … the following provisions;
>
> (1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms, … shall … be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth ….
>
> To this end, the following acts are … prohibited;
>
> a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> b) taking of hostages;
> c) outrages upon personal dignity, in particular, humiliating and degrading treatments;
> d) the passing of sentences and … carrying out executions without previous judgement pronounced by a regularly constituted court affording … judicial guarantees.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services….
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

It can be seen that Common Article 3(1) refers to 'persons taking no active part in the hostilities, including members of armed forces who have laid down their arms'. The reference to 'persons taking no active part in hostilities' implies, in contradistinction, the existence of 'persons who take active part in hostilities'.[217] Thus, one can discern three groups of persons present in non-international armed conflicts to which Article 3 applies, namely, 'members of the armed forces', 'persons taking no active part in hostilities' and 'persons taking an active part in hostilities'.[218]

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[217] J K Kleffner 'From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities — On the Principle of Distinction in Non–International Armed Conflicts One Hundred Years after the Second Hague Peace Conference" (2007) 5 (2) *Netherlands International Law Review* 315 at 324.

[218] While the provision refers to members of the 'armed forces' it is not clear whether this pertains only to a state, or whether it also includes armed forces attached to non–state actors.

Similarly, it is possible to see glimpses of specific groups of persons in relation to the wording employed by various Articles of Additional Protocol II. For example, Article 1, which defines the scope of the Protocol, refers to 'armed forces … dissident armed forces and other organised armed groups'.[219] Furthermore, Article 4, which elaborates upon the fundamental guarantees to be provided to persons within such internal conflicts, refers to 'all persons who do not take a direct part or who have ceased to take part in hostilities'. In this regard, the term 'direct part in hostilities' as used in the Protocol, and 'active part in hostilities', as used in Common Article 3, has been taken to mean the same. Finally, Article 13 of Additional Protocol II refers to 'civilians' in the context of providing protection to this group, affirming the existence of certain persons who are civilians within the context of such internal conflicts.[220] By inference this would suggest that there are other persons in internal conflicts that are not civilians. Unlike the legal regime governing international armed conflicts, Additional Protocol II provides no express definition of civilians. The fact that civilians enjoy protection 'unless and for such a time as they take a direct part in hostilities' may imply that the distinguishing character of this group is that they do not take part in hostilities. It is this feature that sets them apart from the 'armed forces' and 'dissident and organised groups'. However, civilians in this context, just as in international armed conflicts, may choose to engage in hostilities.

In summary, in the absence of an explicit mention of combatant status in non-international armed conflicts, one has to rely on Common Article 3 and Articles 1, 4 and 13 of Additional Protocol II which reveal the following categories of persons involved in non-international armed conflicts:[221]

- Members of the armed forces, for example, where the state may be involved in an internal conflict. The criteria for membership in the armed forces of a state are unlikely to be different in this regard from that applicable to

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[219] Article 1 of Additional Protocol II.

[220] Article 13 of Additional Protocol II. The provisions of this Article provide as follows: 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations … 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.

[221] ICRC 'Second Expert Meeting on the Notion of Direct Participation in Hostilities' Summary Report, Hague (October 2004) 9–11, 18.

international armed conflicts.[222] As in international armed conflicts, what will be required is an act of incorporation in line with the requirements of the domestic legal regime.

- Members of dissident forces or organised armed groups. In conflicts governed by Additional Protocol II, such forces must show that they are organised and acting under a responsible command.[223] The terms 'organised' and 'acting under responsible command' can be taken to mean the same as that ascribed in their use in Article 4A(2)(a) of Geneva Convention III and Article 43(1) of Additional Protocol I in relation to international armed conflicts.[224]
- Persons who take 'an active part in hostilities'[225] or 'direct part in hostilities'.[226] Arguably this includes civilians that infringe the rule against participating in direct hostilities.[227]
- Protected civilians that do not take a direct part in hostilities.[228]

Thus, though the legal regime for non-international armed conflicts does not expressly refer to combatants, the first two groups (the armed forces and dissident armed groups) could be viewed as *de facto* combatants that stand in contrast to civilians present in such conflict zones. As discussed in relation to international

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[222] K Watkins 'Opportunity Lost: Organi ed Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 2 *International Law and Politics* 641 at 651–654. Those who qualify to be a part of the states armed forces in international armed conflict are essentially the same persons used in non–international armed forces.

[223] Article 1(1) of Additional Protocol I.

[224] Inherent in 'organised' is the notion of 'responsible command'. It is argued that there cannot be an organised force without responsible command. See *Prosecutor v Hadzihasanovic, Alagic & Kubura* (*Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*) IT–01–47–AR72 (16 July 2003) paras 16 & 17; *The Prosecutor of the Tribunal Against Jean–Paul Akayesu* supra note 16 para 626 International Criminal Tribunal for Rwanda (ICTR) (*Sentencing Judgment*) ICTR–96–4–T (2 October 1998) para 626; *Fofana & Kondewa* Trial Chamber Special Court for Sierra Leone (*Judgment*) para 127, available at http://www.sc–sl.org/LinkClick.aspx?fileticket=ENLjRKVm%2fDg%3d&tabid=104 [accessed on 30 March 2012]. The underlying rationale for this requirement is to ensure that the armed group is in a position to ensure that the basic requirements of Common Article 3 can be met. See International Law Association Committee on the Use of Force, Final Report on the Meaning of Armed Conflict in International Law, Committee on the Use of Force, International Law Association (March 2010) 29; K Watkins & A J Norris (eds) *Non–International Armed Conflict in the Twenty–First Century* (2012) 128.

[225] Common Article 3 of the Geneva Conventions

[226] Article 4 of Additional Protocol II.

[227] Article 13(3) of Additional Protocol II.

[228] Since the protection afforded to civilians under Article 13 includes their protections from military operations. This would suggest that civilians that benefit from this protection do not directly participate in hostilities.

armed conflicts, it is helpful to explore the nature of rights and obligation that ensue when an actor in international armed conflict is considered a *de facto* combatant or a civilian. The next section explores this issue.

3.3.2 Rights and Responsibilities in Non-International Armed Conflicts

Since treaties relating to internal armed conflicts contain no express provisions referring to combatancy as are found in international armed conflicts the differences that ensue out of the classification of persons in such conflicts are more nuanced. For example, since this body of law does not recognise combatant status and its associated privileges,[229] the right to directly participate in hostilities is not expressly recognised.[230] There is also no entitlement to prisoner of war status.[231] The legal status of actors will be determined by domestic law, which may impose harsh criminal sanctions for having engaged in hostilities contrary to national law. State authorities, however, are encouraged to 'grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty…'.[232] In terms of their treatment in detention, persons who engage in hostilities may be detained for security purposes and provided basic humanitarian treatment available to anyone captured.[233] In addition, non-derogable human rights that complement international humanitarian law will remain applicable.[234]

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[229] Henckaerts et al op cit 29 at 384–388. Rule 106 of customary international law provides: 'For purposes of the principle of distinction, members of State armed forces may be considered combatants in both international and non–international armed conflicts. Combatant status, on the other hand, exists, only in international armed conflicts.'

[230] It must be assumed that the notable exception to this would be in respect of those individuals who are part of the state's instruments of violence (the army, police, paramilitary forces etc). This is supported by references in Common Article 3 to the Four Geneva Conventions supra note 2, and Article 3(2) of Additional Protocol II supra note 3, negating the use of the provisions to qualifying the legal status of persons in the conflict, the sovereignty, and retaining the governments' right to suppress rebellion by armed citizens.

[231] Common Article 3 actually resists the granting of any kind of recognition to an insurgent party. It expressly states that 'the application of the [Common Article 3] provisions shall not affect the legal status of the Parties to the conflict'; Article 3(2) of Additional Protocol II states that 'nothing in [Additional Protocol II] shall be invoked for the purposes of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re–establish law and order in the State or to defend the national unity and territorial integrity of the State'; Pictet et al op cit note 1 at 60–61.

[232] Article 6(5) of Additional Protocol II.

[233] As outlined in Common Article 3 supra note 2, and Part II of Additional Protocol II supra note 3. Such persons must be treated humanely (including decent treatment in detention) and enjoy protection against military attacks and other acts or threats of violence, such as murder, torture, inhumane or

Generally, persons in non-international armed conflicts who do not directly participate in hostilities enjoy generally more protection against the dangers of military operations than do persons that engage in hostilities.[235] Their protection, however, is not as extensive as that conferred to civilians in international armed conflicts. For example, there are no specific obligations upon states to remove them from a zone of conflict. It is nevertheless clear from Common Article 3 as well as Articles 4 and 13 of Additional Protocol II, that all such persons should not be attacked.[236] Such persons will lose their right of protection when they take a direct part in hostilities.[237] The absence of clear definitions of 'combatants' and 'civilians', however, raises ambiguity around who can and cannot be targeted by an adversary. In this confusion four approaches for tackling this issue have been suggested: the membership approach; the specific acts approach; the affirmative disengagement approach; and the direct participation on a sliding scale approach.[238]

The membership approach draws from the combatant/civilian dichotomy used in the treaties governing international armed conflicts. It suggests that persons confirmed to be members of one of the factions or groups should be treated in the same way as

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degrading treatment, the taking of hostages, and the passing of sentences without a fair trial.

[234] The International Covenant of Civil and Political Rights, 6 ILM 368 (ICCPR) lists the following rights as non–derogable: the right to life, prohibition of torture, slavery, genocide, arbitrary detention, imprisonment because of inability to fulfil a contractual obligation, the principle of legality in criminal law, the recognition of everyone as a person before the law, the freedom of thought, conscience and religion. The UN Human Rights Committee has confirmed that this list does not mean that other Articles may be derogated at will. 'General Comment No 29: States of Emergency' UN Human Rights Committee (2001) para 6, 8; Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May – 12 June 1971, Report on the Work of the Conference, ICRC, Geneva, (January 1972) Vol I, 120, para 2.536-2.537 & 2.539; A Orakhelashvili 'The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19(1) *European Journal International Law* 161–182; M J Dennis 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 19(1) *American Journal of International Law* 119–141.

[235] Article 13 of Additional Protocol II supra note 3; S Watts 'Present and Future Conceptions on the Status of Government Forces in Non–International Armed Conflicts' in K Watkin and A J Norris *Non–International Armed Conflict in the Twenty–First Century* (2012) 147–153.

[236] Henckaerts et al op cit 29 at 37–39; Schaller op cit note 61 at 357; Dinstein op cit note 8 at 32.

[237] B Boothby 'Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance: "And For Such Time As": The Time Dimension To Direct Participation In Hostilities' (2010) 2 *New York University Journal of International Law* 741 at 742–753.

[238] ICRC 'Interpretive 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 (2008) 90(872) *International Review of the Red Cross* 991–1047; Kleffner op cit note 218 at 315–336.

members of the armed forces in international armed conflicts, which ought to be different from the treatment given to civilians that directly participate in hostilities in international armed conflicts. This means that they can be attacked at any time irrespective of what activity they are engaged in at a specific instance.[239] This approach is consistent with the traditional view of armed conflict, where fighters are grouped on one side and can be targeted until such a time as they surrender or become *hors de combat.* It has, however, been criticised for permitting blanket attacks on all members of a group, irrespective of whether they may or may not engage in direct hostilities.[240]

The specific acts approach equates all persons outside a state's armed forces with civilians in international armed conflicts that take a direct part in hostilities. Just as these civilians are liable to attack for 'such time as they take part in direct hostilities', such persons may not be attacked unless they directly take part in hostilities.[241] Their immunity from attack is forfeited for the duration of the act amounting to direct participation in hostilities, and they may reclaim it once the act has ended.[242] The specific acts approach has been criticised for viewing non-international conflicts, as a contest between governmental forces and 'civilians that participate in hostilities'.

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[239] Pilloud et al op cit note 57; D Kret mer 'Targeted Killing of Suspected Terrorists: Extra–Judicial Executions or Legitimate Means of Defence?' (2005) 16 *European Journal of International Law* 171 at 198. The theory gains support from the ICRC Commentary on those references in Additional Protocol II to armed forces that suggest that persons who belong to armed forces or armed groups may be attacked at any time.

[240] J F Qu guiner 'Direct Participation in Hostilities in International Humanitarian Law' Report Prepared by the International Committee of the Red Cross, Geneva (September 2003) 8–10 available at http://www.icrc.org/ara/assets/files/other/direct_participation_in_hostilities_sept_2003_eng.pdf [accessed on 12 October 2012]. The aims of international humanitarian law are to minimise suffering. This can only be achieved if attacks are limited to persons engaged in hostilities. In this case, to extend attacks on the basis of membership may affect the rest of the civilian population. It transposes the situation of combatants in an international armed conflict into a non–equivalent context of non–international armed conflict where human rights law applies. Under human rights law it would be unlawful to kill someone that could be arrested without risk. This could lead to targeted killings.

[241] ICRC ibid at 1013–1015; N Mel er 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 2 *New York University Journal of International Law* 831 at 886–890; L Doswald–Beck 'Private Military Companies Under International Humanitarian Law' in S Chesterman and C Lehnardt F*rom Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007) Chapter 7. This loss of immunity while engaged in direct hostilities is narrowly defined as per those treaties dealing with international armed conflicts.

[242] Common Article 3 provides for the protection of 'persons taking no active part in the hostilities'. This suggests that persons who engage in hostilities ought not to be attacked when they refrain from engaging in active hostilities; Article 13(3) of Additional Protocol II affirms the protection of the civilian population 'unless and for such time as they take a direct part in hostilities'. This may be taken to support the theory that fighters in armed internal conflicts should be viewed as civilians engaged in hostilities.

This undermines the fundamental lines of authority that exist in the operations of dissident armed groups.[243] Further, the specific acts approach undermines international humanitarian law's efforts to maintain equality among belligerents by creating an uneven ground where non-state fighters remain immune between specific acts of hostilities, while the armed forces of a state remain legitimate targets throughout the conflict.[244]

The affirmative disengagement and the sliding scale approaches combine the membership and specific acts approaches in different ways. In the affirmative disengagement approach, the loss of immunity lasts from the first act of direct participation in hostilities until when the civilian completely disengages from all such actions.[245] The sliding scale approach applies the affirmative disengagement approach to organised armed groups, and the specific acts approach to unorganised civilians.[246] A combination of both approaches appears amenable to the context of non-international armed conflicts. On the one hand, the sliding scale approach levels the playing field between organised groups and adversarial forces that belong to the state.[247] Those persons who are not members of organised groups are treated as civilians, and may only be targeted when they actually participate in direct hostilities.[248] On the other hand, the affirmative disengagement addresses the risk of the 'revolving civilians' who intermittently transitions between engaging in direct hostilities and being civilians. Combining these approaches best addresses the need to balance between the right of belligerents to defend themselves against civilians engaging in direct participation in hostilities, and the immunity of the civilian population.[249]

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[243] These are recognised in Article 1 of Additional Protocol II's references to 'command responsible' 'control' and 'ability to implement this Protocol'.

[244] Schmitt op cit note 163 at 510.This has the potential to undermine respect for the law as belligerents cast off restraint in an unequal environment where their adversaries employ a revolving door phenomenon shifting between civilian and combatant spaces.

[245] ICRC op cit note 58 at 62–63.

[246] ICRC op cit note 58 at 62–3.

[247] Mirroring the traditional approach of international humanitarian law evident in those treaties dealing with international armed conflicts.

[248] This is in harmony with the provisions of Common Article 3 to the Geneva Conventions supra note 2, and Article 13 of Additional Protocol II supra note 3, which give protection to only those persons 'taking no active part'/'direct part in hostilities'.

[249] Schmitt op cit note 70 at 534. The aim of the DPH rule is to motivate civilians to keep away from hostilities by depriving them of their immunity. If given a narrow interpretation it may increase the risk to the civilian population. If given a broader interpretation, ie, an interpretation in favour of

In summary, the distinct differences in the rights and obligations of individuals that flow from their status classification in international armed conflicts are less evident in non-international armed conflicts where there is no express reference to a 'combatant'. Even though one can recognise from the provisions of the treaties the existence of certain groups of people, in the absence of an express distinction between combatants and civilians the legal status of persons will be largely determined by the domestic regime. Furthermore, where international humanitarian law ascribes a minimum set of rights to be accorded to these persons, these are generic rights applicable to any persons present in conflict. They are not tied to the classification of individuals, as illustrated in international armed conflicts, where, for example, being classified as a combatant corresponds to one's right to participate in hostilities and be a prisoner of war. The clear distinction between the rights to legitimately target combatants while ensuring the protection of civilians from hostilities that is evident in international armed conflicts is also more nuanced in non-international armed conflicts where one has to resort to various interpretative approaches in an attempt to separate persons actively engaged in hostilities from those that are not. In short, due to the absence of an express reference to combatants and civilians, the discrepancies that arise from the classification of actors in international armed conflicts are muted in the context of non-international armed conflicts.

3.4 OBSERVATIONS ON THE COMBATANTS/CIVILIANS JURISPRUDENCE

The foregoing discussion has underlined the significance of the combatant/civilian dichotomy as the fundamental basis upon which rights and obligations are correspondingly apportioned to persons that fall in one group or the other. Before discussing the challenges that emerge when civilians cross the dividing line to perform combatant functions, it is useful to conclude the above analysis by reflecting

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finding DPH, it may further the purpose of international humanitarian law by providing civilians with a reason to stay away from hostilities.

on a few observations regarding present criteria as to the combatant/civilian divide. This distinction is underpinned by three main considerations: the imperative to achieve a balance between military necessity and humanity; the prevalence of a state-centred paradigm in relation to lawful combatant status; and finally, the tension between the sacredness of the *jus in bello* space and developments occurring within the *jus ad bellum* environment.

3.4.1 Balance between Military Necessity and Humanity

Central to the development of international humanitarian law treaty provisions has been the need to maintain equilibrium between the principles of military necessity and humanity.[250] The provisions regarding the identity of combatants and civilians are no exception to this approach and constitute a compromise between these two principles. Military necessity justifies the departure from the prohibitive nature of international law on the use of force by allowing for the lawful attack on certain groups of persons,[251] while the principle of humanity seeks to limit suffering during armed conflict.[252] Military necessity permits belligerents to apply coercive force upon the enemy to compel their surrender.[253] Humanity restricts the lawfulness of this force by, among other things, restricting the persons upon whom such force can be applied, including the means through which it may be applied.[254] Essentially, there must be some connection between the level of death and destruction and the overcoming of enemy forces.

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[250] St Petersburg Declaration (1868), Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Saint Petersburg (29 November/11 December 1868) available at http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/130 [accessed on 12 October 2012]. The St. Petersburg Declaration recognised the need to maintain the balance between these two principles by seeking to fix the limits at which necessities of war ought to yield to the requirements of humanity.

[251] *United States v. von Weizsaecker* 14 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 *(Hostage Case)* (1950) 1230. Military necessity permits a belligerent, subject to the laws of war, to use force to compel submission of the enemy, including by destroying the life of armed enemies.

[252] Inherent in the Martens Clause that is included in the preamble of Hague Convention IV that obligates belligerents to conduct war in accordance with 'dictates of the public consciences'.

[253] *Von Weizsaecker* (*Hostage Case*) supra 251 at 1230.

[254] The principle of humanity emerges in various treaty provisions such as the principle of proportionality and precaution (Articles 57 & 58 of Additional Protocol I).

This fundamental balance is reflected in the mutually exclusive nature by which combatants and civilians are defined. The provisions of Article 4A of Geneva Convention III and Articles 43 & 44 of Additional Protocol I outline those persons (combatants) for whom the expediency of military necessity permits attack, while Articles 50(1) outlines those persons (civilians) who, in the interest of humanity, cannot be attacked under the guise of military expediency. Along the same lines, military necessity justifies the divergence from humanitarianism with respect to civilians, aptly described under Articles 51(3) of Additional Protocol I and Article 13 of Additional Protocol II as those who 'take a direct part in hostilities'. In terms of the conduct of hostilities, the balancing nature of humanity and military necessity is evident in the use of the term 'excessive' in determining whether the principles of precaution and proportionality have been met.

A look at the provisions of Article 4A of Geneva Convention III and Articles 44(3) of Additional Protocol affirms the importance of re-thinking the nature of combatancy where circumstances have changed and there is a need to re-determine what defines a combatant and/or civilian. This re-determination is necessary to maintain the delicate balance between military necessity and humanity. The emergence of new fighters (guerrillas) in new wars (national liberation wars) introduced the question of whether military necessity/humanity balance was well reflected in the provisions dividing combatants and civilians within the earlier 1907 Hague Convention IV and 1949 Geneva Conventions. The provisions of Article 1(4) Additional Protocol I revisit the application of this balance within the unique situation that had emerged, namely, of armed conflicts in which peoples are fighting against colonial domination, alien occupation and/or against racist regimes in the exercise of their right to self-determination. In this situation it was felt that a more flexible criterion for combatant status needed to strike an appropriate balance between military necessity and humanity.

This flexibility is reflected in Article 44(3) of Additional Protocol I and its extension of combatancy to persons in situations 'where owing to the nature of the hostilities an armed … [such a person] cannot … distinguish himself' provided he/she openly carries weapons during military deployment and during an attack. The provisions of the Additional Protocol I were thought to have been a revolutionary shift in response

to these developments aimed at accommodating these groups of persons as combatants and, thus, entitling them to the privileges that accompany combatant status (such as the right of participation in hostilities and prisoners of war status, upon capture).[255] This was an attempt to respond to the dilemma of how to enhance the protection of civilians from hostilities by providing appropriate incentives to irregular fighters to distinguish themselves from civilian population in zones of conflict through admission as combatants. Article 44(3) is therefore a compromise aimed at encouraging certain fighters to comply with international humanitarian law,[256] without reducing the protection of the civilian population, and remains a classic example of how the rules can evolve to accommodate the changing terrain. The debate remains open as to whether this shift maintains the balance between humanity and military necessity. Some states have criticised this development as undermining the ability of a state to target its adversaries and thus giving undue weight to humanity at the expense of military necessity. Whatever opinion one may have on the matter, what the developments discussed above illustrate is the changing terrain of armed conflict and the corresponding need to develop the distinction between combatants and civilians in a way that balances humanity and military necessity and thus maintains the efficacy of the law.

3.4.2 State-centric Nature of the Provisions

The provisions of Hague Convention IV, the 1949 Geneva Conventions and the 1977 Additional Protocols reflect the goals of the states consenting to be bound by them. Treaties regulating armed actors were open for ratification by states only, and reflect their views. States were, and remain, the primary subjects of international law. Within the context of war, this state-centric paradigm in a sense reflects the principle of legitimate authority within the just war philosophy as discussed in Chapter Two. Legitimate authority is tied to entities assumed not to have any higher authority, and since states have no common higher authority on the international platform, they

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[255] C Pilloud et al op cit note 57 at 520–521 & 529–530.; D Fleck op cit note 27 at 65–104, 309.
[256] Article 44(3) of Additional Protocol I is therefore a compromise aimed at encouraging certain fighters to comply with international humanitarian law.

were considered at the time of the making of these treaties, to be the subjects of international law.

It must, therefore, be borne in mind that the developments of the relevant provisions within Articles 1 – 2 of the Hague Regulations, Article 4A of Geneva Convention III and Articles 43-44 of Additional Protocol I, regarding who is and is not a combatant, first and foremost reflect the interest and wishes of states. In light of these provisions, actors that were not connected to the state fell outside the scope of lawful combatancy. Lawful combatancy is reserved for only those connected to the state. In this respect, those individuals that belong to the states' instruments of coercion, that is, members of the armed forces, are first on the list provided in Article 4A of Geneva Convention III and Article 43 of Additional Protocol I. States possess discretion as to who falls within their national armed forces. Lawful combatancy is only ceded to irregular forces such as those mentioned in Article 4A where these have a *de facto* link with the state.[257] Such irregular forces must 'belong to a Party to the conflict'[258] and be 'under a command responsible'.[259]

This state-centric nature is also evident in the fact that less detail is accorded to the development of a similar category of lawful combatants in the context of non-international armed conflicts. The provisions governing non-international armed conflicts reveal the tension between the development of international law and the sovereignty of a state and more specifically, the reluctance by states under international law to cede rights to non-state actors.[260]

In this regard, non-state fighters are excluded from enjoying the rights combatants receive during international armed conflicts, such as the right to prisoner of war status. This meant that states treated captured individuals as civilians (or unlawful combatants), who may be prosecuted for the simple fact of participating in hostilities, rather than persons who have combatant privilege and may enjoy prisoner of war status. This tendency, and the preeminent position of the state, is further reflected in

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[257] Article 4A of Geneva Convention III.
[258] Article 4A(2) of Geneva Convention III.
[259] Article 4A(2)(a) of Geneva Convention III supra note 2, and Article 43(1) of Additional Protocol I.
[260] In terms of the development of the identity of such non–state forces and their rights.

the differentiation of the rights that pertain to actors in situations where external intervention by a state 'internationalises' an internal armed conflict between a government and non-state actor. Military confrontation, resulting from an external state actor aiding a government against an internal non-state actor, is governed by the less detailed regime of non-international armed conflict treaties.[261] However, where the forces of an external state aiding a non-state actor against its government confront the government forces, this confrontation will be governed by the rules applicable to international armed conflicts.

3.4.3 Prevailing Tension Between *Jus Ad Bellum* and *Jus In Bello*

The tensions that arise out of the confluence between *jus in bello* and *jus ad bellum* discussed in the previous chapter are evident in the present legal regime's attempt to classifying actors in conflict. The separation of *jus in bello* and *jus ad bellum* as was shown there, is critical since it maintains a platform where belligerents are treated equally during *jus in bello* and, through this approach, affords the maximum protection to the victims on both sides of the conflict. There are indications that the tension that has characterised the need to separate these two spheres of the law of war persists in the current legal framework. Some provisions demonstrate attempts to isolate international humanitarian law from the influence of *jus ad bellum.* Other provisions manifest the encroachment of *jus ad bellum* on the classification of actors and their rights.

The interaction between *jus ad bellum* and *jus in bello* can be seen in the context of non-international armed conflicts. It is evident that international humanitarian law espouses the need to keep the two domains separate. For example, Common Article 3 to the Geneva Conventions makes it clear that the extension of minimal rights to internal conflicts 'shall not affect the legal status of the Parties to the conflict'. Thus according to the ICRC Commentary on Article 3, when a state applies this Article, it does not recognise the authority of its non-state adversary. In so doing Article 3 does

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[261] Common Article 3 to the Four Geneva Conventions supra note 2 and Additional Protocol II supra note 3.

not deny states the right to quell an armed rebellion against its authority. This approach could be taken as the desire to keep the spheres of law separate.[262]

In contrast, the influence of *jus ad bellum* in *jus in bello* is evident within the legal framework. For example, it can be seen in the failure by the legal regime governing non-international armed conflicts to provide a definition of who is a combatant or who is a civilian. This failure is no accident, since the fundamental challenge in this context is the absence of a clear *jus ad bellum.* In international armed conflicts the rights pertaining to *jus ad bellum* possessed by states are elaborate and have given rise to a situation where there is no difficulty in defining, in the situation of *jus in bello,* combatants and their rights and obligations and non-combatants and their rights and obligations. In contrast, there is no *jus ad bellum* in non-international armed conflicts. Article 3 and the provisions of Additional Protocol II remain aloof on the rights of the non-state actors to engage in conflict and instead outline minimal rights for those not taking an active part in hostilities. This discrepancy between the two contexts (international and internal conflicts) is a reflection of the influence of the absence of *jus ad bellum* on the rights applicable during *jus in bello.*

The influence of *jus ad bellum* into the *jus in bello* domain is also evident in the enlargement of the scope of international armed conflicts to include situations previously considered internal conflicts where non-state actors fight against colonial domination, alien occupation and racist regimes, in pursuit of their right of self-determination. Article 1(4) of Protocol I conferred upon these non-state actors *jus in bello* rights, for example prisoner of war status, that remain out of the reach of other non-state actors. Moreover, by virtue of Article 44(3) of Additional Protocol I, these rights are accessible to such actors under more favourable conditions than regular armed forces, since when operating in exceptional circumstances such actors are only required to comply with more relaxed criteria for distinguishing themselves from civilians.[263] This approach signifies attempts by the law to enlarge the net of persons deserving of *jus in bello* protection. The question of *jus ad bellum* creeping into the realm of *jus in bello* can be raised by the fact that Additional Protocol I has extended

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[262] Chapter 2 (section 2.3.4).
[263] Chapter 3 (section 3.2.1.3).

protection to one group of fighters previously excluded from lawful combatancy — guerrillas fighting in wars of national liberation — while excluding another group of fighters, like mercenaries, from combatant privileges based on *jus ad bellum* reactions during post-colonial Africa..[264]

3.5 CHALLENGES FOR CIVILIANS DIRECTLY PARTICIPATING IN HOSTILITIES

Civilians are not expressly authorised to participate directly in hostilities and, provided that they refrain from hostilities, are to be respected.[265] Although not expressly prohibited from doing so in specific treaty provisions, civilians who directly participate in hostilities do not possess similar rights to lawful combatants that directly participate in hostilities. In this regard, understanding the notion of 'direct participation in hostilities' is useful to determining when civilians contravene this strict obligation.[266] This preliminary understanding is also crucial since once civilians cross the lines of this prohibition a range of consequences arise beyond the effect that this action may have on the individuals rights of the civilian in question. In addition, the engagement of civilians in hostilities also has the potential to undermine the aims of international humanitarian law in protecting the wider civilian population. In certain contexts, this may also have an impact on the extent of state and command responsibility that may arise in relation to violations committed by such civilians.

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[264] It introduces *jus ad bellum* preferences (regarding people who fight for self–determination versus mercenaries) as grounds for more favourable *jus in bello* treatments. This tension is also evident in the provisions of Additional Protocol II where rights are granted only to actors that meet the scope of its application (that is, organised armed forces controlling specific territory and under responsible command) and not to others, for example, private armies; M Reisman 'Private Armies in a Global War System: Prologue to Decision' 14 *Vancouver Journal of International Law* (1973) 1 at 2, 4.

[265] Article 27(1) of Geneva Convention IV; Article 51(2) of Additional Protocol I supra note 3; Article 13(2) Additional Protocol II supra note 3; H P Gasser 'Protection of the Civilian Population' in Fleck op cit note 27 at 267.

[266] D Williams 'The Often–vexed Question of Direct Participation in Hostilities: A Possible Solution to a Fraught Legal Position?' (2009) 2(1) *Journal of Politics and Law* 1–8.

3.5.1 Notion of Direct Participation in Hostilities

The notion of direct participation in hostilities warrants examination in view of its effect upon the protections and rights accorded to actors in international and non-international armed conflicts. In international conflicts it effectively defines the parameters beyond which civilians drift out of their position of immunity (and thus may be attacked),[267] and beyond which they contravene the paramount obligation to refrain from hostilities (and thus may become punishable under domestic law for taking part in hostilities). In non-international armed conflicts, where there is no express reference to combatants, direct participation in hostilities is crucial to determining who forms a legitimate target for the adversary and, depending on the interpretation adopted, may inform whether one is considered to be a *de facto* combatant for these purposes.

In order to establish the meaning of the phrase it is useful to examine its usage within Article 51(3) of Additional Protocol I and Article 13 of Additional Protocol II, which state that 'civilians shall enjoy the protection afforded … unless and for such time as they take a direct part in hostilities'. This limitation is not clear since the phrase is not defined. The International Committee of the Red Cross (ICRC) Interpretative Guidance on the Notion of Direct Participation in Hostilities[268] defines direct participation in hostilities as a 'specific hostile act carried out by individual as part of the conduct of hostilities between parties to an armed conflict'.[269] It is consequently generally agreed that acts amounting to direct participation in hostilities must meet three cumulative requirements,[270] namely, achieve the threshold regarding the harm likely to result from the act; exhibit a relationship of direct causation between the cause and the expected harm; and show a belligerent nexus between the act and the hostilities between belligerent parties.

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[267] K Dörmann 'The Legal Situation of "Unlawful/Unprivileged combatants"' (2003) 8 9(85) *International Review of the Red Cross* 45 at 72.
[268] The product of five large–scale expert meetings held by ICRC to research the notion. ICRC op cit note 238 at 991–1047.
[269] ICRC op cit note 238 at 1013; The nature of hostilities involves preparation and return from combat, see Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) 192 (Swiss Federal Political Department 1978) 26 May1977, XV 330,, CDDH/III/224.
[270] Ibid at 1014; ICRC op cit note 58 at 17–24.

To qualify as 'direct participation in hostilities', an act must give rise to the objective likelihood that the harm likely to result meets a particular threshold. What matters is not the materialisation of the harm, but the objective likelihood that the act will result in such harm.[271] The requisite threshold can be reached where the act either adversely affects the military operations or its gravity is particularly severe enough to cause injury, death or destruction to civilians or protected objects.[272] Examples of acts that adversely affect military operations and would thus meet this threshold include sabotaging armed or unarmed military operations; disrupting military deployments, logistics, communications and equipment; capturing or guarding military personnel or objects; clearing mines placed by the adversary; electronic interference with military computer networks or wiretapping the adversary's information for an attack.[273] This means that to qualify as 'direct' rather than 'indirect' participation, there must be causal or design proximity between the act and the harm. According to the ICRC Commentary on Article 51 (3) of Additional Protocol I, the act must be 'likely to cause actual harm' by its nature or purpose.[274] Essentially, the harm must be brought about in one causal step. In other words, the test is: but for the act in question, would the harm have materialised?[275] Only activities that are not too remote meet the requisite degree of causation. An act that has potential to harm an enemy or causes harm only indirectly will not be included. The causal proximity required in direct causation should, however, not be mixed up or interpreted to mean that the link requires time and geographical proximity.[276] The likelihood of harm may be met through delayed weapon systems as well as through far-flung remote-controlled weapon systems, whose time and geographical borders are distant. Similarly, the causation requirement may also be met within the collective nature and complexity of contemporary military operations that occur within subsequent periods or different locations.[277]

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[271] Ibid.
[272] Ibid.
[273] Ibid at 1018.
[274] Pilloud et al op cit note 57 at 613–628.
[275] ICRC op cit note 58 at 33.
[276] Schmitt op cit note 70 at 537.
[277] ICRC op cit note 238 at 1022–1023.

In addition to the above criteria, the act of violence must have a nexus to the belligerents, that is, support one party to the detriment of the other.[278] The decisive question is whether the conduct could be perceived as designed to support one party by directly causing the required threshold of harm to another party. Many activities lack a belligerent nexus even though they cause considerable harm. For example, the exchange of fire between police and hostage-takers during an ordinary bank robbery, violent crimes committed for reasons unrelated to the conflict, and the stealing of military equipment for private use, may cause the required threshold of harm, but are not specifically designed to support a party to the conflict by harming another.[279] Similarly, individual self-defence or the defence of others against violence in contravention of international humanitarian law will lack the required belligerent nexus, and not amount to direct participation in hostilities. Likewise, the military operations of a party adversely affected when fleeing civilian roadblocks is not designed to support one party and lacks belligerent nexus. This would change if, for example, civilians block a road to facilitate the withdrawal of insurgent forces by delaying the arrival of governmental armed forces.[280]

3.5.2 Erosion of the Immunity of the Civilian Population

As observed in Section 3.4 of this Chapter, international humanitarian law seeks to balance the fulfilment of the military mission of belligerent parties within the confines of humanitarian principles that limit the suffering of those not taking part in hostilities.[281] To this end, Spaight, a scholar of the early Twentieth Century, observed that the separation of combatants and civilians into two distinct classes was one of the greatest triumphs of international humanitarian law towards mitigating the evils of war.[282] Combatants are to distinguish themselves from civilians as they engage in military operations and, at the same time, civilians are not authorised to directly participate in hostilities. The principles on the conduct of hostilities, such as

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[278] Ibid.
[279] A Wenger and S J A Mason 'The Civiliani atio n of Armed Conflict: Trends and Implications' (2008) 90(872) *International Review of the Red Cross* 835 at 852.
[280] Schmitt op cit note 163 at 526.
[281] Melzer op cit note 241 at 886–890; Doswald–Beck op cit note 242 in Chesterman & Lehnardt (2007) Chapter 7.
[282] Spaight & Acland op cit note 30 at 37.

those of precaution, military necessity and proportionality, rest upon combatants complying with this distinction, and civilians refraining from hostilities. In particular, the ability to issue clear instructions to belligerent forces around these rules is based upon the belligerent's ability to distinguish between the combatants who essentially form a threat, and civilians who in the same context are, as it were, 'harmless'.[283]

The desired aim of the law and the rules on how belligerents should conduct hostilities do not envisage a battlefield populated by civilians playing the primary role of combatants — that of directly participating in hostilities. Such civilians present formidable challenges to the implementation of the rules governing the conduct of hostilities. They blur the lines between those perceived as combatants and those meant to be civilians. They also present dilemmas to belligerents as to how to prosecute military operations in line with the object of international humanitarian law in order to maintain a balance between their right to overcome the enemy while adhering to the humanitarian concerns of protecting civilians. This dilemma is aggravated by the fact that belligerents may live among civilians and engage in hostilities while not distinguishing themselves.

Enemy belligerents could justifiably conclude that civilians are directly taking part in acts that are hostile and harmful to their personnel, population and equipment and be tempted to engage the civilians they view as *de facto* combatants.[284] Their appearance as actors directly engaging in hostilities may, in the eyes of a belligerent, be viewed as a gradual metamorphosis from non-combatant status to a *de facto* or quasi-combatant status. In the long run these views may have a negative impact on the perceptions of the enemy towards ordinary civilians, where the enemy may find it increasingly excusable to engage any civilians close to military operations.[285] The result is the encroachment on the boundaries of civilian immunity. Much of the context rests on the concepts of innocence and harmlessness discussed earlier in Chapter Two. Essentially, persons located within the adversary's population, who are presumed innocent on the basis of their harmlessness or that they do not pose a

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[283] W H Parks 'Special Forces Wear of Non–Standard Uniforms' (2003) *Chicago Journal of International Law* 493 at 514.
[284] Pilloud et al op cit note 57 at 618–619.
[285] D M Maxwell 'The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?'(200) *Military Review* 17 at 20.

military threat, ought to be protected from direct attack. When civilians begin to directly participate in hostilities, they undermine this rule and its application to the wider civilian population. Civilians would fall victim to arbitrary targeting by armed forces unable to identify their adversary and, under increased pressure, of being harmed by civilian persons involved in the conflict.

3.5.3 Unlawful Belligerency and the Loss of Rights under Humanitarian Law

Civilians directly participating in hostilities present difficulties with regard to linking them to the term of 'non-combatants'. This has prompted some military law analysts to place them in the grey area of persons described as unlawful combatants.[286] Unlawful combatants are actors participating directly in hostilities that fail to meet the requirements for lawful combatant status.[287] In *Ex Parte Quirin*, the court issued a statement that is considered to be a reflection of customary international law concerning unlawful combatants:

> ... the law of war draws a distinction between the armed forces and peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. 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.[288]

According to this dictum, unlawful combatants therefore start as civilians but violate the crucial rule regarding non-participation in hostilities, while remaining unaligned with the requirements for lawful combatant status. In contrast to lawful combatants who remain combatants (and are entitled to combatant protections) even when they breach the laws of war (provided they carry their arms openly),[289] unlawful combatants have never enjoyed lawful combatant status. As a result unlawful combatants have none of the rights proscribed to combatants.[290] At the same time, by

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[286] P W Singer *Corporate Warriors: The Rise of the Privatized Military Industry* (2003) 307.
[287] M Mofich & A E Eckert '"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels' (2003) 36 *Cornell International Law Journal* 59 at 68–69.
[288] *Ex Parte Quirin et al* Supreme Court of the United States 317 US 1 (1942) at 37, available at http://www.loc.gov/rr/frd/Military_Law/pdf/Supreme–Court–1942.pdf [access on 12 October 2012].
[289] Article 44(2)–(3) of Additional Protocol I.
[290] The differences between such civilians and combatants become clear upon capture, in relation to their treatment. As previously shown only combatants rightfully engaged in hostilities are entitled to

engaging in hostilities they lose the substantial protections afforded to civilians in general.[291] Outside the entitlement to core human rights that remain non-derogable during armed conflicts international humanitarian law is not clear on the treatment of civilians who abrogate their obligation not to engage in hostilities.[292] Though they could potentially be civilians under the scope of Geneva Convention IV, their entitlement to the detailed rights contained in Part III of this treaty will be negated by Article 5.[293] The effect of the derogation means that civilians engaged in hostilities are entitled to the minimum protections provided under this treaty and Additional Protocol I.[294]

Beyond this, international humanitarian law does not explain precisely if such civilians who have taken a direct part in hostilities can be prosecuted for merely engaging in hostilities or whether they should be prosecuted only where a crime has been committed. On the international level, as far as international humanitarian law is concerned, the engagement by civilians in hostilities is not a war crime.[295] The ICRC Interpretive Guidance suggests that civilians that engage in hostilities may be

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POW status in the event of capture. In contrast, civilians that directly participate in hostilities will not be entitled to POW status or its accompanying treatment.

[291] In particular, Article 51(3) makes it clear that they lose protection from direct attack and may become legitimate military targets. In addition, they will not be considered to be civilians in the context of the application of the principles of proportionality and precaution by military commanders. As observed, these principles, provided for under Articles 51(5)(b), 57(2)(a)(iii) and customary international law obligate commanders to take into account civilian casualties prior to launching an attack and minimise civilian harm when executing military operations.

[292] M Byers *War Law: Understanding International Law and Armed Conflict* (2005) 118–119.

[293] Article 5 of Geneva Convention III, states: 'Where ... a Party ... is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such an individual shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.'

[294] This will remain entitled to certain non–derogable minimum protections such as humane treatment (as defined under Articles 27 and 37 of Geneva Convention IV), right to fair trial (as defined under Article 71–76 of Geneva Convention IV). This position is confirmed by Article 45(3) of Additional Protocol I, which makes it clear that any person who has taken part in hostilities does not benefit from the favourable treatment of the provisions of Geneva Convention IV, but only the minimum rights provided under Article 75 of Additional Protocol I. These minimum rights include the right to be 'treated humanely in all circumstances' and that to enjoy the respect of their 'person, honour, convictions, and religious practices'. These are fundamental guarantees within customary international law; Henckaerts et al op cit 29 at 306–307. Rule 87 of the Customary International Humanitarian Law Study; Commission of Experts Appointed to Investigate Violations of International Humanitarian Law in the Former Yugoslavia, UN Doc S/199 /67 (2 December 1990) para 52 'Declaration of Minimum Humanitarian Standards' Adopted by a Meeting of Experts, Organised by the Human Rights Institute of Abo Akademi in Turku/Abo, Finland, UN Doc E/CN4/sub2/1991/55

[295] Article 8 of the Rome Statute of the ICC. Article 8 does not include DPH within the definition for a war crime; ICRC op cit note 238 at 1045. The absence of an express right for civilians does not imply the existence of an express prohibition under international humanitarian law.

prosecuted where a crime has been committed under the domestic criminal legislation.[296] In the context of non-international armed conflicts, domestic legislation is likely to criminalise actions where citizens bear arms against their government. In international armed conflicts, the position is less clear since adversarial states may not have domestic laws that criminalise violent acts by civilian enemy nationals. Where domestic laws exist in this regard such civilians will be prosecuted even if they respect all the rules of international humanitarian law.[297] On the other hand, if no such laws exist, such civilians may find themselves in the precarious position of unlawful combatants.[298]

3.5.4 Impact on State Responsibility

The potential of civilians directly participating in hostilities may undermine the effectiveness of the law on state responsibility. In the situation where state X using its forces and its civilians to execute military operations against state Y, the potential to hold it responsible for violations arising from the conduct of either will differ. An understanding of this scenario calls for an overview on the law of state responsibility and its application to these two situations.

The *Chorzow Factory* case (1927) defined state responsibility as an 'obligation to make reparation for any breach of an engagement'.[299] The principles regarding state responsibility were codified in the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter 'ILC Draft Articles').[300] Article 1 stipulates that '[e]very internationally wrongful act of a State

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[296] ICRC op cit note 238 at 1045–1046.
[297] Dinstein op cit note 8 at 105; O Uhler, H Coursier & ICRC (eds) *Commentary: IV Geneva Convention Relative to the Treatment of Prisoners of War* (1958) 55–56.
[298] Chapter 5 (section 5.3.1); C J Mandernach 'Warriors without Law: Embracing a Spectrum of Status for Military Actors' (2008) 7(1) *Appalachian Journal of Law* 137 at 163.
[299] *Case Concerning the* PCIJ (*Jurisdiction, Judgment*) No. 8 [1927] (Series A) No. 9, (1927) 21 available at http://www.icj–cij.org/pcij/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf [accessed on 12 October 2012]. According to the Court, reparation arises from failure to apply a convention, and this need not be stated expressly in a treaty; the principle has been further established in subsequent cases such as *Corfu Channel, Merits* Judgment ICJ Reports (1949) 23.
[300] Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles) 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001) available at http://untreaty.un.org/ilc/texts/9_6.htm [accessed on 10 November 2012]; ILC Draft Articles are also

entails the international responsibility of that State'.[301] Article 2 defines an international wrongful act as an action or omission that: '(a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State'. State responsibility is therefore incurred when there is an international legal obligation between two or more states; that obligation is breached; and the breach committed by the actor is attributable to the state.[302]

The laws of war form the basis for an international obligation which if contravened will qualify as a breach for the purposes of state responsibility., Whether the state is in fact held liable will, nevertheless, depend further upon whether the conduct of the actor contravening the breach is attributable to the state. Articles 4, 5 and 8 of the ILC Draft Articles provides for three different avenues through which attribution can be established:

- In relation to government organs, Article 4 provides:

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

- In relation to persons (including entities) empowered to exercise elements of governmental authority, Article 5 provides:

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reprinted in J Crawford *In n n L mm n' A n S R p n b : Introduction, Text and Commentaries* (2001). The final text of the ILC Draft Articles was adopted the ILC in August 2001. On 12 December 2001, they were adopted, the UN General Assembly adopted Resolution 56/83, which commended the ILC Draft Articles to government for their future adoption. Although states have not adopted these Articles as part of a treaty, the development of the ILC Draft Articles are part of a process of codifying existing customary law. Eg in the ICJ *Case Concerning Gabcikovo-Nagymaros Project (Hungary v Slovakia)* Judgement ICJ Rep 7 (1997) para 27-59 stated that the ILC Draft Article 33 codified existing customary international law regarding the state of necessity.

[301] Article 1 of the ILC Draft Articles; *Barcelona Traction, Light and Power Company, Ltd* (Second Phase) [1970] ICJ Rep 3 – In this case the ICJ contrasted the position of an injured State in the context of diplomatic protection with the position of all States in respect of the breach of an obligation towards the international community as a whole. The Court made it clearly that for the purposes of state responsibility obligations are owed to the international community as a whole and all States have a legal interest in their protection.

[302] M N Shaw *International Law* (2003) 66, 68–71, 696.

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

- In relation to private persons or entities, Article 8 provides:

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

Article 4 establishes unqualified responsibility for the conduct of such organs of the state as explained by the International Court of Justice (ICJ) in the *Bosnia Genocide* case.[303] In view of the abstract example, unqualified responsibility for state X means the it will be liable for the violations by its armed forces for all acts including *ultra vires* acts (in contravention of the direction of his/her superiors) and acts undertaken while off official duty. Neither the argument that the person in question did not act in his/her capacity as a soldier, nor that he/she contravened instructions will provide a defence.[304] This position is confirmed by Article 91 of Additional Protocol I, which provides: '[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'

Articles 5 of the ILC Draft Articles requires a greater burden, for a state will be responsible only if it can be shown that the individual acted in a capacity vested upon him/her to perform specific delegated duties. Even more onerous will be the task of proving the necessary link for attribution in the case of private individuals who may fall outside Article 5. Here, to fulfil the requirements of Article 8 it must be shown that the violation has been perpetrated by private actors who are *de facto* acting on the instructions of, or under the direction and control of, that state in carrying out the

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[303] Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia & Herzegovina v Serbia & Montenegro),* ICJ 2007 91 (26 February 2007) para 392 *(Bosnia Genocide Case)*, available at http://www.icj–cij.org/docket/files/91/13685.pdf [accessed on 30 October 2012]. Read alongside Article 7 of the ILC Draft Articles; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports (1999) (I), 87 para 62.

[304] *Democratic Republic of the Congo v Uganda* ICJ (*Judgment*) [2005] Rep 168 (19 December 2005) para 213 available at www.icj–cij.org/docket/files/116/10455.pdf [accessed on 23 June 2013].

conduct.[305] This still contemplates two different scenarios, namely, one in which a state may explicitly instruct an individual or group to carry out wrongful conduct;[306] or two, where the state directs or controls the conduct of the private actor and this conduct is an integral part of the states operations.[307]

International and regional courts are not unanimous about the degree of direction or control required.[308] The ICJ in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua*)[309] has adopted the effective control test. This requires one to show that the private entity was completely dependent on the state — a very high threshold.[310] In contrast, in the case of [311] the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) rejected the 'effective control' test and instead adopted the 'overall control' test.[312] This test does not require full control but only evidence of overall control by pointing the existence of various factors, for example, equipping and financing, when state support is provided to an armed group.[313] Commentators like Meron have criticised for transposing onto the field of state responsibility issues concerning the qualification of conflicts under international humanitarian law.[314] This criticism seems warranted, since in the ICTY Trial Chamber was called to classify whether an internal conflict was internationalised through the nature and extent of support given by the state of Serbia to Bosnian Serb rebels. In *Nicaragua* the question specifically related to examining whether state responsibility attached to USA for violations committed by various rebel groups opposing the Nicaragua government. For this reason, it is

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[305] Article 8 of the ILC Draft Articles.

[307] *Bosnia Genocide Case* supra 303; supra note 16.
[308] *Bosnia Genocide Case* supra 303 para 19; *Tadic* supra note 16.
[309] *Nicaragua Case* supra note 20 para 219.
[310] M Milanovic 'State Responsibility for Genocide' (2007) 17 *European Journal for International Law* 553 at 576–577. Explaining that it is a high threshold.
[311] *Tadic* supra note 16 at para 94–1.
[312] *Tadic* supra note 16 para 131.
[313] *Tadic* supra note 16 para 131.
[314] T Meron 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout' (1998) *AJIL* 92 (236) at 237, where Meron states that the problem in the [*Tadic*] trial chamber's approach lay not in its interpretation of *Nicaragua,* but in applying *Nicaragua* to at all. Obviously, the *Nicaragua* test addresses only the question of state responsibility. Conceptually, it cannot determine whether a conflict is international or internal; A Cassese op cit note 76 at 657, 663, 668; International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission Finali e d by M Koskenniemi' UN Doc A/AC. /L.682 (13 April 2006) 31–33, paras 49–52.

likely that the appropriate test is that outlined in *Nicaragua.* This view appears to be endorsed by the later ICJ ruling in the *Bosnian Genocide* case. Here the ICJ examined the question of attribution under Article 8 in order to decide if acts by the Serb National Alliance (Republika Srpska) members in Srebrenica could be attributed to the state of subjeYugoslavia.[315] The ICJ rejected the 'overall control' test of and instead reaffirmed the 'effective control' test of *Nicaragua.*

In the hypothetical situation involving State X and State Y, a gap is evident when comparing the responsibility of State X for the actions of a member of the armed forces and for those of the civilians that it tacitly endorses. In contrast to the responsibility it has for its armed forces,[316] there will be no unqualified responsibility by State X in relation to the civilian it may tacitly endorse. Further, the additional requirements under Article 5 and 8 in relation to entities that are not organs of the state make it even harder for State X to be responsible for the violations of these civilians.

These impediments are exacerbated by the fact that attribution of violations by these civilians will most likely need to meet the higher threshold test for 'effective control' instead of the 'overall control' test. This means that it will be insufficient to point to the existence of various factors (for example, financial, weapons supply ,etc.) as evidence of state support to such civilians: one must go further to show that such civilians are completely dependent or under the control of the state.[317] This burden is extremely difficult to prove and will mean only that State X is likely to face less responsibility for the violations of these civilians in comparison with those of its own armed forces. In these circumstances, one cannot rule out the potential for mischief arising out of these discrepancies. State X, cognisant of the difficulties posed in establishing its responsibility for violations by civilians, may deliberately turn a blind eye to such violations. Even worse, State X may deliberately resort to using such

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[315] Bosnia Serb entity that attacked the Bosnian town of Srebrenica and killed 7 000 men and forcibly removed 30 000 women and children. 'Srebrenica: Genocide Reconstructed' Balkan Transitional Justice (2 February 2012) available at http://www.balkaninsight.com/en/article/srebrenica–genocide–reconstructed [accessed on 12 May 2013].
[316] Article 4 of ILC Draft Articles.
[317] Chapter 4 (section 4.4.3).

civilians to conduct assignments that would ordinarily attract responsibility if undertaken by its own armed forces.

3.5.5 Impact on Oversight and Discipline of Civilian Fighters

The involvement of civilians in direct hostilities poses certain challenges in terms of the command, control and discipline of such persons during armed conflict. This is well- illustrated when one compares the consequences that arise where a state hires such civilians in an armed conflict with that which pertains the use of its armed forces. This section explores how the use of such civilians undermines current mechanisms among the armed forces that ensure the responsibility by commanders, the discipline of troops and effective punishment for violations of the laws of war.

In terms of command responsibility, the presence of civilians directly participating in hostilities is likely to weaken the effectiveness of superiors in addressing violations of international humanitarian law by their subordinates. A brief introduction to the doctrine of command responsibility is useful to illustrate this point. Command responsibility extends culpability of individual responsibility for international crimes to high-ranking officials or military officers. The notion has formed a part of the conduct of war since early times, and developed in the post-World War II through the Nuremburg and Tokyo Tribunals to include not just military officials but also civilian leaders.[318] Today Articles 87(1)[319] and 86(2)[320] of Additional Protocol I lay out the scope of the doctrine and have influenced its codification in the statutes of the UN ad hoc war tribunals[321] and the International Criminal Court (ICC)[322] which

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[318] B V A Röling & C F Rüter (eds) *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE), 29 April 1946–12 November 1948* (1977) 30; Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, GA Res 95 (I), UN GAOR, 1st Sess, pt. 2, UN Doc A/236 (1946)1144.

[319] Article 86(2) provides: 'The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal, or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.'

[320] Article 87(1) read as follows: 'The High Contracting Parties to the conflict shall require military commanders, with respect to members of the armed forces under command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.'

[321] Article 6 of the *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13*

made enormous contributions to clarifying its legal nature.[323] Article 86 of Additional Protocol I created an avenue to codify civilian responsibility by referring to 'superiors' instead of 'commanders'.[324] Three elements are required to establish liability under command/superior responsibility. These are the existence of superior/subordinate relationship; [325] a certain degree of knowledge by the superior of the subordinate's actions;[326] and a failure by the superior to act to prevent/repress the subordinate's actions.[327] The discussions that follow show how the application of these elements make it harder for civilian superiors to meet the requirements of superior responsibility than military commanders. [328]

The first of these, superior-subordinate relationship, revolves around effective control by one party of another's actions. It presupposes a duty to act, failure to do so results in liability based on an omission.[329] The superior status must be assessed with regard to the real authority exercised.[330] Civilians assume liability on the basis of either the *de jure* or *de facto* authority they possess. In a non-military setting, it is sufficient if control is comparable with the command authority within a military organisation. The application of superior responsibility to civilians appears to be more stringent than that required in command responsibility. Here this element of authority needs to be established beyond reasonable doubt. Both tribunals affirmed that mere influence of a commander/superior would not be sufficient in this regard,

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October 2006) (8 November 1994) available at http://www.refworld.org/docid/3ae6b3952c.html [accessed 24 June 2013]; Article 7 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)* (25 May 1993) available at http://www.refworld.org/docid/3dda28414.html [accessed 24 June 2013].

322 Article 28 of the Rome Statute of the ICC.

323 (Judgment) Case No IT–95–14/2, Trial Chamber (26 February 2001) para 401.

324 In contrast to the reference under Article 87 to military commanders.

325 Article 86(2) states: 'The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility'.

326 Article 86(2) states: 'If they knew, or had information which should have enabled them to conclude in the circumstances at the time, that [the subordinate] was committing or was going to commit such a breach.'

327 Article 82(2): 'If they did not take all feasible measures within their power to prevent or repress the breach.'

328 Pictet et al op cit note 41 at 1010. The ICRC Commentary on the Article makes it clear that the provision refers both to military and civilian commanders. Furthermore, according to the ICRC Commentary on the Article, the concept of a superior responsibility is broader than command responsibility

329 I Bantekas 'The Contemporary Law of Superior Responsibility' (1999) 93 *American Journal of International Law* 573 at 591–593.

330 Trial Chamber (*Judgment*) Case No IT–95–14–T (3 March 2000) paras 300–2.

[331] and that a higher degree of authority is required, whether formally or informally exercised.[332] This may narrow the possibility of charging a civilian superior or *de facto* commander, creating a gap in the punishment of serious crimes.

The second element requires that the control must be accompanied by a failure by the superior to take necessary and reasonable measures to prevent (all feasible measures within their power) the criminal act or punish the perpetrator. In essence, this creates a duty to use every means within his/her power to prevent or repress grave crimes by his/her subordinates.[333] Preventive measures include providing adequate training; planning operations in accordance with international humanitarian law; having a reporting system to inform on violations of international humanitarian law, and issuing and implementing orders to prevent the commission of a crime.[334] If the crime has already been committed he/she must initiate an investigation into the matter or, alternatively, submit the matter to the appropriate prosecutorial organs.[335] As with the element of control, this action in a non-military context is harder to establish in a military setting. In a military setting, superiors operate within a strict hierarchy that makes them clearly responsible for their subordinates' activities. The hierarchy in a non-military context is not as elaborate and lacks a culture of orders where commanders have recourse to a disciplinary system in exercising control.

In terms of the third element, the phrase 'knew or had reason to know' requires one to demonstrate that the commander/superior was aware 'that the relevant crimes were committed or were about to be committed'.[336] In relation to military commanders, the standard expressed here creates putative negligence where commanders in possession of sufficient information of criminal activity by their subordinates will be

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[331] *&* supra note 324 para 415–16: *Prosecutor v Aleksovski* Trial Chamber (*Judgment*) Case No IT–95–14/1–T (25 June 1999) para 78.

[332] *and C* supra note 324 para 415–16; *Aleksovski* supra note 331 para 78.

[333] *Zjn , Z M (' '), H m n E L n ('Z n g ') (' b ')* ICTY Appeals Chamber (*Judgement*) IT–96–21 (20 Feb 2001) para 370, available at http://www.icty.org/x/cases/mucic/acjug/en/cel–aj010220.pdf [accessed 30 January 2013].

[334] R Arnold & O Triffterer 'Responsibility of Commanders and Other superiors' in O Triffterer *Commentary on the Rome Statute of the International Criminal Court — b ' N , A b Article* (1999) 9.

[335] *N* (*Judgment*) IT–03–6830 (June 2006) para 331 available at http://www.icty.org/x/cases/oric/tjug/en/ori–jud060630e.pdf [accessed on 30 January 2012].

[336] *and* supra note 324 para 369, 427.

liable, despite their factual ignorance of the commission of the specific crime.[337] This will be established where military commanders 'either knew or should have known that the forces were or about to commit' international crimes.[338] Ignorance cannot be invoked where it results from lack of due diligence or negligence on the part of the superior.[339] On the other hand, the knowledge element for civilian superiors is less strict than for military commanders. Article 28 of the Rome Statute of the International Criminal Court[340] makes it clear that the *mens rea* of negligence will not suffice for civilian superiors. Indeed this Article, which appears to contradict customary international law in relation to commanders, was as a compromise to restrict the scope of the duties imposed upon civilian superiors. [341]

An examination of the three elements shows that establishing the degree of control for the leaders of these civilian formations would be harder to satisfy in light of the effective control requirement, than for commanders of the armed forces units. Similarly, while military commanders of the armed forces would be liable for crimes which they ought to have known were about to be committed, this high threshold of the knowledge element that includes negligence would not be applicable to the leaders of a civilian formation. In summary, attempts to secure the accountability of superiors are diluted in instances involving the direct participation in hostilities by civilians.

Besides the impact on command responsibility, civilians engaged in hostilities are likely to be less disciplined than members of the armed forces engaged in similar activities. Members of the armed forces are moulded by group norms that increase respect for humanitarian law and provide for appropriate disciplinary measures for

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[337] This standard rejects pleas of ignorance and raises a duty to know rebuttable only through evidence of due diligence.

[338] Article 28(1) (a) of the Rome Statute of the ICC.

[339] supra note 331 para 332.

[340] Under Article 28(a)(i) of the Rome Statute provides that the *mens rea* for military commanders demands the commander 'either knew or, … should have known', while the *mens rea* provided for civilian superiors under Article 28(b)(i) requires that the superior 'either knew, or consciously disregarded information'.

[341] et al supra note 333; Article 7(3) of the ICTY Statute; Article 86(2) of Additional Protocol I; *Prosecutor V. Zejnil Delalic* ICTY Judgement (*The Celebici Case*) Case No. IT–96–21–T (16 November 1998) para 271, available at http://www.icty.org/x/cases/mucic/tjug/en/cel–tj981116e.pdf [accessed on 12 October 2012]; see however R Cryer, H Friman, D Robinson and E Wilmshurst *An Introduction to International Criminal Law and Procedure* (2007) 324– 325.

those that violate such norms.[342] Their forces will receive appropriate training to ensure they abide by these norms, such as training on the use of force and detailed advice on how to apply the rules in specific scenarios.[343] They will also receive ongoing situational advice by military lawyers on these rules.[344] Civilians engaged in hostilities are unlikely to belong to formations that embody these norms to the same extent as the members of the armed forces. Furthermore, where such civilians work alongside the military they may undermine efforts by military commanders to ensure high standards of discipline for the purposes of ensuring compliance with international humanitarian law. Not only will such civilians not be bound by rules of engagement and codes applicable to the military, but the handling of their violations of humanitarian law will differ sharply from that of similar cases relating to the military personnel. With regard to the latter, the military has authority to prosecute military personnel through an established system of discipline that includes a court martial.[345] Attempts to extend this system and court martial to the former will be hampered by questions regarding their civilian classification.[346]

3.6 CONCLUSION

This chapter provides a foundation for the exploration of the status and rights of PMSCs operating in conflict. This determination will depend upon whether their activities occur in international armed conflicts or non-international armed conflicts. The bulk of international humanitarian law treaties relates to international armed conflicts where the provisions expressly distinguish between two categories, namely, combatants and civilians. This classification forms the lever upon which rights and responsibilities are apportioned. It follows that the rights and responsibilities of

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[342] F Bouchet–Saulnier, L Brav & C Oliveier (eds) *The Practical Guide to Humanitarian Law* (2007) 391. States are under a responsibility to put in place military regulations, instructions and codes of discipline among the armed forces.

[343] G I A D Draper 'Role of Legal Advisers in Armed Forces' (1978) 202 *International Review of the Red Cross* 6–17.

[344] Article 82 of Additional Protocol I.

[345] 'Private Security Contractors at War Ending the Culture of Impunity' Human Rights First Report, New York (January 2008) 1, 23 available at http://www.humanrightsfirst.org/wp–content/uploads/pdf/08115–usls–psc–final.pdf [accessed on 12 May 2012]. For examples of military personnel that have been court–martialled for violations in Iraq.

[346] 'Private Security Contractors at War Ending the Culture of Impunity' Human Rights First Report ibid.

PMSCs will depend upon which of these categories they fall under. Individuals who are either part of the armed forces or members of irregular forces that comply with the requirements laid out in Article 4A(2)(a)-(d) of Geneva Convention III or Article 43 and 44(3) of Additional Protocol I will qualify as combatants. Persons who do not meet this requirement will be civilians by virtue of the mutual exclusive nature of the definition of combatants evident in Article 50(1) of Additional Protocol I. The classification of an individual in one group or the other has profound implications as to their rights and responsibilities during war. If one is a combatant, he/she will have the right to engage in hostilities and be a legitimate object of attack. If captured the person will be immune from consequences of lawfully participating in hostilities (for example, where the person killed adversarial forces) and will be entitled to prisoner of war status. In contrast, civilians are deserving of protection, including the right not to be the objects of attack (provided they refrain from engaging in hostilities).

The international humanitarian law instruments that apply to non-international armed conflicts are less developed than those that govern international armed conflict. Notably absent is an acknowledgement of combatant status. Nevertheless, certain groups can be discerned from treaties: those that belong to the state's armed forces; those that belong to an armed organisations (non-state actors); persons that engage (possibly as individuals) in direct participation in hostilities (as per Common Article 3); and protected civilians that refrain from hostilities.[347] The absence of an express reference to combatants, the distinct differences in the rights and obligations of individuals that flow out of their status classification in international armed conflicts, are less evident in non-international ones. Although international humanitarian law ascribes a minimum set of rights to be accorded to these persons, these are generic rights that are not tied to classification of individuals as illustrated in international armed conflicts. It therefore makes sense to focus upon the context of international armed conflicts when analysing the impact that arises from the status ascribed to individuals in armed conflict.

The distinction between combatants and civilians in international armed conflicts signifies an attempt to strike an appropriate balance between the right of belligerents

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[347] As referred to in Article 13 of Additional Protocol II.

to execute military operations against their military opponents and the need to provide for minimum humanitarian protection to those not engaged in hostilities. Furthermore, combatant status is restricted to persons who are linked to state instruments of violence. The individuals may be an integral part of the armed forces of a state or independent forces that 'belong' to the state. This state-centricism is also evident in the fact that less detail is accorded to the development of a similar category of lawful combatants in the context of non-international armed conflicts. Lastly, it is evident that the criterion for combatants and civilians reveals tensions discussed earlier that arise from the confluence of *jus in bello* and *jus ad bellum.* This can be seen in the exclusion from combatancy of irregular forces such as mercenaries whose participation offends against *jus ad bellum* while extending *jus in bello* rights to other irregular forces that align better with *jus ad bellum.*

It is is the direct participation in hostilities that is the defining characteristic that separates civilians and combatants in the context of international armed conflicts and persons that participate in hostilities from those that do not in non-international armed conflicts. In both international and armed conflicts, and to a lesser extent, non-international armed conflicts, the question of direct participation in hostilities fundamentally alters the treatment of civilians. An assessment of PMSCs will therefore need to go beyond ascertaining their status, and take into account the extent to which their activities fall within this notion. Beyond the implication upon the rights of individuals who contravene this sacrosanct rule of direct participation in hostilities, this chapter has started an interim discussion that will be covered in more detail in Chapter Five. There will be discussed how the conduct of such civilians affects the efficacy of international humanitarian law in providing maximum protection to the civilian population and in holding states and commanders accountable for violations of international law. These concerns are only relevant to PMSCs if they are considered to be civilians and not combatants, and their activities contravene the prime rule of direct participation in hostilities. It is to the first of these questions that Chapter Four now turns.

CHAPTER FOUR: THE CATEGORISATION OF PMSCs UNDER HUMANITARIAN LAW

4.1 INTRODUCTION

PMSCs have been found to operate in both international and non-international conflicts. It is on this basis that this chapter applies the relevant legal provisions to determine the status of contractors in these conflicts. This will mean ascertaining whether private contractors involved in international armed conflicts are combatants or civilians. If they are civilians a secondary inquiry is whether they fall within the limited exceptions of civilians accompanying the armed forces or unprivileged belligerents, such as mercenaries. In non-international armed conflicts the question will revolve around whether these actors fall within any of the four groups highlighted previously, namely, a state's armed forces, organised armed groups, ordinary civilians that choose to engage in active hostilities or protected civilians not involved in hostilities. The answers to this question will have a profound impact on the treatment of PMSC personnel in war since their identity will determine the rights and obligations that attach to them as they render services in armed conflict.

The following points are noteworthy when applying the relevant legal criteria discussed in Chapter Three to PMSCs. First, one must distinguish between the corporate entities and the individual personnel working for PMSCs. The applicable provisions of international humanitarian law focus on the status of individuals and not collective entities like companies. Thus, the determination of combatancy will rest upon the individual personnel of PMSCs and not the corporate entity embodied in the company. Likewise, the rights and responsibilities arising out the status determination will attach to the individual and not the corporate entity itself.[1] That said, it is important to point out that whether or not the individual qualifies as a combatant will depend upon the extent that the group (in this case the employees of

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[1] K Fallah 'Regulating Private Security Contractors in Armed Conflicts' in S Gumedze *Private Security in Africa: Manifestations, Challenges and Regulation* (2007) 101.

the company) complies with certain requirements, necessitating a look at the company as a whole.[2] Cognisance is therefore taken of both these aspects.

As will be shown in this chapter the industry is not homogenous. Consequently, an application of the relevant legal provisions must be done on a case-by-case basis. This means looking at the services rendered by each PMSC as well as the functions undertaken by their individual employees. For the purposes of this study, what matters is the actual services rendered and not the label a company attaches to itself since it is not unusual for companies to camouflage coercive functions by profiling their logistical functions or acting in contravention of a domestic classification they may have been accorded by a government.[3] It will be important, therefore, to examine what the company is contracted to perform. This is not an easy exercise on account of the closely-guarded confidentiality that obscures the relationship between PMSCs and their clients.[4] Many contractors work for government departments and are shielded behind a veil of national security. Others collaborate with regimes or actors operating in unstable terrains where weak regulatory systems make contractual terms almost impossible to access. In view of the difficulties in obtaining sufficient records indicating the relationship between PMSCs and their clientele, it is generally possible to determine the status of contractors via secondary sources only.

4.2 PMSCs IN INTERNATIONAL ARMED CONFLICTS

It will be recalled from the previous chapter that international armed conflict involves a confrontation between two or more states. PMSCs have been found to operate in situations of international armed conflicts where they perform significant roles in conventional state-to-state warfare. Both Ethiopia and Eritrea hired Russian, Ukrainian and Latvian military contractors in 1998, to support their efforts in their

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2 Chapter 3 (see section 3.2.1.2).
3 K Fallah op cit note 2 at 101.
4 A Bearpark & S Schul 'The Private Security Challenge in Africa: Problems and Options for Regulation' in S Gumedze *Private Security in Africa: Manifestations, Challenges and Regulation* (2007) 75.

military confrontation with each other over the disputed western boundary.5 The private contractors flew sophisticated jet fighters that local military personnel were unable to operate. The nature of the support provided by the contractors in this case was linked to direct combat activities. PMSCs have provided other services in similar contexts that do not strictly involve combat operations but which are, nevertheless, vital to the success of one of the state parties to the conflict. For example, in the 1990s the United States PMSC, Military Professional Resources Inc (MPRI) was hired by Croatia to train the Croatian army and re-align it with modern strategies of battle.[6] As a result, Croatia was able to turn the tide of losses that it had been experiencing at the hands of the Serbian forces and achieve a series of successes that ultimately secured its victory.[7] These are early examples of the involvement of private contractors in international armed conflicts.

More recent international conflicts are associated with the rise of the global war on terrorism and have also involved PMSCs. The invasions of Iraq and Afghanistan by USA and coalition forces have been supported by PMSCs.[8] The USA dependence on PMSCs during the 2001 invasion of Iraq was so extensive that some have labelled this war as 'the first privatised war'.[9] Even though the industry in these wars did not offer offensive combat services, it provided critical functions key to the success of the USA and its coalition forces, such as: logistical tasks; protection and guarding services; training, weapons support and maintenance; and interrogation and intelligence services.[10] USA firms like Halliburton's Kellogg Brown and Root (KBR) have provided logistical support consisting of feeding and housing of

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5 Eritrea–Ethiopia Claims Commission – Partial Award: *Jus Ad Bellum* – Ethiopia's Claims 1–8, Volume XXVI, Reports of International Arbitral Awards, December 2005 457–469, available at http://untreaty.un.org/cod/riaa/cases/vol_XXVI/457–469.pdf [accessed on 30 January 2013].

6 D Isenberg *S f n , L : A f f ' S p M n Firms* (1997) 9.

7 F Schreier & M Caparini 'Privatising Security: Law, Practice and Governance of Private Military and Security Companies' Geneva Centre for the Democratic Control of Armed Forces Occasional Paper No 6, Geneva (March 2005) 127.

8 Chapter 1 (see section 1.1); A Bianco & S A Forest 'Mercenaries: The Baghdad Boom' *The Economist* 25 March 2004 available at http://www.economist.com/node/2539816 [accessed on 20 March 2012].

9 'Military Industrial Complexities' *The Economist* 29 March 2003 at 56; C Holmqvist 'Private Security Companies: The Case for Regulation' Policy Paper No. 9, Stockholm International Peace Research Institute (23–26 January 2005) 44.

10 P W Singer Corporate Warriors: The Rise of the Privatized Military Industry (2003) 91–95.

troops.[11] Other contractors have secured facilities, worked as bodyguards, trained other soldiers, conducted patrols, and performed surveillance.[12] Contractors in Iraq have protected military targets and infrastructure with war-sustaining value, such as oil and power installations, and have also escorted convoys guarding military and civilian governmental officials.[13] With the growing reliance of modern warfare on technology contractors in Iraq were used to deliver, maintain and operate complex weapon systems.[14] It has been reported, for example, that contractors in Iraq operated key weapon systems such as B-2 stealth bombers, Apache helicopters, F-177 Nighthawk fighters and M-1 tanks.[15] Finally, the abuses following the interrogation of Iraq prisoners by contractors belonging to the CACI International highlighted the extent to which contractor services had become integrated into the US structures of authority.[16] The increasing involvement of private security and military companies in these ways poses challenges to their classification under international humanitarian law. It is important to understand their status and rights since PMSC personnel deployed to armed conflict could be viewed as a critical element among the belligerents, which could result in such personnel becoming victims of opposing belligerent action.

4.2.1 Are PMSC Personnel Combatants or Civilians?

The reference to combatant status is found only in the treaties dealing with international armed conflicts. As discussed in Chapter Three, in order for one to be a combatant he/she must fall under one of the following groups:

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[11] Singer ibid at 12.

[12] R Heaton 'Civilians at War: Re–Examining the Status of Civilians Accompanying the Armed Forces' (2005) 57 *Air Force Law Review* 155 at 191. There is a blur between what is 'security' and 'military'.

[13] D P Ridlon 'Contractors or Illegal Combatants? The Status of Armed Contractors in Iraq' (2008) 62 *Air Force Law Review* 199 at 234.

[14] 'The Montreux Document: On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' International Committee of the Red Cross (ICRC) & Directorate of International Law Switzerland (17 September 2008) 9, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf [accessed 30 November 2012].

[15] D Isenberg 'A Government in Search of Cover: Private Military Companies in Iraq' in S Chesterman & C Lehnardt (eds) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007) 87–89.

[16] A H de Wolf 'Modern Condottieri in Iraq: Privatizing War from the Perspective of International and Human Rights Law' (2006) 13(2) *Indiana Journal of Global Legal Studies* 320 at 333–334.

- A member of the armed forces of a party to the conflict;[17]
- A member of irregular armed forces (volunteer or militia group) that belong to one of the belligerent parties and fulfils certain conditions;[18]
- A member of irregular armed forces, under a command responsible and in exceptional circumstances, at the time of his capture, individually fulfils certain conditions.[19]
- Inhabitants of a non-occupied territory that spontaneously take up arms to resist invading forces or what is commonly referred to as *levee en masse.*[20]

As previously mentioned,[21] the fourth group is less likely to occur at present, and the analysis that follows focuses on whether private contractors may fall within the requirements of the first three groups. Essentially this means that private contractors may acquire combatant status in two ways, namely, through direct membership of the armed forces of a state[22] and indirectly by qualifying as a part of the irregular forces that belongs to one of the belligerent parties in the second or third group.[23] What will be noticed from the analysis, below, is that each of these scenarios requires a link with the state. It follows that within the context of international armed conflicts, only PMSC personnel hired by states could be combatants.[24]

4.2.1.1 Members of the Armed Forces

As pointed out in Chapter Three, there is no definition of the term 'armed forces' in both Article 3 of Hague Convention IV or Article 4A(1) of the Geneva Convention III. This lacuna was partially addressed by the circular definition of 'armed forces'

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[17] Chapter 3 (see section 3.2.1.1).
[18] Chapter 3 (see section 3.2.1.2).
[19] Chapter 3 (see section 3.2.1.3).
[20] Chapter 3 (see section 3.2.1.4).
[21] Chapter 3 (see section 3.2.1.4).
[22] Article 4A(1) of Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) 75 UNTS 135 (12 August 1949) available at http://www.unhcr.org/refworld/docid/3ae6b36b4.html [accessed 8 October, 2012].
[23] Article 4A(2) of Geneva Convention III or Article 43 of Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Victims of International Armed Conflicts (Additional Protocol I) 1125 UNTS 3 (8 June 1977) available at http://www.refworld.org/cgi–bin/texis/vtx/rwmain?docid=3ae6b36b4 [accessed 1 October 2012].
[24] E C Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88(863) *International Review of the Red Cross* 525 at 532.

provided under Article 43(1) of Additional Protocol I.[25] According to this Article, the armed forces consist of 'organised armed forces, groups and units ... under a command responsible ... and subject to an internal disciplinary system, which [enforces humanitarian law]'. According to the International Committee of the Red Cross Commentary (ICRC Commentary) to this Article, the fact that the armed forces are under a command responsible links them to a party to the conflict.[26] It would appear that by virtue of this understanding, private contractors that are not linked to any state party would automatically not be considered members of the armed forces.

The ICRC Commentary on Articles 43(1) of Additional Protocol I makes it clear that it is the prerogative of the parties to the conflict, mainly the state, to lawfully raise and deploy armed forces as their agents in their international relations.[27] Would contractors performing military services alongside the armed forces fall within this bracket? It is argued that the provision of military services alongside the armed forces would not suffice. The nature of the activities performed by such a company's staff on its own is not a conclusively determining factor on this point. 'Forming a part of the armed forces' essentially requires some kind of procedure of incorporation into the armed forces.[28] International law does not provide for this procedure. Thus, it gives states the discretion as to how to incorporate individuals within their national armed forces. States are thus free to decide entirely subjectively

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[25] Y Sandoz, C Swinarski & B Zimmermann *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) para 1676. Article 4A(4) of Geneva Convention III is still of relevance as Additional Protocol I did not set it aside.

[26] C Pilloud, Y Sandoz, C Swinarski & International Committee of the Red Cross (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 511–513.

[27] Many military manuals specify that the armed forces of a party to the conflict consist of all organized armed groups, which are under a command responsible to that party for the conduct of its subordinates. See, eg, the military manuals of Australia (*The Manual of the Law of Armed Conflict*, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, section 638); Canada (*The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001. section 642); New Zealand (*Interim Law of Armed Conflict Manual*, DM 112, New Zealand Defence Force, Headquarters, Directorate of Legal Services, Wellington, November 1992. section 655); Nigeria (*Manual on the Laws of War (undated) The Laws of War*, by Lt. Col. L. Ode PSC, Nigerian Army, Lagos. Section 656), United Kingdom (*The Manual of the Law of Armed Conflict*, Ministry of Defence, 1 July 2004, section 662); K Ipsen 'Combatants and Non–Combatants' in D Fleck *The Handbook of International Humanitarian Law* (2008) 66.

[28] M N Schmitt 'War, International Law, and Sovereignty: Re–evaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2005) 5(2) *Chicago Journal of International Law* 511 at 526,528, 532.

as to who it is that constitutes their national army, and are in theory not prohibited from incorporating PMSCs into their traditional armed forces.[29] A private contractor may become a member of the armed forces through such official incorporation.[30] One must therefore resort to domestic legislation to ascertain whether or not such incorporation has taken place. An examination at this level shows that there is no homogenous standard for how this takes place. Each state sets the conditions under which such formal incorporation arises so that individual persons are integrated into the structure of its armed forces. Might a commercial contract between the state and PMSC suffice as incorporation? State practice appears to suggest that incorporation requires formal affiliation sanctioned by the domestic laws of the state.[31] In most cases soldiers are formally recruited, subordinated to military discipline, command and control, and vested with combat status by a sovereign act of jurisdiction. A mere contract is not subject to the recruitment procedure or formal subordination under the military that conveys sovereign rights and obligations to the contractor.[32]

As pointed out in Chapter Three, while a state exercises flexibility over whom it incorporates it must maintain command, discipline and a respect for international humanitarian law by members of its defence forces. Implicitly, such forces should comply with Article 4A(2) of the Geneva Convention III which essentially calls for them to be subject to a responsible command, affix distinguishing signs, carry arms openly and respect humanitarian law.[33] Thus, even in those rare instances that one may be tempted to conclude that a PMSC had been duly incorporated under domestic

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[29] Sandoz et al op cit note 26 at 611 para 1914.

[30] Sandoz et al op cit note 26 at 515; C Schaller 'Private Security and Military Companies under the International Law of Armed Conflict' in T Jager & G Kummel (eds) *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects* (2006) 352; C Hoppe 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 *The European Journal of International Law* 989 at 991.

[31] S Bosch & M Marit 'South African Private Security Contractors Active in Armed Conflicts: Citi e nship, Prosecution and the Right to Work' (2011) 14 (7) *Potchefstroom Electronic Law Journal* 71 at 77–78, 82; Schmitt op cit note 29 at 525.

[32] Bosch & Maritz ibid at 77–t8, 82; Schmitt op cit note 29 at 525.

[33] Commentary to Article 4A(2) of the Geneva Convention III in J S Pictet, J de Preux, F Siordet, A P de Henney & International Committee of the Red Cross (eds) *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (1960) 51–56; *Bin Haji Mohamed Ali and Another v. Public Prosecutor* Judicial Committee of the Privy Council (UK) (*Mohamed Ali*)1 AC [1969] (29 July 1968) 430 at 449–450, available at http://www.icrc.org/ihl–nat.nsf/39a82e2ca42b52974125673e00508144/383128666c8ab799c1256a1e00366ad3!OpenDocument [accessed on 12 October 2012]; Y Dinstein 'The Distinction Between Unlawful Combatants and War Criminals' in S Rosenne, Y Dinstein & M Tabory *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 105.

laws, such incorporation alone will not be sufficient to make the private contractor a combatant. In addition, combatants must comply with the conditions laid down in the second part of Article 4A(2). The cumulative fulfilment of all the conditions makes it onerous for private contractors to come within the ambit of recognition as members of a state's traditional armed forces. While contractors may meet some of these requirements, as the discussions in section 4.2.1.2, below, indicates, it will be unlikely that contractors would meet all the conditions.

Since one of the aims of outsourcing is to deliberately reduce reliance on the armed forces *stricto sensu*, it is unlikely that contractors will be considered as part of the armed forces. The conclusion that such PMSC personnel are not members of the armed forces is supported by the fact that a state possesses a unilateral right to incorporate whomsoever it may wish into the armed forces and deliberately opts to enter into a contract with a PMSC instead of incorporating them into its armed forces.[34] This view is reinforced by states' practices regarding various international humanitarian law obligations they are required to meet in relation to their armed forces, such as, providing adequate training & separating their quarters from civilian objects.[35] That states do not feel compelled to fulfil these obligations in relation to PMSCs suggests that they do not consider them members of the armed forces.

4.2.1.2 Irregular Forces Fulfilling the Conditions of Geneva Convention III

Chapter Three established the existence of two types of irregular forces: those that 'form a part of' the armed forces of a party, and those that 'belong to' to a state party to the conflict.[36] In the first instance the irregular forces are incorporated into the armed forces and fall under the denomination 'army'.[37] In the second instance, the irregular forces are a separate and distinct group from the armed forces, but 'belong to a party' to the conflict.[38] In the first instance, for the reasons articulated in the preceding section, private contractors are unlikely to meet the requirements of

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34 Bosch & Maritz op cit note 32 at 77, 106.
35 Articles 82 & 83 of Additional Protocol I.
36 Article 4A(1) & 4A(2) of Geneva Convention III.
37 Schmitt op cit note 29 at 525–529.
38 Ibid.

incorporation into the armed forces. In the second instance, in order to be considered combatants the staff of the PMSCs must fulfil two requirements: the *group* must *belong* to a party to the armed conflict and must meet the four conditions laid down in Article 4A(2) of the Geneva Convention. These four are that of being commanded by a person responsible for his or her subordinates; that of having a fixed distinctive sign recognisable at a distance; that of carrying arms openly; and that of conducting their operations in accordance to the laws and customs of war.

'Belonging to a party' distinguishes those individuals that are fighting on behalf of a state and those who are simply fighting on a territory where an international armed conflict may be taking place without an attachment to any of the belligerent parties. This essentially requires a PMSC to be attached to a state's forces.[39] Only those companies hired by a state party could ever meet this requirement. This means that the large number of PMSCs hired by non-state actors in the context of international armed conflicts would be excluded.[40] This would include those PMSCs contracted by multi-national corporations to protect their economic interests somewhere. It would also include those private contractors employed to provide security to humanitarian organisations providing relief to the victims on both sides of an international armed conflict.

As mentioned in Chapter Three, two approaches have been taken to determine whether such forces belong to a party.[41] The first is a low threshold test where 'belonging to a party' amounts to confirming whether the state expressly or tacitly accepts that the forces are fighting on its behalf. The other approach was that employed in *Tadic*, which employed the 'overall control' test to determine the requirement for belonging.[42] The Commentary to Article 4A appears to give credence to the former approach and the fundamental inquiry in this regard should be whether the PMSC has a *de facto* relationship with the state party, while being independent (that is, not members of the state's armed forces). This would require a

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[39] Ibid.
[40] Gillard op cit note 25 at 32.
[41] Chapter 3 (see section 3.2.1.2).
[42] International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeal Judgment (*Tadic*) IT–94–21 (15 July 1999) para 15, available at http://www.refworld.org/docid/40277f504.html [accessed on 12 October 2012].

PMSC to be attached to the forces of a state while at the same time maintaining a degree of independence so as not to be considered 'a member of the armed forces'. Whether PMSCs can be construed as meeting the requisite attachment so that they are 'responsible to a party to the conflict' as stipulated in Article 3(1), can be measured by the responsibility that the state would be willing to accept for their actions. Responsibility in this sense should be broadly construed, unlike the law of state responsibility actions.[43] It seeks to establish a factual link between the group and the state that establishes possible allegiance or support to the belligerent, but negates a duty of allegiance as would be found among the members of the armed forces.[44]

Whether a PMSC meets this delicate balance between support and independence will depend upon the nature of the contract. A *prima facie* link may be established in a contract to provide combat services where contractor personnel directly participate in hostilities in support of the government, but not as a part of its armed forces. A *de facto* relationship of support may be discerned through a combination of the tacit endorsement of the PMSCs operations by the state evident from the fact that the PMSC reports to the state and receives funds from it.[45] At the same time, the distinguishability of the corporate entity from the armed forces in such situations may be preserved so as not to undermine the sense of 'belonging' envisaged in Article 4A(2). In other cases this inherent tension between attachment and independence to the armed forces may scuttle the chances of PMSCs being considered militia forces under Article 4A(2).[46] For example, contracts to provide protection, guarding services, interrogation and logistical services may form an integral part of the mission of the armed forces, so as not be viewed as independent in terms of the distinctness militia under Article 4A(2) are envisaged to have.[47] Such

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[43] E Wilmshurst International Law and the Classification of Conflicts (2012) 61.

[44] 'Report of the Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions' University Centre for International Humanitarian Law, Geneva (29–30 August 2005) 10, 234 available at http://www.geneva–academy.ch/docs/expert–meetings/2005/2rapport_compagnies_privees.pdf [accessed 9 October 2012]; Y Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) 36–37; *Mohamed Ali et al.* supra note 34 at 430 & 449; *Tadic* supra note 43 paras 93–94.

[45] Report of the Expert Meeting on Private Military Contractors ibid.

[46] Ibid.

[47] Hoppe op cit note 31 at 38.

independence could be further undermined by the practice of sub-contracting where companies contracted by the state subcontract to other companies. [48]

Should a PMSC meet the requirement of 'belonging' to a state party, a further consideration will be whether it fulfils the conditions laid down in Article 4A(2), namely that of being commanded by a person responsible for his or her subordinates; of having a fixed distinctive sign recognisable at a distance; of carrying arms openly; and of conducting their operations in accordance with the laws and customs of war. These conditions must be met by the whole group and a decision on this question can be made only on a case-by-case basis.[49] As discussed in the previous chapter, while individual personnel must fulfil the first two, it will be incumbent upon the company to meet all four requirements.[50]

The phrase 'commanded by' generally means that the units of irregular forces must be responsible to a higher authority. This phrase is linked to the state, and only those falling under the direction and control of the state would fall within an understanding of the phrase. That said, the requirement for command responsibility is not restricted only to military officers but may include civilians endorsed or acknowledged by the state to have responsibility over actions taken on their orders.[51] The fact that the authority could be civilian or military may not be taken to include PMSC directors within the position of this commanding authority given that, as pointed out in Chapter Three, the treaty provisions did not have in mind non-state actors.[52]

The extent to which private contractors fulfil the requirement of a 'fixed distinctive sign' as well as that of 'carrying of arms' should be seen in the light of the objectives of these requirements. These two requirements aim to ensure that such forces distinguish themselves as combatants from both the local civilian population, as well as the adversarial forces. This means that the sign must be sufficiently different from the civilian population, fixed, that is, constantly worn and not conveniently removed

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48 Hoppe op cit note 31 at 1008–1009; Schmitt op cit note 29 at 525–529. .

49 G I A D Draper 'The Status Of Combatants and the Question of Guerrilla Warfare' (1971) 5 *British Year Book of International Law* 173 at 198; Schmitt op cit note 29 at 525–529..

50 Chapter 3 (see section 3.2.1.2).

51 Pictet et al op cit note 34 at 59.

52 Draper op cit note 50 at 201.

in order to blend in with the civilian population. While many PMSCs may satisfy the requirement of carrying their arms openly, observations of their present activities suggest that few of them wear a distinctive sign or distinguish themselves from civilians.[53] A recurring frustration among military commanders against the staff of PMSCs is that of identifying them.[54] According to one commander, the attire of private contractors can vary from full army regalia to ordinary shorts and denim jeans.[55]

'Compliance with laws and customs of war' should be read alongside the obligation to maintain an internal disciplinary system,[56] since the existence of the one ensures the realisation of the other. This condition attaches to the collective and all PMSC personnel would be bound by it irrespective of whether or not they individually comply with it.[57] The aim is to ensure discipline within the group and respect for international humanitarian law,[58] and that it is possible that this could be observed through the existing supervisory structure existing within established companies. Although individual contractors have been accused of serious violations of international humanitarian law, there are no allegations of such companies endorsing systematic violations so as to prevent them from meeting this requirement.[59]

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[53] L Rimli & S Schmeidl 'Private Military and Security Companies in Post–Conflict Situations: A iew From the Local Population in Angola and Afghanistan' presented by Swisspeace at the Governmental Expert Workshop Organized by the Swiss Federal Ministry of Foreign Affairs (13–14 November 2006) 18–19, available http://psm.du.edu/media/documents/reports_and_stats/think_tanks/swisspeace_pscs_in_angola_and_afghanistan.pdf [accessed on 22 May 2013]; 'Interview – Marine Colonel Thomas X Hammes' *PBS Frontline* 21 March 2005, available at http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/hammes.html [accessed on 20 March 2012].

[54] Rimli & Schmeidl ibid at 63. ICRC 'Second Expert Meeting on the Notion of Direct Participation in Hostilities' Summary Report, Hague (October 200) 12.

[55] Schmitt op cit note 29 at 530; K Watkin 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy' Humanitarian Policy & Conflict Research, Occasional Paper Series, (2005) (2) 67.

[56] Article 43(1) of Additional Protocol I, replaces the requirement of Article 4A(2)(d) of the Geneva Convention III.

[57] J Thomas & G Kümmel *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects* (2007) 361.

[58] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1974–1977, Vol. XV, CDDH/236/Rev.1, Swiss Federal Council, Geneva (1978) 414 available at http://www.loc.gov/rr/frd/Military_Law/pdf/RC–records_Vol_15.pdf [accessed on 30 January 2013]. The *p p* of Additional Protocol I confirms that a failure to meet the criteria of being 'subject to an internal disciplinary system' does not exclude a unit from the armed forces.

[59] *Ilham Nassir Ibrahim et al. v. Titan Corporation* et al DDC 391 F Supp 10 (2005), available at http://uniset.ca/other/cs6/391FSupp2d10.html [accessed on 30 January 2013]; *Saleh et al. v. Titan*

The reality is that while some of the PMSCs may meet one or even several of these conditions, it is unlikely that most contractors hired by a state would fulfil all of them.[60] Further, a teleological interpretation of Article 4A(2), making reference to the historical purpose of the article, may also militate against defining PMSC employees as combatants. To justify their categorisation as combatants under this Article runs counter to the historical purpose of Article 4A(2), which was to allow for partisans in the Second World War to have prisoner of war status.[61] Those partisans are equated more with the remnants of defeated armed forces seeking to liberate an occupied territory than with PMSCs.[62] Indeed, the resistance role of these militias was a factor in granting them prisoner of war status.[63] Granting combatant status to security guards hired by an occupying power turns the purpose of Article 4A(2) on its head. It was not intended to allow for the use of private military forces, but to make room for resistance movements and provide them with an incentive to comply with international humanitarian law.[64] Some 30 years later, the very definition of the term 'mercenaries' which seeks to remove the status of 'combatant' from private forces is further evidence that the original intention to effect such removal remained paramount through to the 1970s.[65] Thus, even if some PMSCs could fulfil the four criteria required for combatant status, the combination of the teleological interpretation of Article 4(A)(1-3), together with the deliberate refusal by states to officially incorporate them into their armed forces, would scuttle any hopes of their being granted combatant status under the present relevant provisions of humanitarian law.

4.2.1.3 Irregular Forces in Exceptional Circumstances

Corporation et al., 436 DDC F Supp 2d 55 (2006), available at http://www.cadc.uscourts.gov/internet/opinions.nsf/B6913B5CFF9D636B852578070058D528/$file/08–7008–1205678.pdf [accessed on 30 January 2013].

60 Schmitt op cit note 29 at 531.

61 Pictet et al op cit note 34 at 142–149.

62 Pictet et al op cit note 34 at 53–59.

63 Pictet et al op cit note 41.

64 Sandoz et al op cit note 26 at 521– 522.

65 Gillard op cit note 25 at 561-564.

Article 44(3) of Additional Protocol I address circumstances where the fighters 'owing to nature of hostilities' cannot be expected to distinguish themselves from the civilian population. This Article acknowledges exceptional circumstances where it may not be possible to comply with the requirements for distinguishing oneself. In such exceptional circumstances, combatants are required to respect certain conditions in order to protect civilians. These include the obligation to carry arms openly during each military engagement and to be visible to the adversary during military deployments preceding the launching of an attack. [66]

As noted in Chapter Three, this Article was included to address the emergence of new forces and new wars — national liberation wars.[67] Thus, the exceptional circumstances have been limited to situations such as occupation, national wars of liberation and other situations of asymmetrical warfare where the balance of power is so much in favour of one of the parties,[68] and military predicaments leave no other choice to the party but not to comply with the full obligation to distinguish oneself. The activities of contactors in such situations cannot be ruled out. One can envisage a situation where private contractors support a non-state actor in its pursuit of the right to self-determination. It must be noted, however, that the flexibility rendered to fighters operating in these circumstances pertains to the forces of the non-state actor fighting in a war for liberation. Arguably this flexibility is tied to their fight for self-determination, where the asymmetry in the conflict leaves little chance of success in battle. It is difficult to see how these set of circumstances could be extended to private contractors, unless they are in some way either an integral part of the non-state actor forces, or meet the onerous test for 'belonging' applied to a state party.

The provisions of Article 44(3) should be read together with Article 43(1) of Additional Protocol I.[69] Thus, even though the irregular forces operating under Article 44(3) are allowed greater flexibility when it comes to distinguishing

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[66] Article (3) of Additional Protocol I; G Cadwalader 'The Rules Governing the Conduct of Hostilities in Additional Protocol I to the Geneva Conventions of 1949: A Review of Relevant United States References' (2011) *Yearbook of International Humanitarian Law* 133 at 163.

[67] R R Baxter 'Moderni in g the Law of War' (1977) 78 *Military Law Review* 165 at 169.

[68] Sando et al op cit note 26 at 529; H P Gasser 'An Appeal for Ratification by the United States' (1987) 81 *American Journal of International Law* 912 at 920.

[69] Article 44(1) Additional Protocol I ties combatants in Article 44 of Additional Protocol I to those in Article 43 Additional Protocol I.

themselves from civilians during exceptional circumstances, such forces are still expected to be 'organised', 'under command responsible' and have an 'internal disciplinary' system that enforces compliance with humanitarian law. As mentioned in the preceding sub-section, 'organised' underlies the collective character and structure of the fighting units, while 'command responsibility' means that individuals are subordinated to an authority recognised by the state party. While several PMSCs may exhibit the collective nature inherent in the term 'organised', it is unlikely that their leadership has the sort of endorsement envisaged to qualify as a responsible command. In relation to the phrase 'internal disciplinary system', it can be observed that a number of these companies composed of former military personnel also embody the hierarchical structure resembling certain elements of military traditions. Whether this translates into, and could be said to have, an internal disciplinary system would call for an examination of the individual company's constitutional, policy and service documentation. One researcher suggests that none of the companies she interviewed had made provisions for an internal disciplinary system in these documents.[70]

4.2.2 Do PMSC Personnel Fall within One of the Special Categories?

As discussed in Chapter Three, Article 50 of Additional Protocol I negatively defines civilians as anyone not meeting the requirements for combatancy.[71] Since every person must either be a combatant or a civilian, if PMSC employees are not combatants, they automatically are considered to be civilians.[72] Before examining their rights and obligations as civilians, it may be useful to discuss three groups mentioned in Chapter Three whose special treatment deviates from that accorded to persons who are strictly either combatants or civilians. These are non-combatant members of the national armed forces of a state, persons accompanying the members of the armed forces and unprivileged belligerents such as spies and mercenaries.

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[70] L A Dickinson 'Military Lawyers, Private Contractors, and the Problem of International Law Compliance' (2010) 2 *New York University Journal of International law & Politics* 355 at 379–380, 387.

[71] Chapter 3 (see section 3.2.2).

[72] Article 50(1) of Additional Protocol I.

It is easy to exclude contractors — non-combatant members of the armed forces — from the first of these groups. According to Article 3 of The Hague Regulations[73] and Article 3(2) of Additional Protocol I, these 'non-combatants' constitute the armed forces of a state. Only those private contractors that are members of the armed forces may fall within this category. In view of the hurdles presented by incorporation and additional difficulties associated with the admission of contractors into 'members of the armed forces', it is unlikely that contractors can ever be non-combatant members of the armed forces. The second and third groups, civilians accompanying the armed forces and mercenaries, warrant more attention.

4.2.2.1Persons Accompanying the Armed Forces

Article 4(A)(4) of Geneva Convention III refers to a group of civilians 'who accompany the armed forces without actually being members thereof'. These civilians receive the exceptional combatant privilege of prisoner of war status in the event of capture despite the fact that they are not combatants. Before proceeding further to examine the details of the persons within this group, it is important to point out that the individuals falling in this category are tied to persons hired by the state.[74] This means that numerous employees hired by PMSCs with contracts not connected with states but with entities (such as multinational companies, non-governmental organisations, the United Nations and private individuals),[75] will not qualify as civilians accompanying the armed forces under Article 4A(4) of Geneva Convention III. Only PMSCs specifically hired by a state that is party to the international armed conflict can fall within this special category.

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[73] Hague Convention (IV) Respecting the Laws and Customs of War on Land (Hague Convention IV) and Its Annex: Regulations Concerning the Laws and Customs of War on Land (Hague Regulations), 18 October 1907, available at http://www.refworld.org/docid/4374cae64.html [accessed 12 July 2013].

[74] L Cameron 'International Humanitarian Law and the Regulation of Private Military Companies' Conference on Non–State Actors as Standard Setters: The Erosion of the Public–Private Divide, Basel Institute on Governance, (February 2007) 593, available at http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Cameron.pdf [accessed 23 February 2012].

[75] Gillard op cit note 25 at 532.

Article 4A(4) provides a list of examples of the category of persons that need to be considered as 'persons, accompanying the armed forces'. This list includes 'civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or other services responsible for the welfare of the armed forces'. It has been suggested that this list is not exhaustive and may include services offered by contractors. Reference to 'supply contractors' in the list may insinuate that certain contractors could fall within this group. This is unlikely as the term 'contractor' used in this text is quite different from the meaning that it has acquired when used to refer to PMSCs and their personnel. In recent times the term has acquired a meaning that includes the provision of coercive services in zones of conflict.[76] It was not the intention of the drafters specifically to include such individuals under this heading. As earlier discussed, the authoritative text of the earlier Hague Convention IV where the term 'contractor' is similarly used shows that it applies only to people supplying goods and does not refer to those instructed to employ coercive force beyond self-defence.[77] Indeed, none of the categories in the list provided in Article 4A(4) is coercive,[78] implying that many activities of PMSCs such as training, guarding and intelligence services would fall outside what was envisaged by this Article.

There is the possibility that other benign services related to logistics, performed by the majority of contractors today, could be included under Article 4A(4) of Geneva Convention III. For this to happen, contractors providing such services would have to show that they 'have received the authorisation from the armed forces that they accompany'.[79] This authorisation would require more than producing the model identity card referred to in Article 4(A)(4) (and annexed to Geneva Convention III).[80] The card itself does not create the necessary authorisation. A contractor must be able to point to express domestic legal conditions set by the state, signifying the grant of such authorisation.[81] As noted earlier, these conditions vary with each state, and one

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[76] Chapter 1 (see section 1.6).
[77] Hoppe op cit note 31 at 1007.
[78] Article 4A(4) of Geneva Convention III lists the following: civilian members of military aircraft crews, war correspondents, supply contractors, and members of labour units or of services responsible for the welfare of the armed forces. Thus contractors exercising coercive force would not resemble people in this list.
[79] Chapter 3 (see section 3.2.5.2).
[80] Under Article 4(A)(4) of Geneva Convention III, states are required to issue a model identity card as evidence of authorisation from a state.
[81] Ipsen op cit note 28 at 95.

cannot rule out the out the possibility of such authorisation being granted to certain PMSCs involved in civilian-like functions such as construction, driving of convoys & supplies.

Such persons will also be entitled to protection as civilians, taking into account the balance between their protection and military necessity that should be factored in as implied under Article 58 of Additional Protocol I.[82] Furthermore, not being combatants, they are not entitled to participate in hostilities beyond personal defence.[83] Contractors who have received such authorisation will also be entitled to prisoner of war status should they be captured by the adversary. As prisoners of war, and according to the basic guarantees contained in Article 13 of Geneva Convention III, such contractors must be treated humanely and protected against acts of violence or intimidation and against insults and public curiosity. Furthermore, reprisals against them are not allowed.[84] Finally, upon the end of hostilities, prisoners of war have the right to be repatriated to their home state. Judicial measures may also be taken against those contractors admitted into this fold but who may have committed an offence. This may arise if a contractor has, for example, engaged in hostilities contrary to the obligations attached to the group, or committed serious breaches of the law of armed conflict. In such a situation, the criminal proceedings against the accused do not affect his/her legal status as a civilian accompanying the armed forces and entitled to be a prisoner of war. Other contractors not authorised to accompany the armed forces, and thus not entitled to prisoner of war status if captured, will instead enjoy the protection under Geneva Convention IV and Additional Protocol I in situations of internment or imprisonment.[85] As discussed in more detail in Chapter Five, even where they take a direct part in hostilities, such persons are entitled to be treated humanely and in accordance with the fundamental guarantees provided for in Article 75 of Additional Protocol I.[86]

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[82] Sandoz et al op cit note 26.
[83] Gillard op cit note 25 at 538.
[84] Chapter 3 (see section 3.2.5.2).
[85] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) 75 UNTS 287 (August 1949) available at http://www.refworld.org/docid/3ae6b36d2.html [accessed 11 July 2013] and Articles 72 of Additional Protocol I.
[86] Article 45(3) of Additional Protocol I extends these fundamental guarantees to persons, other than combatants, who have taken part in hostilities.

4.2.2.2 Unprivileged Combatants: Allegations of Mercenarism

Additional Protocol I refers to two groups of persons that will not be deemed lawful combatants, even where they comply with humanitarian law, or are carrying out tasks on behalf of a state party. These are spies and mercenaries who, contrary to the trend in the laws of war towards extending protection to persons on the periphery of the law, find their protection diminished. No definition of spies is provided under the treaties, but the common understanding of the term is that of a person who secretly collects and reports information on the activities and plans of an enemy. The definition is broad enough to cover all kinds of people within zones of conflict, including PMSC personnel, civilians, humanitarians, and members of the armed forces, all of whom may act as undercover agents on behalf of a belligerent party. Given its broad ambit, not much attention will be given to a discussion in this regard, suffice to say that if PMSC personnel operate as spies and are captured they will not be accorded prisoner of war status. In addition, they may be subject to the penal sanctions of the enemy state.

Of more relevance to the identity of PMSCs is the question of mercenaries. The treatment by international humanitarian law of this group is particularly relevant in view of certain similarities that mercenaries have with private contractors. In particular, both actors may engage in force outside the state system. In this regard some authors have attempted to draw links between PMSCs and the activities of mercenaries that operated in the 1960s in parts of Africa. They suggest that today's contractors are simply mutations of the shadowy mercenaries of the 1960s.[87] They point to the fact that private contractors, like mercenaries, provide military force outside the states' monopoly over force[88] while being driven by pecuniary incentives.[89] The former UN Special Rapporteur on Regulation of Mercenaries points to the connections between PMSC hire and remuneration by multi-national corporations in the extractive industry as evidence that they are modern-day

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[87] A Roberts *The Wonga Coup* (2006); J Brabazon *My Friend the Mercenary* (2010).

[88] M Weber (trans) *The Theory of Social and Economic Organization* (1947) 141, 157; M Weber & B S Turner *From Max Weber: Essays in Sociology* (1991) 78. Weber identified the state as that entity which successfully upholds a claim to legitimate monopoly of physical force.

[89] M Sapone 'Have Rifle with Scope, Will Travel: The Global Economy of Mercenary io lence' (1999) 30 *Californian Western International Law Journal* 17 at 5–6, 19–20.

mercenaries.[90] For its part, the private military industry has attempted to distance itself from the unflattering connotation carried by the term 'mercenary', aware of the damage that such association might have on contractual opportunities.[91] The industry points to its corporate structure, accountability to shareholders and market interests, as key distinguishing features. Where possible, the industry has camouflaged services to remove coercive undertones or, alternatively, gone to great lengths to profile such services as legitimate undertakings for professional work aimed at achieving morally sound results. It is debatable whether these rebuttals are sufficient to differentiate them from the essence of a 'mercenary'. Shareholder accountability and the creation of a separate corporate entity are not sufficient to divest PMSCs from financial motivations since, at the core, they remain entities driven by profit maximisation.

The legal definition of a mercenary is provided by Article 47 of Additional Protocol I which states that, in order for private contractor to be considered a mercenary, he/she must meet the following six criteria, namely: [92]

- be specially recruited locally or abroad to fight in an armed conflict;
- take a direct part in the hostilities;
- be motivated to take part in the hostilities by the desire for private gain promised by or on behalf of a party to the conflict, the material compensation of which is substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces;
- be neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- be not a member of the armed forces of a party to the conflict; and

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[90] E B Ballesteros 'Report on the Question of the Use of Mercenaries as a Means of io lating Human Rights and Impeding the Exercise of the Right of Peoples to Self–Determination' Special Rapporteur, Pursuant to Commission Resolution 1995/5 and Commission Decision 1996/113, UN ESCOR, 53rd Session, Agenda Item 7, UN Doc E/CN.4/1997/24, New York (1997) paragraph 68–74, available at: http://www.refworld.org/docid/3ae6b11b4.html [accessed 29 June 2013].

[91] The negative reputation associated with mercenaries is evident from the numerous resolutions raised against their activities – Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, adopted on 24 October 1970, 25 UN GAOR Supp 18 122; C J Rosky 'Force, Inc.: The Privati a tion of Punishment, Policing, And Military Force in Liberal States' (200) 36 *Connecticut Law Review* 879 at 908.

[92] Article 47(2) of the Additional Protocol I.

- be not sent on official duty as a member of its armed forces by a state which is not a party to the conflict.

According to the first requirement the recruitment must be for the purposes of fighting. A PMSC database, used for recruiting personnel could indicate special recruitment processes.[93] The fundamental question is, however, whether this recruitment envisages the contractor being brought into the conflict zone to perform coercive functions. In this regard, numerous PMSCs who keep databases for services and enter into contracts with personnel for services outside 'fighting', such as, logistical support, would not meet the first requirement. It is not enough to be recruited with the intention of taking part in hostilities. According to the second requirement, the contractor must, in addition, directly participate in hostilities. The provision of combat-related services in conflict zones, whether involving offensive or defensive action, would qualify. Since their emergence, certain private contractors have been known to engage in heavy fighting in places like Sierra Leone, Angola, and Iraq.[94] The great majority of private contractors, however, do not provide combat services but rather support services such as providing advice, training, logistical support, and the technical maintenance of weapons, and thus would not meet the test for direct participation in hostilities.

The third requirement pertaining to pecuniary motivation has been thought to be central to the mercenary's identity. This requirement seeks to distinguish the mercenary from the noble volunteer.[95] A private contractor whose name is in the database of a corporate entity driven by profit, and who is ready to respond to a bid that is won by this entity can hardly discount the fact that he/she is principally motivated by private gain. Bearing in mind the difficulties of proving motivation and notwithstanding financial motivation, from a legal standpoint this element presents a major loophole in the definition.[96] While the higher earnings of contractors when

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[93] D Avant 'Think Again: Mercenaries' *Foreign Policy* 1 July 2004, available at http://www.foreignpolicy.com/articles/2004/07/01/think_again_mercenaries [accessed on 30 July 2012].

[94] Chapter 2 (see section 2.2.4).

[95] Pictet et al op cit note 34 at 56–60; I Brownlie 'Volunteers and the Law of War and Neutrality' (1956) 5 *International & Comparative Law Quarterly* 570–580.

[96] Z Sal man 'Private Military Contractors and the Taint of a Mercenary Reputation' (2008) *International Law & Politics* 853 at 885. Lytton C 'Blood for Hire: How the War in Iraq has

compared with their military counterparts may suggest financial motivations, the task of drawing a direct inference between this and their involvement in the battlefield is a mammoth one. This is particularly so given that other motivations, such as religious convictions, patriotism, and ideology, may exist concurrently and be equally responsible for driving one to participate in an armed conflict.[97]

The fourth, fifth and sixth requirements are tied to the state, and aim to exempt those individuals it endorses from being considered mercenaries. According to the fourth requirement nationals and residents of a party to the conflict are exempted.[98] The practical translation of this requirement produces interesting ambiguities, since employees of PMSCs who are nationals of a state party would meet it, while other employees of the same PMSCs who are not nationals of the state, but are involved in the same operations, would be excluded.[99] The fifth and sixth requirements also exclude members of the armed forces of a party to the conflict, or officials sent by an outside state. Looked at together, the fourth, fifth and sixth criteria provide convenient escapes for states using mercenaries, as all a state (sending or receiving) has to do to avoid a contractor being classified as a mercenary is to incorporate the individual into its armed forces or simply grant them nationality or permanent residency.

While some contractors may meet one or two of the requirements, it is unlikely that they would simultaneously satisfy all.[100] Further, the fourth, fifth and sixth criteria provide convenient escapes for those states that may use private contractors. Despite the fact that private contractors are unlikely to meet the onerous legal definition, the question of mercenaries remains relevant from the perspective of how international humanitarian law chooses to respond to these actors. The classification and treatment

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Reinvented the World's Second Oldest Profession' (2006) *Oregon Review of International Law* 307 at 334.

[97] J De Preux 'Commentary on Articles 86 and 87 of Protocol Additional I' in Sando et al op cit note 26 at 571, 578–579.

[98] Article 47(2) of Additional Protocol I; Sapone op cit note 90 at 17–26. It is alleged that PMSCs as corporate entities fall outside Article 47 of Additional Protocol I. However, Article 47 may affect employees of companies.

[99] S Gumed e 'Towards the Revisions of the 1977 OAU/AU Convention on the Eliminations of Mercenarism in Africa' (2007) 16( ) *Africa Security Review* 22 at 28.

[100] G Best *Humanity in Warfare: The Modern History of International Armed Conflicts* (1980) 375, where the author states that '[A]ny mercenary who cannot exclude himself from this definition deserves to be shot — and his lawyer with him.'

of private contractors must be made within the context of the response of the law to the only such actor mentioned in humanitarian treaties that acts in a private capacity and engages in direct hostilities, that is, mercenaries. According to Article 47(1) of Additional Protocol I, a 'mercenary shall not have the right to be a combatant or a prisoner of war'. In contrast to the trend in humanitarian law treaties towards extending protection to persons previously not covered, the law here deliberately limits such protection, raising questions as to why in particular these actors are treated in such a portentous manner. The reasons for this may be traced to principles within the just war components of *jus ad bellum* that militate against the acceptance of mercenaries.

Mercenaries appear to contravene the principle of legitimate authority and right intention. Arguably, both of these elements are present within the ambit of private contractors since they may provide force-related services outside the state's authority and its monopoly over violence, and do so for financially related motives that may not be deemed to fall within the scope of a 'right intention'. In this regard a study aimed at ferreting out the customary international law on mercenaries by the UN Special Rapporteur on Mercenaries appears to suggest that while state practice disavows lone operators, international custom accepts the use of state sanctioned private actors.[101] This suggestion may underlie statements that governments can legitimately employ PMSCs so long as they act in the interests of the governments. For example, the United Kingdom has recently suggested that PMSCs be contracted to aid Libyan rebel forces and urged Arab countries to hire them to train the Libyan rebels.[102] The fourth to sixth requirements in Article 47 resonate with this view in as far as they appear to preserve a means for states to retain authority on whether or not an individual is caught in the mercenary trap.

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[101] Ballesteros op cit note 91; J C Zarate 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder' (1998) 3 *Stanford Journal of International Law* 75 at 77, 127.

[102] P Wintour 'Libyan Rebels Should Receive Training Funded by Arab Countries, Says Britain: British Defence Sources are also Looking to Hire Private Security Companies to Help Strengthen Rebels' Position on the Battlefield' *The Guardian* 6 April 2011, available at http:// www.guardian.co.uk/world/2011/apr/06/libyan–rebels–training–funded–arab [accessed on 7 April 2011]; H Y Liu 'Mercenaries in Libya: Ramification of the Treatment of Armed Mercenary Personnel Under the Arms Embargo for Private Military Company Contractors' (2011) 16 *Journal of Conflict and Security Law* 293 at 306–307.

In conclusion, the discussion on mercenaries is particularly relevant to the identity of PMSCs, as these actors highlight the deeper dilemma of maintaining a clear distinction between the identity and treatment of actors in *jus in bello* despite their motivations and alignment to *jus ad bellum*. The radical approach of Article 47 in excluding actors from protection, because of their traits (in this case their motivation or endorsement by the state) instead of including them, appears to blur the separation between the two components of *jus ad bellum* and *jus in bello*. The suggestion by the UN Special Rapporteur that customary law may view private actors tied to the state differently from those that are independent, further underlies the intrusion of considerations located in *jus ad bellum,* such as legitimate authority into the domain of *jus in bello*. The approach set out in Article 47 of Additional Protocol I needs to be taken cautiously in the way international humanitarian law classifies actors in war, including PMSCs.

4.2.3 Implications of PMSC Status upon their Rights and Obligations

PMSCs present in international armed conflicts but contracted by entities other than the state will not be regarded as combatants. In defining combatancy, Article 4A of Geneva Convention III and Articles 43 and 44 of Additional Protocol I link persons that qualify therein with the state. The vast majority of contractors are unlikely to meet the requirement of being members of the armed forces because their contracts are unlikely to meet the test of incorporation into the armed forces. Besides, the very fact of using such contractors' aims to shift reliance away from formal armed forces and, for this reason, it is unlikely that states would be willing to accept a contract as evidence of incorporation. The vast majority of PMSC personnel are also unlikely to meet the requirements of the irregular forces mentioned in Article 4A(2) of Geneva Convention III and Article 44(3) of Additional Protocol I. The cumulative effect of the four conditions prescribed in Article 4A(2) of Geneva Convention III, as well as the teleological understanding of this Article, rule out the possibility of admitting private contractors into this fold. Finally, their contracts are unlikely to fall within the exceptions highlighted by the treaties relating to mercenaries and civilians accompanying the armed forces. In keeping with the desire to maintain two mutually exclusive classes of persons — combatants and civilians — as contained in Article

50(1) of Addition Protocol I, the remote possibility of qualifying as combatants means that the majority of PMSC personnel will be civilians. Their rights and obligations will therefore correspond to that accorded to civilians located in zones of international armed conflicts.

Parties to a conflict are obligated to protect civilian contractors during international armed conflict. Such contractors must be respected by opposing belligerent forces in line with the rules of the conduct of hostilities, as contained in Articles 48-71 of Additional Protocol I and customary international law.[103] This means that in accordance with Articles 51(1)-(2) of Additional Protocol I, belligerents will be prohibited from intentionally carrying out attacks and reprisals against them[104] — provided that the contractors refrain from taking part directly in hostilities.[105] As civilians, the personnel of such PMSCs will therefore be immune, not just from deliberate attacks, but also from attacks by belligerents that may be considered as either indiscriminate or causing excessive injury.[106] The use of means and methods of warfare that fail to distinguish between military personnel/objectives and civilian contractors/zones would therefore be prohibited.

Since the physical and functional proximity of contractors to the armed forces bear a much higher personal risk than that of ordinary civilians, their protection under the principles on the conduct of hostilities needs to be further qualified. Contractors, because they work alongside the armed forces and undertake tasks that may be an integral part of the military mission, are more likely than other civilians to be in danger of becoming victims of an armed attack. This could occur through collateral damage when a belligerent attacks an adversary working in the same geographical space as civilian contractors. It could also occur when belligerents deliberately target enemy forces working alongside contractors performing tasks perceived to be critical

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[103] J M Henckaerts, L Doswald–Beck, C Alvermann & International Committee of the Red Cross (eds) *Customary International Humanitarian Law* (2005) 3 & 25. Rules 1 & 7 of the Customary International Humanitarian Law Study.

[104] Articles 8(2)(b)(i), 8(2)(b)(iv) & 8(2)(e) of the Rome Statute of the International Criminal Court (Rome Statute of the ICC), 17 July 1998 (last amended 2010), ISBN No. 92–9227–227–6, available at http://www.unhcr.org/refworld/docid/3ae6b3a84.html [accessed 3 October 2012].

[105] 'Contractors on the Battlefield' Field Manual 3–100.21, Headquarters, Department of the Army, US (January 2003) 2–11, 4–13, available at http://www.fas.org/irp/doddir/army/fm3–100–21.pdf [accessed on 14 May 2013]; Henckaerts et al op cit note 104 at 115.

[106] Articles 51(3) of Additional Protocol I; Henckaerts et al op cit note 104 at 3, 25.

to the neutralisation of the enemy's military threat. These situations could occur in instances when civilian contractors support fighting troops, escort combat fleets, or work within the proximity of the military environment performing sensitive tasks critical to battlefield success. In such a blurred state of affairs, any of the diverse services considered strictly civilian, such as, logistic supplies, could well be exposed to the dangers of enemy attacks. In such situations the protection of civilian contractors would have to take into account the balance envisaged in Article 58 of Additional Protocol I,[107] which requires such belligerent forces to take precautions against the effects of attacks and the dangers of military operations, to the 'maximum extent feasible'. The use of the phrase 'maximum extent feasible' suggests a balancing act that takes into consideration the military necessity of belligerents and the general humanitarian objective of protecting the civilians.[108] Along the same lines, the same Article makes it clear that belligerents relying on such contractors would have to take the necessary measures to the maximum extent possible to remove civilians from the vicinity of military targets.[109] If compliance with the obligations is not possible, as in the case of contractors performing essential military tasks, protection measures have to be extended accordingly to mitigate hostile actions against such personnel.[110]

The general protection afforded to civilian contractors will be qualified in two respects: where they engage in hostilities and where they are protected civilians that pose a threat to public security for the purposes of Geneva Convention IV. In the first instance, as with all other civilians, contractors have no right to take direct participate in hostilities. The defining characteristic of the civilians is that they do not take a direct part in hostilities. Contractors directly participating in hostilities while not meeting the requirements for combatancy usurp a privilege that is reserved for combatants. As provided by Article 51(3) of Additional Protocol I, such contractors are liable to attack by belligerents for the duration of their direct participation. Chapter Five examines further consequences that ensue as a result of contractors

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[107] Article 58 (c) of Additional Protocol I.
[108] Sandoz et al op cit note 26 at 693.
[109] Article 58 of Additional Protocol I .
[110] 'Contractors on the Battlefield' Field Manual 3–100.21, Headquarters, Department of the Army, US op cit note 117. The United States Army force protection measures not only include military personnel but also contractor employees since these persons, because of their status as civilians, bring with them an inherent need for such protection.

engaging in hostilities in more detail. In the second instance, when such civilian contractors are considered to be 'protected civilians' within the meaning of Geneva Convention IV, they may be interned where the enemy power perceives them to pose a threat to public security. Protected persons, as pointed out in Chapter Three, are civilians who are enemy nationals who find themselves under the control of an adversarial power.[111] This could happen in three situations, namely when their states have been overrun by the adversary, or their state has been occupied, or where they live within the territory of the adversarial states. Thus, within the context of the USA invasion of Iraq in 2001,civilian contractors operating in areas under the control of the Iraqi government before its fall would comprise enemy nationals. The government of Iraq had the right to intern such contractors where it believes they pose a risk to public security.

4.3 PMSCs IN NON-INTERNATIONAL ARMED CONFLICTS

As discussed in the previous chapter, non-international armed conflicts take place within the territory of one state among factions or between such factions and the state. Only Common Article 3 of the Geneva Conventions and Additional Protocol II are applicable in this situation.[112] There are examples of the significant roles that PMSCs have played in this type of conflicts,[113] where they have proved to be battle changers by providing significant military enhancement to a state facing rebel groups. The customer base of PMSCs is not restricted to states, and multinational firms and international organisations have sought their protection in the unstable climate that often characterise non-international armed conflicts. Transnational corporate entities have sought private contractors to protect their economic interests against attacks by violent non-state actors.[114] Humanitarian groups have also turned to private contractors for protection amidst the barriers posed to carrying out

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[111] Chapter 3 (see section 3.2.2).
[112] Customary international humanitarian law also supplements these rules, see *Tadic* para *96–99*.
[113] Chapter 2 (see section 2.2.4) & Chapter 1 (1.7); Singer op cit note 11 at 3–6.
[114] Chapter 1 (see section 1.1); J Palou–Loverdos & L Armendri 'Privatiation of Warfare, Violence and Private Military & Security Companies: A Factual and Legal Approach to Human Rights Abuses' Report presented to UN Working Group, Geneva (October 2011) 43–44, 498, available at http://nova.cat/wp–content/uploads/2011/12/Informe_PMSC_Iraq_Nova_ok.pdf [accessed on 21 May 2013].

humanitarian relief in the instability that characterises zones of internal armed conflicts.[115] Furthermore, although less frequently, non-state actors have been known to hire contractors in such conflicts.[116] A few examples reinforce the reality of contractors within such conflicts.

As mentioned in Chapter Two, during the 1990s companies such as Executive Outcomes and Sandline were part of combat operations occurring in internal conflicts taking place in different African countries.[117] Executive Outcomes helped the Angolan government defeat the rebel movement, União Nacional para a Independência Total de Angola[118] (UNITA). In 1991 the same contractor helped the government of Sierra Leone push back a violent rebellion led by the Revolutionary United Front (RUF).[119] Upon its departure another PMSC, Sandline came to the aid of the Sierra Leonean government which had already begun to cede ground upon the departure of Executive Outcomes.[120] About the same time Mobutu Sese Seko, the ruler of the former Zaire (now the Democratic Republic of Congo), sought the assistance of Executive Outcomes and Military Professional Resources Inc (MPRI) to repel a growing rebel movement led by Laurent Kabila that was overrunning the country. When this was not forthcoming he turned for support from another PMSC, Geolink.[121] Subsequently, when Kabila took over control, he turned to Executive Outcome for help against rebel movements supported by Rwanda and Uganda.[122] His adversaries also resorted to other South African PMSCs, Stability Control Agencies (Stabilco) and Avient, for support in aerial combat. This reliance upon PMSCs has not just been limited to Africa. As previously discussed, in the 1990s Sandline undertook similar operations in Papua New Guinea.[123] PMSCs have also been

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[115] Chapter 1 (see section 1.1); Palou–Loverdos & Armend r i ibid at 3–44, 498.
[116] Chesterman & Lehnardt op cit note 16 at 185.
[117] Chapter 2 (see section 2.2.4).
[118] Portuguese for 'National Union for the Total Independence of Angola'.
[119] Chapter 2 (see section 2.2.4); H M Howe *Ambiguous Order: Military Forces in African States* (2004) 187–242; H Howe 'Private Security forces and African stability: the Case of Executive Outcomes' (1998) 36 *The Journal of Modern African Studies* 307–331; Singer op cit note 11 at 3.
[120] M S Kargbo British Foreign Policy and the Conflict in Sierra Leone: 1991–2001 (2006) 283; B M Russet, H Star & D T Kinsella (eds) World Politics: The Menu for Choice (2008) 354.
[121] Singer op cit note 11 at 10; D N Nelson & L J Neack (eds) *Global Society in Transition: An International Politics Reader* (2002) 95.
[122] Singer op cit note 11 at 10.
[123] 'Gladiators for Hire' *Spiegel Online Magazine* 3 May 2004, available at http://www.spiegel.de/international/spiegel/cover–story–gladiators–for–hire–a–298144.html [accessed on 4 March 2013].

present in internal conflicts taking place in Bosnia and Kosovo,[124] Colombia,[125] Iraq,[126] Afghanistan[127] and, more recently, Libya.[128] In these conflicts contractors have trained forces (Iraq and Bosnia), flown gunships (Columbia), protected political leaders like the President (Afghanistan) and provided intelligence-gathering services.[129]

The past involvement and the range of services that PMSCs have offered in such non-international armed conflicts warrants attention with respect to how they are viewed under the present provisions of humanitarian law. The provisions of the treaties governing internal conflicts will undoubtedly have an impact on the rights and responsibilities of PMSCs, and their initial requirement is that the identity of PMSCs in non-international armed conflicts be ascertained. The importance of this question can be illustrated by the involvement of a PMCS in Columbia where the government has been involved in a long drawn out internal conflict with FARC guerrillas. Between 2000-2002, DynCorp a US PMSC, was involved in military-like activities that included humanitarian protection and rescue operations in support of Columbia's drug eradication efforts.[130] DynCorp also provided pilots, trainers, and maintenance workers for the government.[131] During one of these missions in 2002, the guerrillas downed a police helicopter and captured a number of the contractors.[132] It was necessary to establish what status and treatment such contractors, and others

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[124] C Boggs Empire Versus Democracy: The Triumph of Corporate and Military Power (2012) 34.
[125] N Pearson & M Singer (eds) Detective Fiction in a Postcolonial and Transnational World (2013) 116.
[126] C Molden What Were the Consequences of the Iraq War Contracts? (2012) 26.
[127] E Girardet Killing the Cranes: A Reporter's Journey Through Three Decades of War in Afghanistan (2012) 368.
[128] R Baroud 'Mali — New Ground for Western Security Firms to Flourish' *Al Arabiya News* 3 February 2013, available at http://www.alarabiya.net/views/2013/02/03/264057.html [accessed on 20 May 2013].
[129] '[Multi–agent Autonomous Reasoning System] MARSS and More: Quasi–Civilian Spy Plane Services On the Front Lines, *Defence Industry Daily*, 31 March 2011 available at http://www.defenseindustrydaily.com/telfords–dash–7s–to–supplement–military–surveillance–04947/ [accessed on 30 March 2013]. Such as the American firm Airscan which operates private air reconnaissance.
[130] Singer op cit note 11 at 14–15.
[131] Singer op cit note 11 at 14–15.
[132] F Mathieu & N Dearden 'Corporate Mercenaries, The Threat of Private Military and Security Companies' War on Want (2006) 5 available on http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/805_mercenaries_/805_mercenaries_en.pdf [accessed on 5 April 2012].

like them, should be accorded in the context of non- international armed conflicts. It is this issue that forms the substance of the next two sections.

4.3.1 The Identity of PMCS Personnel in Non-International Armed Conflicts

As discussed in Chapter Three, there is no reference to the term 'combatant' in the legal regime governing non-international armed conflicts. In the absence of an explicit mention of combatant status, a constructive reading of Common Article 3 of the Geneva Conventions and Articles 1, 4 and 13 of Additional Protocol II reveals the existence of four groups in this situation:[133] members of the armed forces of a state; members of organised armed groups; civilians directly participating in hostilities;[134] protected civilians not directly participating in hostilities.[135] The sections below explore under which of these groups PMSC personnel that are present in non-international armed conflicts would fall under.

4.3.1.1 Members of the Armed Forces of a State

As discussed in the previous chapter, the criteria for membership of the state's armed forces in non-international armed conflicts are likely to be the same as that in international armed conflict.[136] Essentially, this means incorporation of an individual into the armed forces in line with the state's domestic legal regime. The resolution here will match that used in regard to international armed conflicts, where PMSCs are unlikely to be considered as part of the armed forces. As explained earlier, a state contract with a PMSC alone will not be sufficient to convey the formal sense of

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[133] ICRC op cit note 55 at 18.
[134] As per Article 13 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non–International Armed Conflicts (Additional Protocol II) 1125 UNTS 6098 (June 1977) available at: http://www.refworld.org/docid/3ae6b37f40.html [accessed 11 July 2013] or 'an active part in hostilities' as per Common Article 3 of the Four Geneva Conventions.
[135] As referred to in Article 13 of Additional Protocol II.
[136] K Watkins 'Opportunity Lost: Organi ed Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 2 *International Law and Politics* 641 at 651–654.

incorporation.[137] Furthermore, as explained earlier,[138] since one of the aims of outsourcing is to deliberately avoid reliance on the armed forces, there are likely to be few instances when states would accept that contractors are part of their armed forces.[139] The fact that states possess discretionary power to incorporate individuals into their armed forces, and chose instead to work with them as contractors is supportive of this view.

It will be recalled that within the territory of a state domestic law determines the legal status of non-state actors, and that rigorous procedures govern recruitment into the armed forces. The state may cede the right to maintain public security to certain persons without necessarily incorporating them into its armed forces. In this respect, a situation can be envisaged where PMSCs are authorised to use violence in these contexts in pursuance of a mandate to maintain public order. Though the privatisation of law enforcement functions may contravene the state's monopoly on violence, the legality of such authorisation is not proscribed by international law but defined by the domestic legal order of the state in question. With state authorisation, private contractors may therefore engage in confrontations with dissident armed groups. While they would not be lawfully incorporated into the state, a case could be made by way of analogy to the militia in Article 4A of Geneva Convention III for such contractors to be construed as 'fighting on behalf' of the state. To establish this fact a plausible case could be advanced for the sufficiency of a *de facto* link between the contractor and the state, such as that applied when establishing that a militia 'belongs' to a state in the context of an international armed conflict. The *de facto* link would be clear where the contractors' activities are in support of the state and have the tacit approval of the state.[140]

4.3.1.2 Members of Organised Armed Groups

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[137] Hoppe op cit note 31 at 991.
[138] Chapter 4 (see 4.2.2.1).
[139] P Walther, M Eegholm & L C Hammer 'The Legal Status of Private Contractors Under International Humanitarian Law' (2008) 31(4) *Justicia* 3 at 30.
[140] J N Maogoto & B Sheehy 'Contemporary Private Military Firms under International Law: An Unregulated Gold Rush' (2006) 26(2) *Adelaide Law Review* 2 5 at 252; A Cassese 'The *Nicaragua* and *Tadic* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649 at 650–651.

PMSC services rendered to non-state actors could be taken to mean that they belong to armed groups/dissident forces either fighting the state or each other. According to Article 1 of Additional Protocol II such forces must be 'organised', 'under responsible command', exercises control over a part of the state's territory and carries out sustained military relations.[141] Thus, only PMSCs hired by armed groups that meet these requirements qualify for consideration under this section.

It will be necessary to show in all cases of non-international armed conflicts, that the PMSC 'belongs to', that is, fights on behalf of the dissident group or fighting faction. It is likely that the test to determine that a contractor 'fights on behalf' of an organised armed group in a non-international armed conflict is similar to that applied to the irregular forces that 'belong to' or fight on behalf of the state in international armed conflicts.[142] As previously shown, this requires one to establish a *de facto* link between the PMSC and the organised armed group.[143] For example, if contractors participate directly in hostilities on the instructions or under the direction or control of an organised armed group, they could be taken to be fighting on behalf of that group.

Finally, there is nothing to prevent a PMSC from regarding itself as an independent party to a non-international armed conflict if the level of violence the PMSC displays meets the threshold of a non-international armed conflict.[144] As pointed out,[145] this threshold is considerably higher for internal conflicts that fall within the scope of Additional Protocol II than for those that fall under Common Article 3. Additional Protocol II, therefore, governs internal conflicts which meet only a certain threshold where parties are organised armed groups, under responsible command, exercise control over a part of a State's territory and are able to sustain military operations.[146] Common Article Three provides a lower threshold of application and covers all conflicts not essentially considered to be international, whatever the nature or form

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[141] Article 3 of the Four Geneva Conventions is silent on whether armed factions operating in other non–international conflicts need to meet similar conditions. The terms 'organised' and 'under responsible command' can be inferred from their use in Article A of the Geneva Convention III and Article 43 of Additional Protocol I in relation to international armed conflicts.
[142] Chapter 3 (see section 3.3.1).
[143] Chapter 3 (see section 3.2.1.2).
[144] ICRC op cit note 55 at 81–82.
[145] Chapter 3 (see section 3.3).
[146] Article 1(1) of Additional Protocol II.

the fighting factions use. In respect of Additional Protocol II, the critical requirement would appear to be that the PMSCs' personnel both control and sustain military operations in a part of a state's territory. This is purely speculative, since there has been no such recorded incident where PMSCs have entered into a conflict in their own right as independent parties.

4.3.1.3 Civilians Directly Participating in Hostilities and Protected Civilians

If PMSCs do not act on behalf of either the state or one of the organised armed forces involved in a conflict occurring on the territory of the state, they could still be categorised as civilians. This depends on whether they take 'an active part in hostilities' (as used in Common Article 3 of the four Geneva Conventions) or a 'direct part in hostilities' (as used Article of Additional Protocol II) . The important question here will therefore be whether their activities qualify as 'direct participation in hostilities'. Clearly from the broad range of their services, certain functions, such as the provision of combat support, would meet this requirement, while others like logistic functions to do with catering would not. In particular, contractors hired to perform functions that constitute direct participation in hostilities will be considered to be civilians within the meaning of Article 13 of Additional Protocol II. Chapter Five discusses this issue in depth, as well as the profound implications that arise when contractors are found to engage in hostilities.

4.3.2 Effect on PMSCs Rights and Obligations

The fact that PMSCs may operate in various capacities providing a range of different services within non-international armed conflicts where the legal regime is not as clear as that in international conflicts poses challenges to the determination of their rights and obligations in such a situation. As pointed out earlier,[147] only Common Article 3 of the Geneva Conventions and Additional Protocol II cover these conflicts, and both do not contain express provisions, similar to those in Geneva Convention III and Additional Protocol I, delineating who is a combatant and who a civilian, let

[147] Chapter 3 (see section 3.3).

alone their corresponding rights and obligations. In this situation it may be helpful to look separately at PMSCs that operate as *de facto* combatants (directly participating in hostilities on behalf of a state or organised forces), or simply as civilians. The paragraphs that follow look at the implications of the activities of the former in terms of their right to engage in hostilities, their treatment upon capture, and their position as far as being legitimate targets of the adversarial belligerents.

4.3.2.1 PMSCs Considered to be De Facto Combatants

As pointed out earlier,[148] while it is unlikely that PMSCs may be incorporated into a state's armed forces, one cannot rule out the possibility of their providing coercive services on behalf of the state, for example, where the state has privatised law enforcement functions. The legal framework governing non-international armed conflicts does not provide actors with the right to directly participate in hostilities. In this vacuum domestic law will define the legality of such PMSC activities. Such laws are likely to sanction their actions where they use force as agents of the state. In contrast, the use of force by PMSC in support of organised armed groups fighting the state is likely to breach domestic law. The situation of who is or is not sanctioned by domestic law could again be reversed if the government is overthrown and the former rebels become the new authority.

As noted earlier, the heart of this anomaly is due to the absence of express references to combatant (and the rights associated with it) in the law of non-international armed conflicts.[149] This not only results in silence regarding the existence of combatant immunity (when they use force), but the rights PMSC personnel that fight on behalf of the state or rebel forces will be entitled to in the event of their capture. Such personnel will not be entitled to prisoner of war status, and will receive only the minimal guarantees set out in Article 3 to the four Geneva Conventions and Articles 4, 5 & 6 of Additional Protocol II, as well as non-derogable human rights that remain applicable to all during armed conflicts. That said, Article 6(5) encourages authorities at the end of hostilities to 'grant the broadest possible amnesty to persons

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[148] Chapter 3 (see section 3.3.1) & Chapter 4 (see section 4.2.1.2).
[149] Chapter 3 (see section 3.3.2).

who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict …'. This Article appears to form an attempt to harmonise the treatment of such persons with that of fighting combatants in inter-state conflicts, where repatriation of prisoners of war (upon cessation of hostilities) is seen is fundamental towards achieving the objective of re-establishing normal relations after the conflict.

The position regarding the targeting of personnel working for PMSCs that directly participate in hostilities on behalf of either the state or organised armed groups requires more discussion. Since international humanitarian law strives to ensure the full application of *jus in bello* by placing belligerents on an equal footing, members of the armed groups are legitimate targets in the same way as members of the armed forces. It would thus follow that the personnel of PMSCs fighting for the state and those fighting on behalf of non-state organised forces should also be legitimate targets. This should come as no surprise since such contractors knowingly undertake this risk. This position appears, however, to be qualified in relation to PMCS personnel employed by such companies[150] but whose contracts place them in a position where they do not exercise combat functions. It is not certain whether such personnel will also liable to attack as their counterparts who perform functions that involve direct participation in hostilities. The answer to this depends on which of the interpretations outlined in Chapter Three regarding the liability of individuals in internal armed conflicts, one adopts.[151]

Under the membership approach one could argue that such personnel are subject to blanket attacks by virtue of being a part of the PMSC, as are individuals that are a part of the armed forces.[152] The ICRC suggests that a more restrictive construction of membership should be used. This would mean that it would that be limited to only those that assume a continuous function that amounts to direct participation in hostilities (a combat continuous function), as would attacks on any members.[153]

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[150] Examples such as the PMSCs that are fighting on behalf of the state or an armed group.
[151] Chapter 3 (see section 3.3.2) outlines the membership approach, the specific acts approach and the affirmative disengagement approach or the sliding scale approach.
[152] Chapter 3 (see section 3.3.2).
[153] N Mel er 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities'

According to this interpretation, PMSC personnel not hired to perform combat continuous functions would not be liable to attack. The ICRC interpretation resonates with the specific acts approach,[154]and would permit attacks on contractors only as long as they take part in hostilities. As pointed out in the previous chapter, each of these approaches gives rise to problems. The membership approach is incoherent is out of kilter with existing human rights norms.[155] The specific acts approach undermines the evenness of the battlefield by permitting fighters on one side to hide behind a 'revolving door' ploy where they alternate between civilians and *de facto* combatants during intermittent and isolated acts of hostility. Adopting a combination of the affirmative and sliding scale approach could present a slight improvement to this dilemma by allowing such employees to be attacked until such a time that they completely disengage[156] from direct participation in hostilities.[157] This, however, does not eliminate the inequality that would exist between PMSC personnel who do not provide combatant functions and should not be attacked, and their counterparts in the armed forces[158] who would remain subject to attack. In view of international humanitarian law's aspiration to maintain an even battle terrain between belligerents,[159] it is submitted that such PMSC personnel should at the very least be arrested when this can be easily done.[160]

4.3.2.2 PMSCs Considered to be Civilians

PMSC personnel who are civilians would enjoy the heightened protection afforded to the civilian population under Part IV of Additional Protocol II. In particular, as

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(2010) 42 *New York University Journal of International Law* 831 at 839; The ICRC approach has been criticised as granting more protection to irregular fighters (who are only targeted when engaged in hostilities) than the state armed forces (who can be targeted at any time); see Watkins op cit note 137 at 682–686.

[154] The 'specific acts' approach equates all persons that are not part of states' armed forces with civilians in international armed conflicts.

[155] Chapter 3 (see section 3.3.2).

[156] Hence the term 'affirmative disengagement'.

[157] Article 13 of Additional Protocol II; ICRC op cit note 55 at 59–63.

[158] Armed forces such as army personnel employed to render logistic functions.

[159] The need to maintain an even battle terrain between belligerents is key to achieve the law's objective of balancing humanity and military necessity.

[160] This is in line with the ICRC Interpretive Guidance that provides that 'in addition to the restraints imposed by international humanitarian law on …. Warfare … the kind … of force which is permissible against persons … not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose ….' ICRC op cit note 15 at 10 .

civilians they will enjoy protection 'against the dangers arising from military operations'. Furthermore, as provided by Article 13(2) they 'shall not be the object of attack … [and] [a]cts or threats of violence … to spread terror [against them] are prohibited'. As such, indiscriminate attacks on them, are prohibited since they are civilians, [161] and parties are obligated at all times to distinguish between them and persons involved in combat.[162] Thus, in comparison with PMSC personnel considered as *de facto* combatants, contractors that perform civilian-like functions in non-international armed conflicts will generally enjoy more protection against the dangers of military operations than that extended to other civilians.[163] This protection, however, is not as extensive as that conferred on civilians in international armed conflicts. There are no specific obligations upon states, such as those found in Article 58 of Additional Protocol I, to remove them from a zone of conflict.

The enhanced protection that pertains to PMSC personnel considered as civilians will only be applicable as long as they do not directly participate in hostilities.[164] The murkiness of internal armed conflict cannot rule out situations where PMSC employees may be drawn into hostilities while they lack a *de facto* link between them and any of the parties to the conflict.[165] This could happen, for example, where such PMSCs are contracted to perform non-combat services, such as guarding services, and end up in engaging in activities which amount to direct participation in hostilities. In these circumstances, according to Article 13 of Additional Protocol II, they would be liable to attack 'for such a time as they take a direct part in hostilities'. The similarity of wording used in this Article to that employed in Article 51(3) of Additional Protocol I in relation to international armed conflicts, suggests that such personnel can be targeted only when they engaged in individual acts amounting to direct participation in hostilities.[166] Thus, the scope for targeting them here is

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[161] Henckaerts et al op cit note 104 at 3, 25; Dinstein op cite note 34 at 32.
[162] Henckaerts et al op cit note 104.
[163] Article 13 of Additional Protocol II.
[164] Article 13 of Additional Protocol II; B Boothby 'Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance: "And For Such Time As": The Time Dimension To Direct Participation In Hostilities' (2010) 2 *New York University Journal of International Law* 741–768.
[165] For the purposes of concluding that they are fighting on behalf of the state or an organised faction.
[166] S Watts 'Status of Government Forces in Non–International Armed Conflict' (2012) *International Law Studie*s 1 at 5.

narrower than that discussed earlier in relation to PMSC personnel that that act on behalf of one of the fighting parties.[167]

Finally, PMSCs that engage in hostilities while considered as civilians may be deprived of their liberty.[168] They may be detained for security purposes and domestic law will determine their legal status. In these circumstances, harsh criminal sanctions may be imposed on them for contravening national laws that prohibit violence against the state. While such PMSC personnel will be entitled to the same basic guarantees provide to *de facto* combatants (and all other persons) under Article 3 of the Geneva Conventions and Article 4 of Additional Protocol II, an important distinction arises by virtue of Article 6(5) of Additional Protocol II. This provides for amnesty in relation to persons who engage in hostilities or are detained for reasons related to the conflict. Unlike *de facto* combatants, it is less likely that civilian PMSCs that independently engage in hostilities will be considered as such, which allows the states to treat them as common law criminals, including detaining them for periods long after the conflict.

4.4 CONCLUSION

The application of the relevant legal criteria regarding the status of individuals in international armed conflicts leads to the primary conclusion that, except in the remotest cases, the majority of PMSC personnel will not meet the requirements for combatancy. They are not members of the armed forces, mainly because of the difficulty of their meeting the requirement of formal incorporation. In addition, they do not fall within the groups of irregular forces due to the onerous hurdles that have to be satisfied in order for them to be regarded as belonging to a state party, while at the same time meeting the cumulative conditions required of such forces in order to be considered combatants. The present requirements for combatancy are inclined towards admitting only those entities or persons that are linked to the state, thus excluding independent private actors like PMSCs. The conclusion that one arrives at, given the mutually exclusive nature of the combatant/civilian dichotomy, is that

[167] Chapter 4 (see 4.3.2.1).
[168] Chapter 3 (see section 3.3.2).

because PMSC personnel are not combatants, they are therefore civilians.

As civilians, there is a possibility that some PMSC personnel may be considered to be 'persons who accompany the armed forces' under Article 4A(4) Geneva Convention III.[169] This would include PMSCs that provide logistical services such as those listed in the examples provided in the Article that have received the requisite authorisation by the state concerned to accompany its armed forces. A contractor must be able to point to express domestic legal conditions set by the state that signify the grant of such authorisation and possibly possess a card as evidence of such authorisation. A teleological understanding of this Article would suggest the exclusion of private contractors that provide services that amount to direct or indirect participation in hostilities. Moreover, PMSC contracts not concluded with states but with entities, such as multinational companies, non-governmental organisations, the United Nations and private individuals will not qualify as civilians accompanying the armed forces under Article 4A(4) Geneva Convention III.

The treaties also make reference to specific persons that are involved in hostilities but do not meet the requirements of combatancy. Particularly relevant here is the reference by Article 47 of Additional Protocol I to mercenaries. Even though the *modus operandi* of private contractors as entities that provide military services for profit resembles the ordinary inference of the term mercenary, PMSCs are unlikely to satisfy the cumulative nature of the legal definition for mercenaries as provided in Article 47 of Additional Protocol I. Aspects of the definition relating to the pecuniary motivation of an individual are extremely difficult to prove. Furthermore, the fourth, fifth and sixth criteria provide convenient escapes for those states that may use private contractors. Although private contractors are unlikely to meet the legal definition of mercenaries, the question of mercenaries presents a useful background to the approach taken by international humanitarian law towards private actors who engage in hostilities for profit. In contrast to the trend of international humanitarian law towards extending protection to persons in armed conflict previously not covered, the approach in Article 47 of Additional Proposal I deliberately restricts such protection by expressly denying mercenaries prisoner of war status.

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[169] Chapter 3 (see section 3.3.2).

In non-international armed conflicts, where there is no express mention of the combatant/civilian dichotomy, one can discern from the treaties two main groups that PMSC personnel could fall under. These are *de facto* combatants (by virtue of their links to a state armed forces or non-state armed forces) or civilians (who are all expected to not engage in hostilities but some of who may do so). In the case of the former, as the treaties governing non-international armed conflicts are silent on the right to participate in hostilities, domestic law will define the legality of such PMSC activities. Those PMSCs supporting government authorities are likely to be sanctioned by the law, unlike those supporting rebel forces. The absence of 'combatancy' in the international legal regime will further mean such personnel will not have combatant immunity or prisoner of war status. If captured, such contractors will therefore enjoy only minimum guarantees under Article 3 of the Geneva Conventions and Article 4 and 5 of Additional Protocol II. Article 6(5) of Additional Protocol II, however, encourages authorities (on either side) to grant amnesties to such persons at the end of hostilities. Furthermore, as forces are considered to belong to the state or armed groups, such PMSC personnel will be treated on a par with those they support and see as legitimate targets, even though different interpretations suggest the need to distinguish for this purposes between those that perform combatant continuous functions and those that do not.

In contrast, PMSCs providing services of a civilian nature will be considered civilians and be entitled to the heightened protection afforded to the civilian population under Part IV of Additional Protocol II and enjoy more rights than those considered as *de facto* combatants. The enhanced protection will be applicable only so long as they do not directly participate in hostilities. When they take part in hostilities they will be liable to attack and may be deprived of their liberty. If detained, they will be entitled to only the minimum guarantees under Article 3 of the Geneva Conventions and Article 4 and 5 of Additional Protocol II. It is unlikely that such personnel will be considered as persons that Article 6(5) of Additional Protocol II admonishes authorities to 'grant the broadest possible amnesty', since their reasons for engaging in hostilities and subsequent detention do not appear to be 'related to the armed conflict'.

In both the contexts of international and non-international armed conflicts, the treatment of PMSC personnel will be altered radically when such personnel engage in direct hostilities. Not only do these become legitimate targets of attack, the protection and rights they are accorded would also significantly differ from those of other civilians. This raises the primary question of when do services of private contractors constitute direct participation in hostilities. This question forms the subject of Chapter Five.

CHAPTER FIVE: THE PROBLEM OF CIVILIAN CONTRACTORS THAT DIRECTLY PARTICIPATE IN HOSTILITIES

5.1 INTRODUCTION

As shown in Chapter Three, the fundamental distinction between combatants and civilians in international armed conflicts has an impact upon the rights and responsibilities that attach to actors in conflict zones. These two categories are mutually exclusive. In this respect, combatants are defined by provisions of the Geneva Convention III and Additional Protocol I to include members of the armed forces, irregular forces that satisfy the conditions in Article 4A(2) of the Geneva Convention III, and irregular forces operating in exceptional circumstances while complying with the conditions of Article 44(3) of Additional Protocol I.[1] In accordance with Article 50(1) of Additional Protocol 1, all actors that do not meet the requirements for combatancy are automatically classified as civilians.

It has thus far been shown that PMSCs are not combatants since they do not meet the criteria laid out in these provisions. While one cannot rule out the rare possibility of a contractor meeting the stringent requirements for combatants, it is unlikely that the majority of PMSC personnel qualify.[2] They are not members of the armed forces since their contracts are unlikely to be construed as 'incorporation' into these forces. It is also unlikely that they will be considered as irregular forces that meet the cumulative criteria stipulated in Article 4A(2) of the Geneva Convention III, such as adorning a fixed distinctive sign, carrying arms openly, being under responsible command and conducting operations in accordance with the laws of war. If PMSCs are not combatants, then according to Article 50(1) of Additional Protocol I, they

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[1] Article 4A (2) of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) 75 UNTS 135 (August 1949) available at http://www.unhcr.org/refworld/docid/3ae6b36b4.html [accessed on 8 October, 2012]. It refers to having a fixed distinctive sign, carrying arms openly, under responsible command and conducting operations in accordance with the laws and customs of war.

[2] Chapter 4 (see section 4.2.1.1, section 4.2.1.2 and section 4.2.1.3).

will be classified as civilians. Thus the current treaty provisions are not ambiguous on the legal status of private contractors involved in armed conflict. They make no provision for a special status to accommodate PMSCs, but, on the basis of the civilians/combatants dichotomy, regard them as civilians.

The defining feature distinguishing combatants from civilians is that the former participate in hostilities while the latter do not. The discussions that follow echo the tensions that arise when civilians usurp the combatant's right to engage in hostilities.[3] This chapter therefore explores the consequences of PMSCs when they enter conflict zones as civilian providers of services that amount to direct participation in hostilities. In the first instance this will entail an examination of the question as to whether, in the first place, PMSCs enter conflict areas to provide services that amount to direct hostilities. An affirmative response to this question leads to a discussion of the problems that arise from their status and the rights/obligations that attach to them, the protection of civilians and the effective operation of accountability mechanisms such as state and command responsibility. By highlighting these problems, this chapter challenges the blanket classification of such PMSCs as civilians, and thus sets the tone for the next chapter which calls for a re-thinking of their status under international humanitarian law.

5.2 PMSCs HIRED FOR DIRECT PARTICIPATION IN HOSTILITIES

As shown in Chapter One, PMSCs exist in various forms and provide a range of services to both state and non-state actors in international and non-international armed conflicts.[4] Whether personnel working in these firms will be considered to be engaging in direct participation in hostilities is dependent upon the meaning ascribed to the notion of 'direct participation in hostilities'. As discussed in Chapter Three, though the treaties make reference to it there is no express definition of that phrase.[5] In the absence of a treaty definition, as previously shown, the International

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3 Chapter 3 (see section 3.5).
4 Chapter 1 (see sections 1.1, 1.2 & 1.6).
5 Chapter 3 (see section 3.5.1).

Committee of the Red Cross (ICRC) has provided an interpretive guidance for the notion that consists of three criteria that are required to be cumulatively met by an act for these purposes.[6] These criteria are causal proximity between the act and the resulting harm, that is, 'but for' the act; the harm in question would not have materialised; the harm must adversely affect military objects or cause injury, death or destruction to protected persons or objects; and there must also be a belligerent nexus, that is, the act must be carried out in support of one the parties to the conflict.

Although these criteria are not without criticism,[7] they are widely considered sufficient to provide the clearest guidance as to whether actions of PMSC personnel should be considered to be direct participation in hostilities. The conclusion one derives from the application of these three elements to PMSC personnel will depend upon two main factors: the nature of the service the PMSC is hired to perform and the specific functions performed by individual PMSC personnel. As discussed earlier in the study, the PMSC industry should not be treated as a holistic unit.[8] Its services span a wide spectrum of activities. For present purposes, however, it may be useful to break the industry into three groups, PMSCs providing direct combat services; those providing indirect military support to combatants; and those offering purely non-combatant services.[9] The question is whether involvement in these activities could be considered participation in hostilities.

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[6] Chapter 3 (see section 3.5.1).

[7] Chapter 3 (see section 3.5.1). Undoubtedly there is a room for serious debate on whether or not an act amounts to direct participation in hostilities considering the need to maintain a balance between a definition that is not too narrowly restriction to only active military operations, and not to broad to extend to civilian efforts in support of the genera war operation – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May – 12 June 1971, Report on the Work of the Conference, ICRC, Geneva, (January 1972) Vol I, 143-144, paras 3.116 & 2.120.

[8] Chapter 1 (see section 1.2). This fact is also recognised by other writers on the subject, eg W Kidane 'The Status of Private Military Contactors under International Humanitarian Law' (2010) 38 *Denver Journal of International Law* 361 at 413.

[9] Chapter 1 (see section 1.6). This differentiation is analogous to Singer's 'tip of the spear' mentioned in Chapter 1 (see sections 1.6 & 1.7); P W Singer *Corporate Warriors: The Rise of the Privatized Military Industry* (2003) 88–100.

5.2.1 PMSCs Providing Direct Combat Services

This group includes PMSCs hired to provide direct combatant services as extensions of or complements to one of the parties to a conflict. They may operate in close proximity to a belligerent with their involvement in the war appearing to a bystander to be the same as that of other combatants. Examples of PMSCs falling within this group include Executive Outcomes, Sandline International, Sukhoi, Strategic Consulting International, Sterling Corporate Services, and Nephrogenic Fibrosing Dermopathy (NFD).[10] These firms, as noted in Chapter Two, have directed, and been part of, active combat operationsin the execution of services.[11] The services of such PMSCs will, even under the strictest interpretation, meet the requirements of direct participation in hostilities. They meet the requirement for causal proximity since 'but for' the service they provide, resulting harm would not arise. Furthermore, the threshold of harm is likely to be met as the nature of such services are designed to damage the adversary's personnel/equipment or is such that they may cause injury, death or destruction of protected objects. Moreover, as the example of Executive Outcome shows, PMSCs providing these services do so at the behest of one of the parties and are therefore likely to satisfy the requirement for a belligerent nexus.

While the services of such PMSCs clearly amount to direct participation in hostilities, whether the personnel employed by them directly participate in hostilities is not as clear cut. Here it is helpful to rely on the interpretations discussed earlier in relation to when PMSC personnel may be attacked due to having directly participated in hostilities.[12] The membership approach suggests that all personnel hired by such firms are liable to attack and impliedly considers such individuals as directly participating in hostilities.[13] A counter to this position is that advanced by the ICRC, which suggests that only those individuals whose duties constitute a 'combatant continuous function' ought to be attacked for directly participating in

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[10] E B Smith 'The New Condottieri and U.S. Policy: The Privatization of Conflict and its Implications' (2003) 32( ) *Parameters: US Army War College Quarterly* 104 at 108–110; Singer op cit note 9.

[11] Chapter 2 (see section 2.2.4). For example, Executive Outcomes provided to the Angolan and Sierra Leonean.

[12] Chapter 3 (see section 3.3.2).

[13] Chapter 3 (see section 3.3.2).

hostilities.[14] Though both interpretations are not without criticism, there are credible reasons for advancing the membership approach in favour of direct participation in hostilities by virtue of one's employment in firms providing such services,[15] because this approach is more reflective of humanitarian law's aspiration to maintain equality among belligerents.[16] Furthermore, the fact that such employees voluntarily consent to work for firms that they know engage in hostilities arguably places them in the same position as their counterparts in the armed forces. Whichever interpretation one adopts, it is clear that either all or at least some of the personnel contracted by these firms will be regarded as directly participating in hostilities.

5.2.2 PMSCs Providing Indirect Military Services to Combatants

Today PMSCs rarely offer traditional combat operations on the open market as they did in the past. They are more likely to offer services that indirectly support combatant military operations.[17]As discussed in Chapter One, these include services that accentuates a belligerent's capability through three principal means: enhancing their technical ability, for example, through training, advice or operating weapons systems; support through intelligence gathering and interrogation that provides vital information to attack an enemy; and guarding services that secure belligerents military objects/personnel, or aid the belligerent to restrain their adversary's military objects/personnel.[18] Whether or not such indirect military services amount to direct participation in hostilities requires a careful examination of the circumstances under which they are provided. The functions of the employees hired to perform them must also be examined.

To illustrate the potential for direct participation in hostilities, it may be helpful to look at a PMSC operating weapon systems for a belligerent, as a case in point of

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[14] Chapter 3 (see section 3.3.2).
[15] Chapter 3 (see section 3.3.2).
[16] Chapter 3 (see section 3.3.2).
[17] P W Singer op cit note 9 at 119–135; D Isenberg *Soldier of Fortune , Ltd: A Prof f ' Private Sector Corporate Mercenary Firms* (1997).
[18] Chapter 1 (see section 1.6).

services that enhance technical capability.[19] One cannot rule out circumstances in which such services would meet the three-fold requirement for 'direct participation in hostilities'. For example, where these services are an integral part of the successful deployment or launch of the weapon system, it is arguable that the requirement of cause proximity will be met.[20] The service is part of an uninterrupted process that results in the harm occasioned by the weapon system. Further, the 'threshold of harm' requirement is satisfied since the weapon system will be designed to adversely affect the adversary's military operation and has the capability to inflict physical harm/damage on civilians/protected objects.[21] Finally, as the service is provided to belligerents, it is likely to meet the requirement for belligerent nexus. If such services amount to 'direct participation in hostilities', then, as argued earlier, the personnel who perform a continuous function that is an indispensable to the rendering of the services in this manner, directly participate in hostilities.[22] Personnel whose function is not indispensable to the successful operation of the weapon system do not directly participate in hostilities.[23] This conclusion may find support in the interpretation of 'direct participation in hostilities' discussed earlier that excludes the acts of individuals that do not perform 'combatant continuous' functions.[24]

Similarly, in relation to PMSCs hired to conduct interrogation or gather intelligence, the test for direct participation in hostilities may be met where the information sought is so vital to military operation that it renders the direct application of violence inevitable. Such services are likely to satisfy the causal proximity for direct participation in hostilities. The service results in the harm occasioned by the information provided. In addition, the 'threshold of harm' is met as the information acquired is meant to adversely affect the adversary's military operation. Moreover, as

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[19] 'The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' International Committee of the Red Cross (ICRC) & Directorate of International Law Switzerland (17 September 2008) 9 available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf [accessed 30 November 2012]. The Montreux Document shows that PMSCs perform a wide range of functions including maintaining and operating weapons systems.

[20] ICRC & Directorate of International Law Switzerland ibid at 37. This opinion is supported by the examples given in the Commentary to the Montreux Document which lists the operation of weapons systems as an example of 'direct participation in hostilities'.

[21] Chapter 3 (see section 3.5.1).

[22] Chapter 3 (see section 3.3.2). Particularly since the notion of combatant continuous function suggest the acts of such PMSC personnel meet all requirements of direct participation in hostilities.

[23] Such as cleaning or simply delivery of weapons etc.

[24] Chapter 3 (see section 3.3.2).

the information is provided to further the mission of one belligerent against the other, the requirement for belligerent nexus will be satisfied. Under these circumstances, personnel employed to perform functions directly related to the acquisition of the information in question may participate in hostilities. Personnel whose function is not directly related to these purposes, however, ought not to be considered as directly participating since their roles may not meet the requirement of causal proximity.[25]

Finally, PMSCs providing protection services to belligerents may, in certain circumstances, be deemed to be directly participating in hostilities. As earlier discussed, PMSCs secure personnel and facilities in many unstable conflict environments.[26] Whether or not such services constitute direct participation in hostilities depends on the lawfulness of the act to which a PMSCs protection activities relates. Protective force against a lawful act by an adversary will constitute direct participation in hostilities.[27] While protective force against an unlawful attack does not amount to direct participation in hostilities.[28] The unlawfulness of an attack stems from *jus in bello* norms that provide for the legality or illegality of certain acts during warfare.[29] Thus, protective force used against acts that are illegal under *jus in bello* are justified as self-defence. In this case, self-defence negates the strict rule against civilians refraining from direct participation in hostilities.[30] In this situation a

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[25] Chapter 3 (see section 3.5.2).

[26] Chapter 1 (see section 1.6); D Isenberg 'A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq' British American Security Information Council Research Report, Washington (September 2004) available at http://www.ssrnetwork.net/document_library/detail/3463/a–fistful–of–contractors–the–case–for–a–pragmatic–assessment–of–private–military–companies–in–iraq [accessed on 20 November 2012].

[27] Article 49(1) of Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Victims of International Armed Conflicts (Additional Protocol I) 1125 UNTS 3 (8 June 1977) available at http://www.refworld.org/cgi–bin/texis/vtx/rwmain?docid=3ae6b36b4 [accessed on 1 October 2012]. The definition of 'attack' does not distinguish between defensive or offensive acts in conflict.

[28] ICRC 'Interpretive 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' (2008) 90(872) *International Review of the Red Cross* at 1028; ICRC 'Second Expert Meeting on the Notion of Direct Participation in Hostilities' Summary Report, Hague (October 2004) 20.

[29] Chapter 2 (see section 2.3.4). Thus the meaning behind self–defence employed here is not connected with that which falls within the limited *jus ad bellum* exceptions for going to war under Article 2(4) of the Charter of the United Nations (UN Charter) 1 UNTS XVI (24 October 1945) available at http://www.refworld.org/docid/3ae6b3930.html [accessed 11 July 2013] but instead it related to the rules of *jus in bello* that prohibit attacks against the civilian population and civilian objects.

[30] G Werle *Principles of International Criminal Law* (2005) 122. Provided the force used is proportionate to the degree of danger.

contractor does not usurp the right of combatants to engage in hostilities, since they are merely defending themselves from the impending harm of an unlawful attack.

5.2.3 PMSCs Providing Non-Combatant Services

This group includes those firms that provide harmless non-military services, such as transportation management, warehousing, laundry services and routine maintenance of residential and office facilities.[31] Kellogg Brown & Root is an example of such a firm. It offers logistical support to UK and the USA armed forces.[32] Contractors called to perform such services will generally not be considered to be directly participating in hostilities. Under normal circumstances, their activities are unlikely to meet the causal proximity and threshold requirement for direct participation in hostilities. Even then, however, shades of grey may emerge where the conduct of the individual contractor may be deemed to have crossed into the sphere of direct participation in hostilities. For example, the circumstances of a civilian contractor delivering food to troops in military facilities may alter radically when the same contractor delivers ammunition to the same facilities. In this case there is a greater likelihood that the requirements of direct participation in hostilities will be met. Such situations indicate the need for a case-by-case evaluation of each circumstance.

Although PMSCs providing non-combatant services may directly participate in hostilities, their conduct ought to be distinguished from that of PMSCs discussed in the two preceding sections.[33] Incidents of direct participation in hostilities by PMSCs providing non-combatant services are akin to actions where civilians lose their immunity 'for such time as they take a direct part in hostilities'.[34] Such PMSCs that provide non-combatant services and like other civilians contravene this general rule at specific instances when they engage in direct participation in hostilities. In contrast, PMSCs in the preceding sections, that is those providing direct and indirect military services, enter into conflict zones with the intention to provide services that will amount to direct participating in hostilities. As shown below, this position

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31 Singer op cit note 9 at 136–140.
32 Ibid at 168.
33 Chapter 5 (see sections 5.2.1 & 5.2.2).
34 Chapter 3 (see section 3.3.2).

resembles that of individuals described as unlawful combatants because they engage in combatant activities, while not meeting the requirements for lawful combatant status.[35]

5.3 POTENTIAL CONSEQUENCE OF PMSCs PARTICIPATING IN HOSTILITIES

The preceding section has endeavoured to show that PMSC employees may be deliberately drawn into conflict if they render services that amount to direct participation in hostilities. This is the case with respect to personnel working for PMSCs hired to render combat services and those that provide indirect military services, which under certain circumstances may also satisfy the requirements for direct participation in hostilities. This section examines the implications that arise from this reality in the light of the legal classification of PMSC employees as civilians.[36] As earlier shown, the main activity that distinguishes combatants from civilians is the exclusive right of combatants to participate in hostilities. Thus, the direct participation in hostilities of PMSC personnel has profound implications. This section discusses these problems in relation to three main contexts: first, the impact on the rights of the contractor *viz a viz* those that accrue to other lawful combatants such as soldiers; secondly, the impact on the protection of the civilian population; and thirdly, the impact the accountability mechanisms, such as state and command responsibility.

5.3.1 For the Rights and Obligations of Individual Contractors

PMSCs classified as civilians but who nonetheless provide services that amount to direct participation in hostilities may lose substantial rights under international humanitarian law. At the same time they will be bound by fewer obligations aimed at furthering and ensuring the respect of humanitarian law during armed conflict. This is primarily because such PMSCs are likely to be given the unfavourable label of

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[35] Chapter 3 (see section 3.2.3).
[36] Chapter 3 (see section 3.3.1).

'unlawful combatants'. As shown in Chapter Three, this group includes unprivileged fighters who participate in hostilities without meeting the requirements for combatancy.[37] At their legal core, such PMSCs resemble unlawful combatants since they usurp the primary combatant norm, that is, the right to engage in hostilities, despite their classification as civilians. This uncomfortable fit within the civilian/combatant divide means that such PMSCs will be entangled in the conundrum of difficulties that face unlawful combatants. The discussions that follow illustrate these difficulties and draw upon comparisons in their treatment with that accorded to either lawful combatants or civilians.

Lawful combatants such as soldiers have the right to participate in hostilities.[38] Such soldiers possess combatant privilege and have the licence to kill or wound enemy combatants and destroy military objectives.[39] They are immune from domestic prosecution for such acts which, in normal cases, may constitute crimes under the national laws.[40] Members of such forces are, however, subject to combatant attack liability.[41] They are legitimate military targets unless they surrender or otherwise become *hors de combat*. Even though they are subject to attack, however, lawful combatants are protected against prohibited means and methods of warfare.[42] In the event of capture by the enemy, they acquire the secondary status of prisoner of war. The purpose of interning them as prisoners of war is not to punish them, but to hinder their participation in hostilities.[43] As prisoners of war they enjoy immunity from prosecution for lawful acts of war.[44] They are also to be treated humanely and protected from acts of violence or intimidation, insults and public curiosity.[45] Reprisals against them are prohibited.[46] Furthermore, while soldiers are liable for violations of humanitarian law they remain combatants entitled to protection befitting this status (i.e. as prisoners of war). They hold this status even while remaining liable for breaches in the laws of war provided they distinguish themselves

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37 Chapter 3 (see section 3.2.3).
38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid.
42 Ibid.
43 Chapter 3 (see section 3.2.3).
44 Ibid.
45 Ibid.
46 Article 13 of Geneva Convention III.

and comply with the conditions demanded by Article 44(3) of Additional Protocol I.[47] Finally, upon the cessation of active hostilities, prisoners of war not charged with specific breaches of the laws are entitled to be released and repatriated without delay.[48]

As unlawful combatants that usurp the right to participate in hostilities without meeting the conditions for combatancy, the treatment of PMSC personnel engaged in hostilities will differ substantially from that of lawful combatants. Such contractors will have fewer rights than their counterparts in the armed forces that undertake similar missions and perform identical functions. For example, if captured, they will not be entitled to prisoner of war status, which is reserved only for those individuals that satisfy the criteria for combatancy under Articles 4A(2) of Geneva Convention III, and Articles 43(1) and 44(3) of Additional Protocol I. Personnel of these PMSCs will therefore not benefit from the detailed protections under Geneva Convention III. Moreover, such personnel — not being prisoners of war — will not be entitled to be released upon the cessation of hostilities. Instead, as discussed in Chapter Three, these contractors may be prosecuted under domestic criminal legislation for the very act of participating in hostilities. This is because such individuals do not enjoy combatant immunity, a privilege that is reserved for those that meet the requirements for combatancy.

The treatment to be accorded to PMSC personnel upon capture remains a challenge. They are individuals who are civilians and yet act like combatants while remaining unaligned with the requirements for lawful combatancy. International humanitarian law outlines the treatment only of combatants who abrogate combatant status obligations.[49] It is silent on the treatment of civilians who officially abrogate civilian status obligations. As discussed in Chapter Four, such contractors may be considered as protected civilians falling within the scope of Geneva Convention IV.[50]Their entitlement to the detailed rights accorded to protected civilians as contained in Part III of this treaty will not, however, be absolute due to the derogation permitted under

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47 Chapter 3 (see section 3.2.3).
48 Ibid.
49 Ibid.
50 Ibid.

Article 5 of Geneva Convention IV. This Article allows for derogations in respect of persons suspected of engaging in activities hostile to the state. This would leave PMSC personnel with the bare minimum protection accorded to anyone operating in conflict zones.[51] Though these rights provide some cushion, they afford PMSC personnel far less protection compared with that accorded to soldiers interned while undertaking similar military missions.[52] Furthermore, because international humanitarian law provides minimal protection, this means that such actors could be subjected to other maltreatment such as arbitrary and indefinite detention, not specifically provided for in the treaty provisions.[53]

In terms of their responsibilities, lawful combatants are under an obligation to observe international humanitarian law when engaging in hostilities.[54] This essentially means respecting the fundamental obligation to distinguish themselves from the civilian population and complying with the principles governing the conduct of hostilities.[55] In the first instance the obligation imposed on combatants to distinguish themselves from the civilian population facilitates reciprocity among belligerents and, at the same time, protects civilians.[56] Additionally, the rules governing the conduct of hostilities facilitate the execution of conflict within the boundaries of humanitarian principles.[57] This principle gives birth to further principles within the dense framework of rules in Additional Protocol I with which combatants must comply when conducting hostilities.[58] PMSCs that engage in

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[51] Chapter 3 (see section 3.5.3) & Chapter 4 (see section 4.2.2.2). The guarantees provided under Article 75 and Articles 71–76 of Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) 75 UNTS 287 (August 1949) available at http://www.refworld.org/docid/3ae6b36d2.html [accessed 11 July 2013] eg humane treatment, fair trial, right to religious practices etc. They will also be entitled to the non–derogable human rights that remain applicable during armed conflict. See Chapter 3 (see section 3.2.3).

[52] Chapter 3 (see section 3.5.3). In addition to these rights, lawful combatants will be entitled to the detailed protections and guarantees provided for prisoners of war under Geneva Convention III, such as no punishment for participation in hostilities, special rules regarding their treatment during internment, specific rules on their penal and disciplinary proceedings, the right to be visited by Protecting Powers or the ICRC, rights to correspondence etc.

[53] The basic rights under Article 75 of Additional Protocol I, Article 71–76 of Geneva Convention IV, as well as the non–derogable human rights do not provide for these situations.

[54] Chapter 3 (section 3.2.3).

[55] Ibid.

[56] Ibid.

[57] Chapter 3 (see section 3.2.3).

[58] Chapter 3 (see section 2.3.3). As pointed out therein, combatants must comply with principles of military necessity, precaution and proportion. Furthermore, they must not intentionally target civilians or civilian objects. They are also prohibited from engaging in certain means and methods of warfare.

hostilities as unlawful combatants are not under specific obligations to comply with these rules. Furthermore, unlike armed forces that are required to receive appropriate training on these principles, such contractors are likely to find their way into conflict without having been properly trained in these areas.

It is quite clear, then, that private contractors engaged in actions that amount to direct participation in hostilities will enjoy substantially fewer rights than their military counterparts primarily because the former are classified as civilians, while the latter are classified as combatants. Furthermore, because they are not innocent civilians they lose the substantial protection afforded to civilians in general. Civilians have the right to be respected by opposing belligerent forces in line with the rules on the protection of the civilian population against the effects of hostilities.[59] These rules prohibit attacks and reprisals against civilians as long as they do not directly take part in hostilities.[60] As individuals that participate in hostilities, Article 51(3) of Additional Protocol I makes it clear that such contractors will lose their protection from direct attack, and may become legitimate military targets.[61] Moreover, belligerents will not take them into consideration when applying the principles that govern the conduct of hostilities (such as distinction, proportionality, and precaution) as would be required of them in order to safeguard innocent civilians.[62]

This substantial reduction in the rights afforded to PMSC personnel that engage in hostilities in comparison with lawful combatants will be particularly evident in the context of international armed conflicts where the terms 'combatant' and 'civilian' are clearly expressed. In non-international armed conflicts, where the legal regime does not expressly provide for 'combatant status' and its associated privileges, the difference between the rights of such contractors and other actors recognised in the treaties as directly participating in hostilities —such as members of a state's armed forces and dissident armed groups —will be less marked. That said, where they directly participate in hostilities independent of the internal conflict itself, they are unlikely to benefit from the provisions of Article 6(5) of Additional Protocol II

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[59] Chapter 3 (section 3.2.4).
[60] Ibid.
[61] Ibid.
[62] Ibid.

which encourages authorities at the end of hostilities to 'grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict …'.[63] Furthermore, even though the rights pertaining to civilians in non-international armed conflicts are much fewer than those articulated in international armed conflicts, these PMSC personnel will not enjoy the heightened protection afforded to the civilian population under Part IV of Additional Protocol II.[64]

5.3.2 For the Protection of the Civilian Population

The presence of PMSCs that provide services constituting direct participation in hostilities results in a conflict environment intermingled with lawful combatants and civilians who perform combatant-like functions. This intermingling has a profound impact on the objective of the international humanitarian law- to ensure the protection of the general civilian population- since it undermines the degree of certainty as to the identity of the two categories (civilian/combatant). Uncertainty arises because PMSC personnel who provide direct and indirect military services may, while conducting their activities, look like civilians but behave like combatants. The challenge is compounded by the fact that many contractors do not wear uniforms, affix distinctive signs, and drive vehicles without license plates, making it difficult to establish whether they are military personnel or civilian.[65] Furthermore, they may live among civilians while undertaking military functions. In this situation, opposing forces are uncertain as to who are or are not legitimate military targets.[66] Belligerents will find it difficult to distinguish between the enemy's armed forces, civilian contractors possibly working alongside these armed forces and performing functions that amount to direct participation of hostilities, and ordinary civilians (including contractors providing logistical services).[67]

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[63] Chapter 3 (see section 3.3.2).
[64] Chapter 3 (see sections 3.2.4 & 3.5.3)
[65] Chapter 4 (see section 4.2.1.2).
[66] IntelCenter *Intel Centre Terrorism Incident Reference (TIR): Afghanistan, 2000–2007* (2008) 192, for an example of the difficulties faced by defence officials in this regard in relation to the US war against the Taliban in Afghanistan.
[67] W C Banks *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare* (2011) 108. This is particularly so in the context of fluid urban battle zones, where civilians and combatants will be present in close proximity.

The proximity of civilian contractors providing indirect military services to the armed forces disadvantages commanders in their use of various tactics against an adversary. Such services were previously handled by the military, and it was clear that they could be targeted equally alongside other soldiers.[68] The fact that civilian contractors now undertake these combat-related functions heightens the dilemmas faced by commanders prosecuting a war.[69] Commanders exercising oversight over military units where civilian contractors are present are, according to the strict interpretation of the law, required to provide additional protection to them as civilians.[70] Adversaries are, likewise, expected to take into account their presence and apply the precautionary and proportionally principles during the planning and launching of an attack. All of this may be to the disadvantage of their troops and endanger the lives of combatants as they attempt to ensure adequate protection is provided to such 'civilians'.[71]

In this hazy environment, the appearance of civilian contractors may be viewed to be a gradual metamorphosis from non-combatant to combatant status in the eyes of a belligerent.[72] Contractor engagement in such services absorbs civilians who would ordinarily merit protection into the military, while transposing persons performing functions, more commonly associated with the military, into the civilian population. This upsets the vital equilibrium between military necessity and humanity, challenging the ability of belligerents to execute operations in line with the civilian/military distinction.[73] In this context, mere warnings to commanders not to

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[68] M Dunigan *V f H : S mp n ' Imp n M Eff n* (2011) 74, in relation to Iraq and the challenges that PMSCs pose in relation to the chain of command.

[69] L Jos & G del Prado 'Impact on Human Rights of Private Military and Security Companies' Activities' UN Working Group on the Use of Mercenaries, Global Research (11 October 2008) available at http://www.globalresearch.ca/impact–on–human–rights–of–private–military–and–security–companies–activities/10523 [accessed on 31 January 2013].

[70] Chapter 3 (see sections 3.2.4 & 3.2.5.2).

[71] G L Campbell 'Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend upon Them' A paper prepared for the Joint Services Conference on Professional Ethics, Springfield (27–28 January 2000) available at http://isme.tamu.edu/JSCOPE00/Campbell00.html [accessed on 12 August 2012].

[72] P Battersby, J M Siracusa & S Ripiloski (eds) *Crime Wars: The Global Intersection of Crime, Political Violence, and International Law* (2011) 124, regarding the growing potential of PMSCs to became *de facto* combatants; A Krishnan *Killer Robots: Legality and Ethicality of Autonomous Weapons* (2013) 37, referring to the problem of the growing number of military contractors in quasi–combatant roles and the problems that have arisen in Iraq.

[73] Chapter 3 (see sections 3.4.1 & 3.2.3).

jeopardise civilian status may fall on deaf ears.[74] Enemy belligerents could justifiably conclude that civilians are taking direct part in acts that are hostile and harmful to their personnel, population and equipment, and could thus be tempted to enlarge the category of civilians they view to be *de facto* combatants. The result is the encroachment on the boundaries of civilian immunity, with civilians falling victim to targeting by armed forces unable to identify their adversary and themselves under increased pressure of being harmed by civilians involved in conflict.

5.3.3 For the State Responsibility over PMSCs

The burden of establishing state responsibility for the actions of PMSC personnel will be substantially more than that required of other lawful combatants such as the members of the armed forces. As previously discussed, states often make use of private contractors to carry out various functions that may amount to direct participation in hostilities.[75] They use them as 'auxiliaries' to supplement their actions while keeping them outside the official structure of the state.[76] The potential for private contractors to commit violations of humanitarian law while playing this role remains a real possibility.[77] This potential, however, is not confined to PMSC personnel alone. Members of the armed forces have also committed serious breaches of humanitarian law.[78] In such situations, besides providing for individual criminal responsibility for the persons involved, international humanitarian law contemplates the availability of additional accountability mechanisms such as state responsibility. Various treaty provisions make it clear that a belligerent state remains liable to pay

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[74] M E Guillory 'Civiliani i ng the force: is the United States crossing the Rubicon' (2001) 51 *Air Force Law Rev*iew 111 at 136–137.

[75] Chapter 1 (see section 1.2) and Chapter 5 (see sections 5.2.1 & 5.2.2).

[76] This aspect emerges clearly in relation to Coalition Provisional Authority Order No. 17 (Revised), Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq [Iraq], No. 17 (Revised), Section 2, 27 June 2004, which exempted PMSCs operating in Iraq from prosecution by local authorities; W Burchett & D Roebuck *The Whores of War: Mercenaries Today* (1977) 17; J L Taulbee 'Myths, Mercenaries and Contemporary International Law' (1985) 15(2) *California International Western Law Journal America* 339 at 340. In the same way that states have in the past used mercenaries and avoided the direct involvement of their troops.

[77] Chapter 1 (see section 1.2). Accounts such as the 2006 example where the PMSC Triple Canopy is said to have fired indiscriminately on civilian vehicles in three separate incidents on one day.

[78] M an Der Stoel 'Peace and Justice, Power and Principle: From Nuremburg to the Hague' (1996) 2 *The Finnish Yearbook of International Law* 334-340, noting that history has shown that state have allowed their armies to commit violations of international humanitarian law, which may have necessitated a positive interpretation of the obligations under Chapter VII of the UN Charter to allow the UN Security Council to intervene in order to protect basic humanitarian norms.

compensation for injuries or damage caused violations of international law committed by any of its forces.[79] As discussed earlier, the nature of this responsibility has been outlined in the *Chorzow Factory* case[80] and is now codified in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles).[81] This section discusses how the nature and extent of state responsibility will differ depending on whether the violations are committed by contractors or by members of the armed forces.

To illustrate these differences, it is useful to consider a scenario where a both state's armed forces and the employees of a PMSC it hires commit violations of humanitarian law in identical circumstances. The violations could range from contravening the rules governing the conduct of hostilities[82] to more serious breaches of humanitarian law, like war crimes such as the mistreatment of prisoners of war.[83] In these two situations, the application of the law on state responsibility will lead to substantially different conclusions for the actions of contractors and those of members of the armed forces. As the discussions that follow show, it is more onerous to establish state responsibility for PMSC personnel than it is for a state's armed forces. Furthermore, even where the responsibility for the violations of private actors can be established, its extent will be limited when compared with that of the armed forces. These differences not only undermine the effectiveness of the law on state

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[79] Chapter 3 (see section 3.5.4), highlights Article 3 of 1907 Hague Convention IV and Article 91 of Additional Protocol I in this respect.

[80] *Case Concerning the* Permanent Court of International Justice Judgment ( ) PCIJ (Series A) No 9 (1927) 21 available at http://www.icj–cij.org/pcij/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf [accessed on 12 October 2012]. According to the Court, reparation arises from failure to apply a convention, and this need not be stated expressly in a treaty. The principle has been further established in subsequent cases such as *Corfu Channel Case (United Kingdom v. Albania)* ICJ Merits *(Corfu Channel Case)* ICJ 4 (9 April 1949) 23, available at http://www.refworld.org/docid/402399e62.html [accessed 23 June 2013].

[81] Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles) 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001) available at http://untreaty.un.org/ilc/texts/9_6.htm [accessed on 10 November 2012]; ILC Draft Articles are also reprinted in J Crawford *In n n L mm n' A n S R p n b : Introduction, Text and Commentaries* (2001).

[82] Rules such as those that comply with the tests laid out for proportionality or precaution when launching an attack.

[83] F Heeman *Privatising the Military Use of Force: Responsibilities of States* (2009) 45. An example of such a situation arose in Abu Ghraib where personnel from both the US armed forces and a contracted PMSC, CACI International Inc., committed gross violations of the rights of Iraq prisoners.

responsibility, but also provide a loophole for states wishing to avoid the more cumbersome responsibility associated with utilising their armed forces.

As previously discussed, state responsibility arises when there is a breach of an international legal obligation by an actor which is attributable to the state.[84] Establishing state responsibility over the conduct of a contractor or member of the armed forces will therefore entail establishing three things: first, the existence of an international obligation that is binding on the state; secondly, a breach of that obligation by the conduct of the individual concerned; and thirdly, attribution to the state of the breach.

International humanitarian law imposes clear obligations on states. As previously established, fighters are expected to comply with specific rules during military engagements.[85] Where the actions of private contractors and soldiers contravene these obligations by, for example, deliberately targeting civilians or mistreating prisoners of war, the question of state responsibility becomes relevant. It is at this point that critical differences in the application of the doctrine to the armed forces and private contractors begin to emerge. As discussed earlier, attribution of wrongful conduct is a core requirement of state responsibility, and may be established through three main avenues that show that the entity concerned is an organ of the state (Article 4); empowered to exercise governmental authority (Article 5); and has acted on the instruction or under the direction of the state (Article 8).[86] The discussions that follow illustrate the differences that arise between PMSC personnel and members of the armed forces in this respect.

As discussed earlier, Article 4 establishes a general rule of attribution in relation organs of the state. According to the International Court of Justice (ICJ) in the *Bosnia Genocide* case,[87] the fundamental inquiry required here is, therefore, whether the actors in question are 'organs of the state'. In this regard, the commentary to

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[84] Chapter 3 (see section 3.5.4).
[85] Chapter 3 (see section 3.2.3).
[86] Chapter 3 (see section 3.5.4).
[87] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia & Herzegovina v Serbia & Montenegro*) (*Bosnia Genocide Case*) 2007 ICJ Rep 43 (26 February 2007) para 392 available at http://www.icj–cij.org/docket/files/91/13685.pdf [accessed on 30 October 2012].

Article (1) makes it clear that 'state organ' covers all entities which make up the organisation of the state and act on its behalf.[88] This would include the legislature, executive and judiciary.[89] While the armed forces may meet this consideration, it is unlikely that PMSC personnel will do so. Members of the armed forces constitute the military, which makes up a part of the executive arm of the government and, on this basis, 'organs of state'. To reach a similar conclusion regarding PMSC personnel, one would have to show that they are part of the armed forces. As previously discussed, this is unlikely since membership of the armed forces requires incorporation evidenced by formal compliance with domestic laws, which commercial contracts will not satisfy.[90] Furthermore, compliance with the cumulative requirements of Article 4A(2) of Geneva Convention III decrease the likelihood of contractors being considered as part of the armed forces.[91]

Attribution under Article 4 read alongside Article 7 implies unqualified state responsibility.[92] This means that a state will remain responsible for all wrongful conduct of its armed forces, including those committed outside their capacity as a soldier (off-duty conduct) and in contravention of instructions given by an overseeing authority (*ultra vires* conduct). This position was established in the ICJ case of the *Democratic Republic of the Congo v Uganda*, which examined Uganda's responsibility for violations committed by its soldiers in the DRC.[93] The ICJ affirmed the customary character of attribution under Article 4, and dismissed Uganda's defence that its soldiers 'did not act in the capacity' bestowed upon them.[94] This conclusion resonates with provisions of Article 3 of the Hague Convention IV and Article 91 of Additional Protocol I, which make it clear that the state remains

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[88] Commentary on Article 5 of the ILC Draft Articles in International Law Commission 'ILC Final Draft Statute and Commentary' *Yearbook of the International Law Commission II* (2001) 1454-1552.

[89] It was stated in *Salvador Commercial Company* (Sales No 66V3) UNRIA vol XV (1902) 455 at 477 that 'a state is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government …'

[90] Chapter 4 (see section 4.2.1.1); S Bosch & M Marit 'South African Private Security Contractors Active in Armed Conflicts: Citi e nship, Prosecution and the Right to Work' (2011) 14 (7) *Potchefstroom Electronic Law Journal* 71 at 77–78, 82; M N Schmitt 'War, International Law, and Sovereignty: Re–evaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2005) 5 *Chicago Journal of International Law* 511 at 525.

[91] Chapter 3 (see section 3.2.1.2) and Chapter 4 (see section 4.2.1.2).

[92] Article 7 of the ILC Draft Articles; *Bosnia Genocide Case* supra note 87 para 392.

[93] *Democratic Republic of the Congo v Uganda* Judgment *(DRC Congo)* ICJ Rep 168 (19 December 2005) available at http://www.icj–cij.org/docket/files/116/10455.pdf [accessed on 12 August 2012].

[94] *DRC Congo* ibid para 213.

responsible for all acts committed by its armed forces. Since private contractors exist outside the umbrella of state organs, and there are no grounds for establishing attribution under Article 4, the opportunity for a state to assume unqualified responsibility equal to that assumed by armed forces is lost.

The limitations posed by Article 4 in relation to private contractors are partially addressed by attribution through Article 5 of the ILC Articles. As discussed in Chapter Three, attribution in this case arises where an entity or person is empowered by the law to exercise elements of governmental authority.[95] Thus, if the wrongful conduct of the PMSC is in keeping with its standing as an entity empowered to exercise governmental authority, attribution will be established.[96] Exercising governmental authority requires the existence of a law empowering the contractor to undertake the functions in question.[97] A contract alone is insufficient as it lacks the authorisation that ought to be conveyed by domestic law, which is essential to the notion of 'governmental authority'.[98] Besides, even if such an internal law exists one must be able to show that the law empowers the PMSC to carry out the conduct in question as an exercise of public authority.[99] This could arise where PMSCs are authorised to exercise public or state intrinsic functions such as combat, arrest, detention, or interrogation of prisoners.[100] Even then, possible delegated governmental authority may be negated by the degree of independence from the state that the PMSC possesses.[101] Such independence is contrary to the subordination

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[95] Chapter 3 (see section 3.5.4).

[96] J Crawford *In n n L mm n' A n S R p n b : In n, Text and Commentaries* (2002) 101.

[97] Commentary on Article 5 of the ILC Draft Articles in ILC Draft Articles Commentary op cit note 88 at 42–43.

[98] J Crawford 'First Report on State Responsibility' Special Rapporteur UN Doc A/CN / 90/Add6 (1 May 1998) 3 para . The ILC Special Rapporteur stated for the purposes of Article 5 that 'the usual … basis for that exercise will be a delegation or authorisation by or under the law'. It is unlikely that a contract would be considered a 'delegation under the law'.

[99] R M Letschert & J J M van Dijk *The New Faces of Victimhood: Globalization, Transnational Crimes and Victim Rights* (2011) 265. In other words, that the PMSC has been vested with the capacity to perform specific delegated duties.

[100] C Lehnardt 'Private Military Companies and State Responsibility' in S Chesterman & C Lehnardt (eds) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007) 1 3; C Hoppe 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19(5) *The European Journal of International Law* 989 at 992.

[101] This is evident where, for example, contractors provide guard or combat services in a manner that sustains the dependency of the state on the contractor.

contemplated under Article 5.[102]

Clearly, satisfying the nature of 'governmental authority' envisaged under Article 5 will not be easy in relation to PMSCs. Furthermore, in those exceptional cases when governmental authority can be established, the extent of state responsibility for violations by PMSC personnel will still be less than that pertaining to violations by soldiers under Article 4. This is because while Article 7 extends responsibility to the acts of an entity that 'exceeds its authority or contravenes instructions' for both state organs and entities under Article 5, the entity falling under Article 5 must still 'act [within] the capacity' of governmental authority. There is no similar restriction in relation to state organs requiring the wrongful conduct to be undertaken by an individual while in the course of performing their duties as an organ of the state. This means that while off-duty conduct by state organs results in state responsibility, the same will not occur in relation to entities falling under Article 5. Thus, although a state will be responsible for the *ultra vires* conduct of PMSCs exercising governmental authority just as it would be in the case of its armed forces,[103] this responsibility will not extend to the off-duty conduct of PMSC personnel.[104]

A PMSC's failure to establish attribution in relation to acts of PMSCs under Article 4 or Article 5 would require turning to Article 8 for these purposes. As discussed previously, the Article relates to private persons/entities and elevates their conduct to acts of a state if undertaken on the instructions by the state or under its direction or control.[105] The existence of specific instructions to a PMSC could be evident in the contract and/or other communication between the PMSC and the state.[106] What is

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[102] Commentary on Article 5 of the ILC Draft Articles in ILC Draft Articles Commentary op cit note 88 at 42–43. The nature of delegated authority under Article 5 contemplates situations where states cede power/authority to entities such as parastatals in a subordinate position; A i nes 'Mercenaries, Human Rights and Legality' in A F Musah & J K Fayemi (eds) *Mercenaries: An African Security Dilemma* (2000) 169. In the same way that mercenaries may be called upon by a state in dire straits rather than to act as forces under its command.

[103] According to Article 7 of ILC Draft Articles which provides that the 'conduct of an organ of a state or of a … entity empowered to exercise elements of … governmental authority shall be considered as an act of the state … even if [the entity] exceeds its authority or contravenes instructions'.

[104] In contrast, state responsibility over the armed forces under Article 4 of ILC Draft Articles accrues irrespective of whether or not such personnel are on official duty.

[105] Chapter 3 (see section 3.5.4).

[106] L Cameron & V Chetail (eds) *Privatizing War: Private Military and Security Companies Under Public International Law* (2013) 206–207.

more difficult to ascertain is whether a PMSC is under the direction or control of a state. As discussed before, the jurisprudence emerging from international and regional courts is conflicting with regard to the degree of direction or control required.[107] The ICJ in *Military and Paramilitary Activities in and against Nicaragua*[108] adopted the 'effective control' test in contrast to the 'overall control' test as espoused by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of *Tadi* .[109] The 'effective control' test is based on a higher threshold that requires control in the physical sense, as opposed to the lower threshold provided by the 'overall control' test, where control is based upon evidence of the existence of various factors such as financing, supply of equipment etc.[110] As previously discussed, the later case of *Bosnian Genocide* case[111] reaffirms the effective control test, and for reasons alluded to earlier, it is likely that this is the more appropriate test to be applied in the context of state responsibility.[112]

Establishing state responsibility for the acts of private contractor violations through Article 8 by applying the effective control test will be quite difficult. The ICJ's application of the test to the relations between the USA and the Contras would suggest that attribution would be established only if one could show that the state was in 'complete control' and the PMSC was 'completely dependent' upon the state.[113] Furthermore, the ICJ went on to state that only the express encouragement of violations was viewed as capable of establishing the requisite standard for attribution.[114] The potential for establishing state responsibility over the acts of PMSC personnel based upon this text is extremely difficult due to the near impossibility of providing evidence that shows at the same time 'complete control'

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[107] Chapter 3 (see section 3.5.4).
[108] *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua v USA*) 1986 ICJ 14 (*Nicaragua*) WL 522 (27 June 1986) available at http://www.icj–cij.org/docket/index.php?sum=367&p1=3&p2=3&case=70&p3=5 [accessed on 30 January 2013].
[109] *Prosecutor v Tadic* International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeal Judgment (*Tadic*) IT–94–21 (15 July 1999) paras 67–70, 96 available at http://www.refworld.org/docid/40277f504.html [accessed 11 July 2013].
[110] Chapter 3 (see section 3.5.4).
[111] *Bosnia Genocide Case* supra note 87 para 392.
[112] Chapter 3 (see section 3.5.4).
[113] *Nicaragua Case* supra note 108.
[114] *Nicaragua Case* supra note 108.

by the state, 'complete dependence' by the PMSC, as well as the existence of specific military orders to commit violations.[115]

To sum up, state responsibility is easier to establish and of greater scope in relation to its armed forces than it would be for PMSC personnel. Under Article 4 the state will attract unqualified responsibility for the actions of its armed forces. The state will be liable for all their conduct (including *ultra vires* and off-duty conduct). As PMSC personnel are unlikely to be part of the armed forces, they fall outside the ambits of Article 4 and require a more onerous inquiry under Articles 5 and 8 in order to establish attribution to the state. Establishing governmental authority under Article 5 in relation to PMSCs is not simple for the reasons discussed above and, furthermore, will still result in state responsibility that is of a lesser extent. Similarly, attribution under Article 8 will be difficult because of the high standards demanded by the effective control test. Furthermore, the fact that state liability under Article 8 will be limited to conduct where PMSC employees act under specific instruction, direction or control of the state, implies that the state will not be liable *ultra vires* and off duty wrongful conduct.

The key to the differences in state responsibility for the acts of private contractors and members of the armed forces has to do with the quality of the link between the state and either group. Members of the armed forces form part of the state's organs and attract unqualified responsibility on the part of the state. PMSCs are private entities and thus the more onerous path of linking them to the state through Articles 5 and 8 is required. This difference in treatment between public and the private entities under state responsibility appears to mirror the differences in the treatment of persons who are combatants from those who are civilians under humanitarian law. As previously illustrated, combatancy is reserved exclusively for those who have a link to the state.[116] In line with the position reflected under the law for state responsibility, humanitarian law assumes more comprehensive state responsibility

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[115] R Wolfrum 'State Responsibility for Private Actors: An Old Problem of Renewed Relevance' in M Ragazzi (ed) *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 429.

[116] Article 4A(2) of Geneva Convention III and Article 43 of Additional Protocol I. Such persons are either a part of the state's armed forces or irregular forces that 'belong to' or are 'under the responsible command' of a state.

for soldiers, with the state being liable to pay compensation for all acts of persons forming a part of its armed forces, as is evident in Article 91 of Additional Protocol I.[117] Even though this provision does not expressly include irregular forces that meet combatancy requirements under Article 4A of Geneva Convention III, there is a fair likelihood that by virtue of their 'belonging' such forces would be viewed as state organs for the purposes of Article 4.[118]

Since combatancy is reserved for persons linked to the state, state responsibility is more comprehensive for persons or entities recognised as belonging to the state. Members of the armed forces (lawful combatants) have a different relationship with the state from 'civilian' contractors who are presumed to be private individuals hired by the state. This construct is rooted in a paradigm where wars were fought by states through its public organs (that is, traditional armed forces). The practice of states was to rely on public instruments of violence (professional soldiers). All other persons were civilians who were expected not to take part in the conflict. In this setting, it was reasonable that the responsibility of a state for soldiers should be higher than that borne in relation to civilian citizens opting to join the conflict on behalf of the state.

The current understanding fails to reflect the present realities of armed conflict where states may deliberately use private forces in conflict. In this situation, states intentionally rely on civilians to perform military tasks while maintaining that they are not part of the organs of a state. Though a state may still be found to be responsible in this regard, the more onerous burden of proving the requirements of Articles 5 and 8 is on the claimant. This burden is much easier for a claimant to discharge in relation to violations by a state's armed forces than it would be for PMSCs, making the additional inquiry under Articles 5 and 8 necessary. These differences could present possibilities for states to circumvent international

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[117] C Pilloud, Y Sandoz, C Swinarski & International Committee of the Red Cross (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 1053–1058.

[118] 'Report of the Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions' Conference organised by the University Centre for International Humanitarian Law, Geneva (29–30 August 2005) 9–12 available at http://www.geneva–academy.ch/docs/expert–meetings/2005/2rapport_compagnies_privees.pdf [accessed 12 April 2013]. There are strong grounds for these positions since it will be recalled that some militia qualify as a part of the armed forces.

accountability by resorting to private contractors to perform certain acts which, if performed by their armed forces, would give rise to state responsibility.[119]

5.3.4 Impact on the Oversight and Discipline of PMSC Personnel

The direct participation of PMSC personnel in hostilities poses challenges to maintaining effective mechanisms for their control and discipline. In particular, mechanisms like command responsibility will be more difficult to establish in relation to PMSCs because of their civilian nature than it will be in the case of the armed forces. Moreover, as civilians PMSCs are unlikely to exhibit the same standards of oversight and discipline that prevail among lawful combatants, and this may make them less compliant and respectful of international humanitarian law during armed conflict. The paragraphs that follow explore these drawbacks by highlighting the differences between PMSCs and members of the armed forces.

As discussed earlier, the application of the doctrine of command responsibility to civilians and its application to combatants leads to different liability outcomes.[120] The difference occurs because the requirements of the doctrine's broader notion of 'superior responsibility'[121] that is applicable to civilian superiors is more difficult to establish than its strict form of 'command responsibility',[122] which is applicable to military commanders.[123] As shown in Chapter Three, the three requirements for establishing liability under command/superior responsibility include the existence of superior responsibility; failure by the superior to take feasible measures to prevent/repress breaches by subordinates; and an indication that the superior/commander knew or had information, that the subordinate was committing or going to commit the breaches in question.[124] The consequences of the application of these criteria to PMSCs who undertake military tasks and commit violations of

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[119] Cameron & Chetail op cit note 106 at 262; S Chesterman & C Lehnardt (eds) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007) 228; C Kinsey *Corporate Soldiers and International Security: The Rise of Private Military Companies* (2006) 139.
[120] Chapter 3 (see section 3.5.5).
[121] As contained in Article 86(2) of Additional Protocol I.
[122] As contained in Article 87(1) of Additional Protocol I.
[123] Chapter 3 (see section 3.5.5).
[124] Chapter 3 (see section 3.5.5).

international humanitarian law will be different from that to the armed forces performing similar tasks and committing similar violations.

5.3.4.1 Control (Indications of a Superior/Subordinate Relationship)

As noted above, the first element of a superior/subordinate relationship is predicated on the power of one party (the superior) to effectively control the actions of another party (the subordinate).[125] The existence of a superior/subordinate relationship presupposes that the superior is in a position that places upon him/her a duty to act, the omission of which makes the superior liable. As observed in *Prosecutor v Halilovic,*[126] the duty of the superior extends beyond the direct criminal responsibility of subordinates. Instead it gives rise to liability for the crimes committed by subordinates.[127] This position is different from vicarious liability where a superior incurs liability simply by virtue of his/her position.[128]

A superior could be a military officer or civilian. Several cases have confirmed that civilians with political influence can be indicted under command/superior responsibility.[129] In addition, the command/superior doctrine has been applied to civilians operating in private entities. This was confirmed in *Prosecutor v*

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[125] *Prosecutor v Delalic* ICTY Judgment *(Celebici Case)* IT–96–21–T (16 November 1998) para 333.
[126] ICTY Judgment (*Halilovic*) IT–01–48–A (16 October 2007).
[127] ICTY Judgment (*Halilovic*) IT–01–48–A (16 October 2007) ibid para 54. It was held in this case that 'command responsibility is responsibility for an omission … [where] the commander [does not] share the same responsibility as subordinates who committed crimes, but rather because of the crimes committed by subordinates'.
[128] Pilloud et al op cit note 117 para 346. This is confirmed by the need by the superior to satisfy the three elements of the doctrine.
[129] *Prosecu* ICTY Judgment *(Kordic)* IT–95–14/2 (26 February 2001) involved a civilian leading militia forces in Bosnia–Herzegovina, *Milutinovic* a civilian who was president of Serbia. *The Prosecutor of the Tribunal Against Jean–Paul Akayesu* International Criminal Tribunal for Rwanda (ICTR) Sentencing Judgment (*Akayesu*) ICTR–96–4–T (2 October 1998) para 601, available at http://www.refworld.org/docid/402790524.html [accessed on 11 July 2013] is a case concerning a civilian *bourgamestre* who was charged with crimes committed by the *Interahamwe* (local militia); *Prosecutor v Kajelijeli* ICTR Judgment *(Kajelijeli)* ICTR–98–44A–T (1 December 2003) is a case concerning a civilian *bourgmestre* charged for the acts of the *Interahmwe; Prosecutor v Kambanda* ICTR Judgement & Sentence *(Kambanda)* ICTR 97–23–S (4 September 1998) is a case concerning the former prime minister during the period of the Rwanda genocide; *Prosecutor v Kayishema* ICTR Judgment *(Kayishema)* ICTR–95–1–A (1 June 2001) is a case concerning a prefect of Kibuye charged with crimes committed by law enforcement agencies; *Prosecutor v Seurshago* ICTR Indictment Case No ICTR–98–39–I (8 October 1998) is a case concerning the *de facto* leader of the *interahamwe*.

Musema,[130] where a director of a tea company was charged in his capacity as a superior with ordering others to commit serious violations of Common Article 3 of the four Geneva Conventions.[131] A similar conclusion would be likely in relation to PMSCs where there are greater grounds for finding superior responsibility with respect to companies whose core business is to provide military services.

The existence of the control element requires a chain of command or hierarchical structure through which one person exercises authority over subordinates. During the post-World War II period, the doctrine was predicated on the ability of military superiors to use such an hierarchy to punish culprits.[132] The need for hierarchical structures was affirmed in *Prosecutor v Delalic (Celebici* case*)*[133], where Delalic was authorised to negotiate contracts by a local authority but could not be viewed as a superior, because he was not part of a hierarchy of authority necessary to create a superior and subordinate relationship.[134] As discussed earlier, it would seem that organisational and hierarchical structures exist among contractor companies. Taking into consideration previous discussions regarding the nature of services these firms provide, it is apparent that PMSCs are not ordinary companies.[135] Unlike ordinary companies, PMSCs provide combat and other military services that would require effective hierarchical structures to guarantee optimum performance. Furthermore, many of these firms draw their staff and management from the military, which is likely to introduce into their corporate environments a hierarchical culture that resembles that within the armed forces.[136]

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[130] ICTR Judgment *(Musema)* ICTR–96–13–A (27 January 2000) paras 863–883. This was affirmed in *Prosecutor v Bangilishema* ICTR Judgment (*Bangilishema*) ICTR–95–01A–A (4 July 2002) paras 49–62.

[131] *Prosecutor v Nahimana* ICTR Judgment (*Nahimana*) ICTR–IT–99–52–T (3 December 2003). This case offers further support for this conclusion where a civilian director of a radio station was convicted on account of superior responsibility.

[132] *The Hirota Case* – 3 Judgements of the International Military Tribunal from the Far East 1 (1948); 20 Records of Proceedings of the International Military Tribunal for the Far East (1946–49); This position is affirmed in the Commentary on Article 86(2) in C Pilloud et al op cit note 117 at para 35 , which states that the superior/subordinate relationship requires 'a hierarchy encompassing the concept of control'.

[133] *Celebici* supra note 125 para 658.

[134] Ibid. This view was confirmed in the case of *Bagilishema* that made it clear that it is this element of authority that 'distinguishes … superiors from mere rabble rousers'.

[135] Chapter 5 (see section 5.2.1).

[136] C Lehnardt 'Individual Liability of Private Military Personnel under International Criminal Law' (2008) 19 *European Journal of International Law* 1015 at 1026.

The control element will be established if it can be shown that the superior has 'effective control' over the actions of subordinates.[137] Effective control may be deduced from either a formalised relationship (*de jure* authority) or factual control (*de facto* authority).[138] This distinction is critical since it leads to differences in the application of command responsibility to PMSC superiors and military commanders. *De jure* control creates a rebuttable presumption that effective control exists[139] and is likely to be applied to military commanders where the formal position of a commander will normally be accompanied by disciplinary authority. *Prosecutor v Kordic*[140] appears to support this view, as it recognised that 'military positions will be strictly defined and the existence of a clear chain of command based on strict hierarchy, easier to demonstrate'.[141] Thus, evidence that a commander occupies a certain position is likely to be sufficient to establish superior authority in the context of the military units.[142]

Conversely, in a non-military context involving corporate entities like PMSCs, *de jure* authority alone may be insufficient evidence of 'effective control' by a superior over subordinates. This view was established in the *Ministries* case,[143] where the tribunal acquitted a civilian government official with formal authority because it could not be shown that the subordinates in question were under his control.[144] A similar conclusion was reached in *Kordic*[145] where a civilian with formal authority but lacking the authority to prevent violations or punish subordinates was acquitted.[146] It is therefore likely that the superior/subordinate element in the case of PMSCs will require evidence of *de facto* control or factual ability of the manager/supervisor to prevent or punish criminal conduct of his/her subordinates.

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[137] *Halilovic* supra note 136 para 59; *Kajelijeli* supra note 129 para 85–86; *Celebici* supra note 125 para 378; Article 28(a) & (b) of the Rome Statute.
[138] Chapter 3 (see section 3.5.5).
[139] *Celebici* supra note 125 para 197 held that 'a court may presume that possession of [*de jure*] … power *prima facie* results in effective control unless proof to the contrary is produced'.
[140] *Kordic* supra note 129.
[141] *Kordic* supra note 129 para 419.
[142] E van Sliedregt *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003) 184.
[143] *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law* No 10 *(The Ministries Case)* Vol XIV (October 1946–April 1949) at 983–984 & 960–962.
[144] *Celebici* supra note 125 paras 354 & 378; *Prosecutor v Semanza* ICTR Judgment *(Semanza)* ICTR–97–20 (15 May 2003) para 402; *(Kordic)* supra note 129 paras 414–415.
[145] *(Kordic)* supra note 129.
[146] *Kordic* supra note 129 paras 839–841.

Evidence of such *de facto* authority by a superior may be observed in a range of factors such as the degree of influence that a superior possess over a subordinate,[147] the capacity of the superior to issue orders to the subordinate;[148] and evidence of how tasks are distributed in an entity,[149] such as the ability of the civilian superior to transmit reports/complaints to the appropriate authorities where they could trigger disciplinary and criminal measures, etc.[150]

The distinction between the application of a *de jure* standard of authority in military contexts and the need to establish *de facto* standard of authority in civilian contexts, means that it will be more difficult to meet the superior/subordinate control element in the case of PMSCs than in the case of military commanders. Whereas evidence of *de jure* control by a military commander will be sufficient, a more onerous inquiry for additional evidence of *de facto* control will be required in the case of PMSC managers/supervisors. As stated in *Prosecutor v Aleksovski*,[151] in relation to civilians in positions of authority, 'it cannot be expected that a civilian authority will have disciplinary power over his subordinate equivalent to that of the military authorities in an analogous command position'.[152] Furthermore, the reliance upon evidential testimony to establish this factual authority means that in the same way a range of factors could be used to negate evidence of *de facto* control. For example, PMSC personnel could challenge *de facto* authority by pointing to express terms in their contracts. In the same way, a supervisor could use the contract to contest his/her *de facto* authority over subordinates. Lastly, military commanders possessing *de jure*

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[147] *The Ministries Case* supra notes143. For example, in the *Ministries* case which concerned the responsibility of high ranking civilian government officials, the US Military Tribunal took the view that a person's influence can form the source of authority for command responsibility purposes.

[148] *Celebici* supra note 125 para 764. For example, in this case the signing of orders by Mucic, a civilian, was an indication of his command status.

[149] *Prosecutor v Nikolic* ICTY Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence *(Nikolic)* IT 942–R61 (20 October 1995) para 24. For example, this case established that superior states could be deduced from how tasks are distributed in order to ascertain whether one party is subjugated to another; this was affirmed in *Prosecutor v Furundzija* ICTY Judgment *(Furundzija)* IT–95–17/1–T (10 December 1998) paras 65 & 130 where a paramilitary individual was a commander because evidence showed that he was the one in charge of interrogation and was normally referred to as the 'boss' by others; *Prosecutor v Mrksic, Radic and Sljivancanin* ICTY Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence ICTY *(Vukovar Hospital Case)* Case No IT–95–13–R61 (3 April 1996) para 16.

[150] *Prosecutor v Aleksovski* ICTY Indictment *(Aleksovski)* IT–95–14/1–A (24 March 2000) paras 77–78.

[151] *Aleksovski* ibid.

[152] *Aleksovski* ibid.

authority are likely to be responsible for subordinates at all times while PMSCs managers/supervisors possessing *de facto* authority have temporary oversight.[153]

These difficulties will be exacerbated by the meaning given to Article 28(b) of the Rome Statute of the International Criminal Court (the Rome Statute) regarding the nature of control that should be exercised by a civilian superior.[154] This Article, which outlines the requirements of superior responsibility, introduces a causal link between the superior's failure and subordinate's crime in order to confirm the existence of the control element. Prior to its adoption, the decisions of the *ad hoc* tribunals did not require proof of this causal link.[155] The need of a causal link could now limit superior control to only those cases where the crimes committed were the result of the failure of the superior to exercise control. Although the International Criminal Court (ICC) in *Prosecutor v Bemba*[156] has tried to address the disjuncture between this position and the earlier jurisprudence by suggesting that causal link is limited to future crimes, it has still insisted on retaining a lower degree of causation where it remains necessary 'to prove that the commander's omission increased the risk of the commission of the crimes'.[157] This insistence on a causal link is likely to restrict the cases where civilian superiors could have *de facto* authority because it rules out a superior's control where violations by a subordinate are not be linked to the omission of a superior. In these circumstances the possibility of finding PMSC managers/supervisors as *de facto* superiors is reduced, presenting such supervisors/managers with room to circumvent their obligations under superior responsibility.

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[153] Military personnel are subject to an internal disciplinary system which assumes that the commander has effective control over all activities of subordinates twenty four hours a day — see G Mettraux *The Law of Command Responsibility* (2009) 32–33. In contrast, civilian superiors only have control while engaged subordinates are engaged in work–related activities and again based on their *de facto* authority.

[154] Article 28(b) of the Rome Statute of the International Criminal Court (the Rome Statute) 37 ILM 1002 (1998) available at http://untreaty.un.org/cod/icc/index.html [accessed on 15 May 2012]. See discussions in Chapter 3 (section 3.5.5).

[155] In the *Celebici Case* supra note 125 para 398, the tribunal found 'no support for the existence of a requirement of proof of causation as a separate element of superior responsibility'.

[156] ICC Decision on the Confirmation of Charges *(Bemba)* Case No ICC–01/05–01/08 (15 June 2009).

[157] *Bemba* ibid paras 421–423.

5.3.4.2 Feasible Measures to Prevent and Repress Breaches

As mentioned earlier, the second element of command responsibility creates a duty on the superior to use every means to prevent or repress crimes by subordinates.[158] According to Article 86(2) of Additional Protocol I, the superior is required to 'take all feasible measures to prevent or repress' the criminal act. The measures are determined by the obligations under international humanitarian law since, as noted in the case of *Celebici*, the duty under Articles 86 and 87 of Additional Protocol relates to preventing violations of humanitarian law.[159] The ad hoc tribunals have, however, extended its application to the crimes of genocide and crimes against humanity.[160] It is safe to say that the measures to be taken by PMSC managers/supervisors could encompass acts necessary to prevent and repress the commission of international crimes. The measures are tied to international obligations and are not dependent on domestic law.[161] This was affirmed in *United States v Wilhelm Von Leeb, et al* (*the High Command case*), [162] in which the US Military Tribunal made it clear that Germany could not opt to be bound by 'only those provisions of the [Hague] Conventions which suited her own purposes'.[163] The same reasoning could bar PMSC managers/supervisors from relying upon their company rules or the contract to negate responsibility.

Under international humanitarian law, preventative measures include providing adequate training;[164] planning operations in accordance with international humanitarian law;[165] having a reporting system to inform on violations of

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[158] Chapter 3 (see section 3.5.5).
[159] *Prosec N* ICTY Judgment IT–03–68 (30 June 2006) para 331, available at http://www.icty.org/x/cases/oric/tjug/en/ori–jud060630e.pdf [accessed on 30 January 2012]. This case stated that measures must be 'aimed at bringing unlawful practices of subordinates in compliance with the rules of war'.
[160] *Kordic* supra note 129; *Milutinovic* supra note 129.
[161] It was stated in Pilloud et al op cit note 117 paragraph 1010 that 'the national law of a state establishes the powers and duties of civilian or military representatives of that state, but international law lays down the way in which they may be exercised'.
[162] 11 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law* No 10 (1950).
[163] Ibid at 532; *United States v von Weizsaecker (Hostage Case)* 14 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 (1950) 1289.
[164] Articles 6 & 82 of Additional Protocol I.
[165] Article 18(5) of Geneva Convention IV and Articles 12(4), 56(5) and 58(a) & (b) of Additional Protocol I.

international humanitarian law;[166] and issuing and implementing orders to prevent the commission of a crime.[167] Depending on the circumstances in question, PMSC managers/supervisors would need to show evidence of having complied with such measures. For example, PMSC managers/supervisors could point to their provision of sufficient training on international humanitarian law to subordinates; the execution of operations in accordance with international humanitarian law; the establishment of reporting systems to inform on potential violations and issuance of appropriate orders to stop violation and ensuring their implementation.[168]

In this regard, a major encumbrance arises regarding the feasible measures to be taken since these measures will be closely linked to the nature of control established. In other words, as stated in *Aleksovski,*[169] a superior can only take measures that are within their powers. The measures expected of PMSCs will thus be linked to the kind of control they exercise over subordinates. As shown earlier, the control element for these purposes will go beyond *de jure* authority of military commanders, and require evidence of *de facto* authority. The assessment of preventative measures that should be taken by PMSC supervisory personnel will, therefore, only be established in line with their *de facto* authority. Conversely, the preventative measures required of military commanders will be in line with the *de jure* authority they possess. Thus, while a military commander will be deemed to have failed in exercising preventative actions for example, issuing or implementing orders and providing adequate training by virtue of occupying a certain position, a PMSC manager/supervisor could be absolved by pointing out the absence of factual authority to exercise these measures. In short, the scope of preventative activities expected of PMSC superiors will be less than those of the military commanders.

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[166] As evident in the requirement under Article 43(1) of Additional Protocol I that requires the armed forces to be 'subject to an internal disciplinary system, which … shall enforce compliance with the rules of international law applicable in armed conflict'.

[167] It was held in supra note 159 para 331 that preventative measures included 'issuing … routine instructions … special orders aimed … secur[ing] implementation of these orders'.

[168] W J Fenrick 'Article 28' in O Triffterer & K Ambos (eds) *Commentary on the Rome Statute of the Internatioanl Criminal Court* (1999) para 9. According to Fenrick the commander must ensure the forces are adequately trained in IHL; ensure due regard to IHL in operational decision making; ensure an effective reporting systems is established to inform when IHL violations have occurred; monitor the reporting system to ensure it is effective; and take corrective actions when violations are about to occur.

[169] *Aleksovski* supra note 150 paras 73–74.

If the violation has already been committed, punitive action must be undertaken. As *Prosecutor v Oric*[170] pointed out, some of the measures a superior could take are 'to protest … or criticise criminal action, to take disciplinary measures … or to report to … a superior authority [so] that immediate action [may] be taken'.[171] Thus, a PMSC manager/supervisor will be expected to comply with similar measures including, for example, submitting the results of investigation to the competent state authorities for further action. Just as in the case of preventative measures, the punitive measures to be taken will be influenced by the nature of the control element since the civilian superior will only be expected to take the measures that are 'within his material possibility'.[172] In these circumstances, the punitive measures expected of military commanders assumed to have *de jure* authority are likely to be wider than those of PMSC superiors operating on the basis of *de facto* authority. PMSC managers/supervisors can only take measures in line with their *de facto* authority and their obligation to repress violations will be interpreted accordingly. This considerably narrows the scope of measures a manager or supervisor is obligated to undertake in comparison with that of a military commander.

5.3.4.3 Knowledge of Superior

The third element of command/superior responsibility requires one to demonstrate that the commander/superior was aware that crimes were committed or about to be committed.[173] Prior to the adoption of the Rome Statute, the standard of knowledge relied upon was that provided under Article 86(2) of Additional Protocol I- that the superior 'knew or had reason to know' that the subordinate was going to or had committed a crime. This standard was adopted in the Statutes of the ICTY and ICTR and their accompanying jurisprudence.[174] Article 28 of the Rome Statute established

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[170] supra note 159 para 331.
[171] ibid.
[172] *Celebici* supra note 125 para 395.
[173] The term 'knowledge' has been taken to mean awareness of a circumstance, see ICC Prep–Com (11–21 February 1997) Decisions Taken by the Preparatory Committee UN Doc A/AC249/1997/LF Art H (12 March 1997).
[174] Article 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia 32 ILM 1159 (1993) available at http://www.refworld.org/docid/3dda28414.html [accessed 24 June 2013]; Article 6(3) of the Statute of the International Criminal Tribunal for Rwanda (ICTR) 33 ILM 1598 (1994) available at http://www.refworld.org/docid/3ae6b3952c.html [accessed 24 June 2013]; supra note 129 paras 369 & 427.

different standards for persons acting as military commanders and for other superiors. In the latter case, the standard is contained in Article 28(b), which requires that a superior 'knew, or consciously disregarded information'. In the former case, the standard is higher: Article 28(a) expects that a military commander or person effectively acting as a military commander 'knew or, owing to the circumstances at the time, should have known'.[175] The difference in standards reflects the opposition to the extension of standards applicable to military superiors to civilians.[176] Based on the standard in Article 28(a), military commanders in possession of sufficient information of the criminal activity of subordinates will be liable even where they are factually ignorant of the commission of a crime.[177] In the case of civilian superiors, however, knowledge will be established only if it can be shown that a superior consciously disregarded information that indicated that a crime was about to be committed. In this case, the civilian superior must have wilfully ignored information regarding the criminal offences, in addition to failing to exercise due vigilance.[178]

The categorisation of contractors as civilians has critical implications for the application of the knowledge element to PMSC management and supervisors. It remains to be seen if a court would follow the test for civilian superiors or military commanders. If the court were to apply the military test because it perceives PMSC managers as a person effectively acting as a military commander, it is possible that the evidence needed to demonstrate knowledge in relation to a PMSC supervisor would be higher than that of military commanders, as the knowledge requirement will be diluted by the absence of *de facto* authority that a PMSC superior possesses. If, on the other hand, PMSC managers/supervisors are thought to be civilians directing operations as civilians, a court may distinguish them from a military commander, and apply the standards applicable to a civilian superior. Their status as civilians under international humanitarian law[179] could incline the court to use the standards that are applicable to a civilian superior. If it applied the test for civilian superiors, the knowledge element for civilian contractors would be less strict than for

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[175] Article 28 wording, and cases of ICTY previously relied on this standard.
[176] R S K Lee *The International Criminal Court and the Making of the Rome Statute: Issues, Negotiations and Results* (1999) 202.
[177] *Prosecu* ICTY Judgment (*Blaskic*) IT–95–14–T (3 March 2000) para 332.
[178] *Celebici* supra note 125 paras 193 & 387.
[179] Chapter 4 (see section 4.2.3).

military commanders. The higher standard of constructive negligence will be applicable to PMSC managers and overseers. This will significantly reduce the duty on them to remain informed of potential violations that could occur within their domain of supervision.

In sum, while PMSCs exhibit the hierarchical structure through which superior responsibility may be fulfilled, by virtue of their being civilian superiors, their command/superior responsibility will be considerably reduced. The control element expected of a superior will be easier to meet among military commanders where it will suffice to show *de jure* authority, without the need to prove the *de facto* authority. Likewise, the scope of preventative and punitive actions demanded of superiors is restricted in the case of PMSCs to *de facto* authority held by a PMSC superior. Lastly, the knowledge element for civilian PMSC managers/supervisors (constructive negligence) will be less strict than that required of military commanders (objective negligence), resulting in a significantly reduced duty on them. The cumulative effect of these will undermine the doctrine as an effective tool for establishing criminal liability for humanitarian law violations committed by PMSCs.

5.4 CONCLUSION

The failure to meet the requirements of lawful combatant status, as set out in the relevant provisions of Geneva Convention III and Additional Protocol I, means that the large majority of contractors will be considered to be civilians. This conclusion is at odds with the one characteristic that distinguishes combatants from civilians in the battlefield, that is, their participation in hostilities. As this chapter has shown, there are many instances today where PMSCs are present in conflict zones specifically to participate in hostilities. One cannot rule out the possibility of such contractors committing violations of humanitarian law. In such contexts, their activities resemble those of combatants, yet they remain categorised as civilians under the applicable legal regime. Since the law of armed conflict rests heavily on the civilian/combatant dichotomy, with the treatment of individuals being dependent on which side of the divide they lie, the engagement of PMSCs in such activities, while remaining under

the banner of civilians, has enormous implications. This chapter has attempted to highlight those implications.

As the chapter has demonstrated, within the context of international conflict, the combatant/civilian dichotomy is clearly articulated and the corresponding rights and obligations clearly defined. Within this theatre, the rights and privileges accorded to PMSC personnel engaged in hostilities will be substantially eroded due to their classification as civilians during conflict. On the one hand, they will not be accorded the same protection as that provided to the general civilian population because they are not innocent civilians. On the other, they will not be entitled to the privilege of combatancy, for example, the right to engage in hostilities because they are not lawful combatants. Further, if captured, such PMSCs will not have the right, as have military personnel, to prisoner of war status and its corresponding treatment. Finally, in such situations, they will not be able to claim combatant immunity for having taken a part in hostilities. In this regard, actions taken against PMSC personnel that engage in hostilities will very much be left to the discretion of the domestic provisions of the state that captures them. While they will be entitled to certain minimal guarantees, the lack of clarity about this may leave them vulnerable to arbitrary treatment at the hands of the authorities concerned; a significantly inferior position to that accorded to their military counterparts.

Beyond their rights as individuals, the presence of contractors legally classified as civilians but engaged in hostilities within the conflict terrain has a profound impact on the law's objective to ensure the protection of the general civilian population not involved in armed conflict. Protecting civilians is dependent on the law's ability to maintain a delicate balance between ensuring belligerents can fulfil their military mission and providing for the appropriate protection of those that do not or no longer take a part in hostilities. Maintaining this balance largely rests on the principle of distinction and the dividing line between those who actively engage in combat and those who refrain from hostilities. As long as the dividing line is delineated by the relevant treaty provisions drafted within the context of Nineteenth and early Twentieth Century conceptions of war, when armies belonging to the state were the norm, the presence of civilian contractors has the potential to adversely affect the protection of innocent civilians. The involvement of contractors performing

functions traditionally reserved for, and in close proximity to, the military is likely to create uncertainty over the identity of actors present in conflict. Belligerents will find it difficult to distinguish between combatants and civilians in general in the increasing haze of contractors who are civilians but nonetheless act as if they were combatants. In such circumstances the combatant/contractor (civilian) divide will be compromised as belligerents begin to consider the conflict terrain to be one where civilians gradually metamorphose from non-combatant status to *de facto* or *quasi* combatant status. This is all to the detriment of the majority of civilians that refrain from hostilities.

When PMSC personnel who are engaged in hostilities commit violations of humanitarian law, their status as civilians also undermines the effectiveness of accountability mechanisms such as state responsibility and command responsibility of superiors. The difference between state responsibility over their armed forces and the civilian contractors they have hired for similar functions dilutes the effectiveness of using this mechanism to hold the state accountable for violations by contractors. As private entities, contractor violations require a more factual inquiry than would be the case with armed forces. Furthermore, the extent of a state's responsibility for the contractors it hires is less than its unqualified responsibility for both the *ultra vires* and off-duty violations of its armed forces.

Finally, there are differences in establishing the responsibility of superiors for crimes committed by their subordinates depending on whether they are PMSC managers or military commanders. These differences undermine the important function that the doctrine of command responsibility plays in ensuring the respect for humanitarian law by actors in conflict. They are rooted in the disparity in the application of the doctrine towards persons who are considered to be civilians and those considered to be military personnel. Each of the three elements require command responsibility to be established in respect of who is in control—taking feasible measures and having the relevant knowledge — will demand the satisfaction of a higher threshold for civilian superiors than what is expected from military commanders. Practically, this suggests that the potential is greater for PMSC superiors to escape liability for violations committed by the contractors they oversee, something which limits the utility of the doctrine as a tool for ensuring respect for humanitarian law.

All of this suggests the need to re-evaluate the present legal responses to contractors who provide services that involve engagement in hostilities. The next chapter discusses possible ways in which this re-evaluation could be done and the potential benefits that could be gained therefrom.

CHAPTER SIX: REVISITING THE CLASSIFICATION OF PMSC UNDER INTERNATIONAL HUMANITARIAN LAW

6.1 INTRODUCTION

The discussions in Chapter Four have revealed that in the majority of cases, PMSC personnel are likely to be treated as civilians. This includes those PMSCs whose services amount to direct participation in hostilities but do not fulfil the conditions laid down for combatancy under Article 4A of Geneva Convention III and Articles 43 and 44 of Additional Protocol I.[1] The only way that such PMSCs could be considered to be combatants is when they are linked to a state.[2] As observed previously, the state-centric nature of combatancy reflects the evolution of the means of violence that culminated in the emergence of the state and its attempts to consolidate the instruments of violence under its central command. This state-centric paradigm is rooted in the just war theory and how it confers legitimate authority on the state.[3] It is this position, reflected in the present treaties, that presents a hurdle for extending combatancy to PMSCs.

As discussed in the previous chapter, several challenges arise when PMSCs that directly participate in hostilities are ruled out of lawful combatancy.[4] The individual rights and obligations of those PMSCs will, thus, be diminished.[5] The categorisation of such PMSCs as civilians will have an impact on the protection of the civilian population and undermine efforts to hold them accountable or the state for which they work. This chapter considers whether it is possible to bring PMSCs within the ambit of lawful combatancy. It also attempts to address potential obstacles to opening lawful combatancy to private entities. Finally, the chapter discusses how the

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1 Chapter Three (see section 3.2.1).
2 Chapter Three (see section 3.2.1.1). As expressed through incorporation into a state's armed forces or by being a part of irregular forces that 'belong' to a state.
3 Chapter Two (see section 2.2.2).
4 Chapter Five discussions generally.
5 Since they are not combatants, it does not matter how much they comply with standards of humanitarian law during conflict.

re-classification of PMSCs as combatants may alleviate the problems discussed in the previous chapter.

6.2 A NEW APPROACH TO THE CLASSIFICATION OF PMSCs

Although the current legal regime does not make provision for PMSCs to be classified as combatants, reliance upon such actors for military services is unlikely to diminish. As discussed previously, societies have historically relied upon private military forces alongside — and despite the emergence of — the state's control of violence.[6] Their resurgence in the post-Cold War period is part of a trend in which private entities have filled gaps that arise from the failures of public security systems. This trend is one that is likely to persist whenever the exigencies of modern warfare compel state and non-state actors to seek military services outside the state system.[7] It is only prudent to reflect on how the international regime of armed conflict should respond to the presence of PMSCs as military agents in conflict. One suggestion that has been put forward is the complete prohibition of PMSCs' involvement in direct participation in hostilities.[8] Another suggestion recommends the creation of a special category of persons under humanitarian law in order to accommodate PMSCs.

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6 Chapter Two (see sections 2.2.3 & 2.2.4).

7 Chapter Five (see section 5.2) & Chapter Two (see section 2.2.4).

8 Some international proposals & commentators, conscious of the consequences of civilians directly participating in hostilities, have suggested that international law should ban and criminalise PMSCs engaged in hostilities. Egs proposals put forward in the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict' 17 September 2008, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf [accessed 30 November 2012]; proposal put forward by the UN Working Group on the Use of Mercenaries for the consideration by the UN Human Rights Council regarding a 'Draft of a Possible Convention on PMSCs' in 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, Fifteenth Session, Agenda item 3 Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development UN A/HRC/15/25. Articles 1(b), 2(h)(i) & 7(2) affirm the monopoly of states over violence and their duty to ensure that PMSC do not directly participate in hostilities; S Cleary 'Angola: A Case Study of Private Military Involvement' in J Cilliers and P Mason (eds) *Peace, Profit or Plunder? The Privatisation of Security in War Torn African Societies* (1999) 141-167; H Sanche 'Why Do States Hire Private Military Companies?' available at http://newarkwww.rutgers.edu/global/sanche .htm (accessed on 12 October 2012); C Spearin 'The Emperor's Leased Clothes: Military Contractors and Their Implications in Combating International Terrorism' (200) 1(2) *International Politics* 243-26 ; T Mlinarcik 'Private Military Contractors and Justice: A Look at the Industry: Blackwater & the Fallujah Incident (2006) 4 *Regent Journal of International Law* 129 at 133.

Neither of these suggestions is satisfactory. The first suggestion echoes the negative sentiments that accompanied the emergence of mercenaries in Africa during the 1960s and led to the establishment of specific treaties that sought to curtail their use.[9] These treaties did not enjoy the support of many powerful members of the international community and hence, took a long time to secure the state ratifications necessary to bring them into force.[10] This was arguably because of the way the treaties approached the question mercenaries.[11] Mercenaries have continued to operate despite these treaties.[12] In the same way, a total ban may not receive wide support given the global inclination towards privatisation. Moreover, such a ban would probably force such companies to continue their operations underground, thereby impeding their accountability in zones of conflict.[13]

The second suggestion to establish a third category to cater for PMSC personnel is likely to undermine the present set up of the legal regime, which bases the classification of actors upon the mutually exclusive dichotomy of civilians/combatants. As previously discussed, the present combatant/civilian dichotomy is fundamental to the regulation of actors in the conflict terrain. It is through this dichotomy that harmful actors are separated from harmless ones, with the overall objective being to minimise suffering during armed conflict.[14] Furthermore, the dichotomy lies at the heart of the rights and responsibilities of

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[9] Chapter Three (see section 3.2.5.3). As discussed in that section, the abhorrence of mercenaries was so great that, contrary to the trend of IHL in expanding the rights of individuals during war, international humanitarian law restricted the rights of mercenaries.

[10] International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (UN Mercenary Convention) 2163 UNTS (1989) 96. The treaty was drafted in 1989 only secured the required number of ratification for it to come into force, in 1989 when Costa Rica became the 22nd member to ratify the treaty – see Multi-Lateral Treaties Deposited with the Secretary General 112, UN 2003.

[11] The mercenary treaties pitched developing and developed states on opposite sides. Attempts by developing African states to outlaw mercenaries were hypocritical particularly since the ban imposed by OAU Mercenary Treaty did not outlaw the use of mercenaries by its member states – see Articles 1 & 6 of the Organisation of Africa Unity Convention for the Elimination of Mercenaries in Africa 1490 UNTS (1977) 96.

[12] A J en ter War Dog: Fighting Other People's Wars – The Modern Mercenary in Combat (2006) 318; S Chesterman & C Lehnardt From Mercenaries to Market, The Rise and Regulation of Private Military Companies (2007) 36; B Davies Soldiers of Fortune Guide to How to Become a Mercenary (2013).

[13] Chapter Two (see section 2.2.); C Holmqvist 'Private Security Companies: The Case for Regulation' Policy Paper No 9, Stockholm International Peace Research Institute (23-26 January 2005) 42.

[14] Chapter Three (see section 3.2).

actors in conflict.[15] Sub-categorising contractors as something 'in between' or *quasi* combatants would infringe upon the mutual exclusive treatment of combatants and civilians, and cause mayhem to the functioning of the entire system of international humanitarian law.[16]

It is posited that what is required is a re-assessment of the elements that make up the combatant/civilian dichotomy to create room for contractors that provide services that amount to direct participation in hostilities. As has already been pointed out, the present provisions of the law awkwardly equates such PMSC personnel with civilians, notwithstanding their combatant-like activities.[17] This conclusion is at odds with their activities and gives rise to the problems discussed in Chapter Five.[18]

Although legal and policy makers have been urged to come up with new initiatives to address the identity of PMSCs that are active in hostilities, few calls have been made for the inclusion of PMSCs as lawful combatants. Scholars steer away from exploring this possibility by affirming that humanitarian law deals aptly with private military contractors since their personnel automatically fall into one of the two mutually exclusive categories of combatant and civilians.[19] The problem, however, is not the mutually exclusive nature of the legal framework but rather the appropriateness of placing contractors in one group or the other without taking seriously the activities that these actors are involved in.[20] In this regard, the sections that follow outline a proposal to reclassify certain PMSC personnel as combatants, irrespective of their link with the state. It is suggested that as long as such personnel conduct their activities dutifully and comply with specific conditions met by lawful combatants, they should be regarded as such. The essence of this reclassification is founded in the *jus in bello* principle of discrimination which distinguishes actors that

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15 Chapter Three (see sections 3.2.3 & 3.2.4).
16 Chapter Three (see section 3.2).
17 Chapter Four (see section 4.2.1.1).
18 Chapter Five general discussions
19 Chapter One (see section 1.7); G L Rose 'Updating International Humanitarian Law and The Laws of Armed Conflict for The Wars of The 21st Century' (2007) 1 *Australia Defence Association* 21-23; E Gillard 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88 *International Review of the Red Cross* 525-572; J N Maogoto and B Sheehy 'Contemporary Private Military Firms Under International Law: An Unregulated Gold Rush' (2006) 26 (2) *Adelaide Law Review* 245 at 252.
20 Chapter Five (see section 5.3). As discerned from the challenges articulated in this section.

are 'harmful' from those that are not.[21] With this central idea in the background, the classification of PMSC personnel will be guided by two main factors, namely, the nature of their services and, where these services constitute direct participation in hostilities, whether or not they comply with conditions applicable to other lawful combatants.

6.2.1 Classification Based on the Nature of their Services

The first factor to be considered in reclassifying PMSCs is related to the nature of services provided by the company rather than the recipient of the service (state or non-state) or the motives of the service provider. The goal is to distinguish companies within the PMSC industry from each other, on the basis of its services in order to derive categories that mirror the combatant/civilian dichotomy. One group would consist of PMSCs which provide services that combatants normally provide. These services consist of direct or indirect military activities that are likely to amount to direct participation in hostilities.[22] The other group would cover companies that offer non-combatant support services such as delivery, maintenance and other logistic functions. These are generally not considered to amount to direct participation in hostilities.[23]

This division of the PMSC industry resonates with historical concepts, as discussed earlier, that focus on the nature of the activities of the actors as the starting point for determining their treatment during conflict. For example, the innocence and harmlessness principles provide valuable insights for division of the industry.[24] These principles, distinguish between innocent individuals, whose functions are remote from military affairs and who offer no resistance (and therefore ought not be targeted) and harmful individuals who have taken up arms (and ought to be targeted). Private military contractors that 'take up arms' ought to be treated differently from

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[21] Chapter Two (see sections 2.3.1 & 2.3.3).
[22] Chapter Three (see section 3.2)
[23] Chapter Five (see section 5.2). The nature of PMSC activities in the first group is reflective of the combat norm and it is a misnomer to label them as civilians, while the activities of those in the second group are in line with the character and identity of civilians and their members ought rightfully to be considered as such.
[24] Chapter Two (see sections 2.3.1 & 2.3.3).

those whose behaviour is harmless. Where PMSCs behaviour mirrors that of the armed forces, they should be regarded as such. The first factor discussed here therefore presents a first step towards addressing the misnomer of labelling such PMSCs civilians.

6.2.2 Additional Conditions for Combatancy

The second hallmark of the re-classification rests on giving PMSCs that render direct/indirect military services the opportunity to be lawful combatants irrespective of their links with the state and thus bring their conduct in this respect within the normative framework of humanitarian law. As mentioned in Chapter Three, those who would get the benefit of combatant status would have to be prepared to comply with the conditions qualifying them for this privilege. As discussed in that chapter, the following conditions have formed the basis upon which combatancy has been extended to irregular forces:[25] identifiable or visual distinction; openness in conducting military operations; compliance with the laws of war; evidence of hierarchical organisation and control; and linkage to a state. These conditions with the exception of the last (state linkage), form the basis for extending lawful combatancy to the PMSCs in question. The non-inclusion of the last condition is discussed later in reference to problems inherent in the just war philosophy, and specifically the influence of legitimate authority as a ground for limiting combatancy to agents tied to the state.[26] Like other lawful combatants, PMSCs would need to cumulatively fulfil all the other four conditions in order to qualify as combatants.[27]

First, PMSCs providing direct/indirect military services would have to visually distinguish themselves visibly from the civilian population. The importance of visual distinction between combatants and non-combatants in the battlefield cannot be

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[25] Chapter Three (see section 3.2.1.2). This conditions reflect those submitted by the ICRC in its International Red Cross Conference, which had emerged from the Conference of Governmental Experts regarding the admissibility of such forces, see – Report on the Work of the Conference of Government Experts (1947) 100 & XVIIth International Red Cross Conference, Draft Revised or New Conventions for the Protection of War Victims.

[26] Chapter Two (see section 2.3.4).

[27] Chapter Three (see section 3.2.1.2).

overemphasised.[28] As mentioned in the previous chapter, if a contractor taking part in the activities prescribed above is not identifiable by his military opponent then lives of ordinary civilians will be placed in harms way. Since one of the purposes of the law of war is to afford a high measure of protection to innocent civilians, a contractor who does not comply with this condition will greatly frustrate that purpose. PMSC personnel providing direct/indirect military services while appearing as civilians disadvantage adversaries and expose civilians to humanitarian risks.[29] The fulfilment of this obligation by PMSCs goes some way towards levelling the battlefield between such contractors and other combatants under similar obligations.

An assessment of the identifiability of such PMSCs would be in line with the purposes of Article 4A(2) of Geneva Convention III. As previously discussed, this assessment turns on whether the individual is permanently marked so that he is distinguishable from an ordinary peaceful civilian from a distance where an enemy can employ weapons against the person in question.[30] The nature of their external appearance, whether through a fixed distinctive sign or decorated uniforms, should distinguish them from civilians in the same way as members of the armed forces are distinct from the civilian population through the practice of wearing uniforms. Although, modern weaponry has made this condition difficult to apply, the condition remains essential, particularly where contractors are part of ground operations. Further, if the contractors are to have the same status as other lawful combatants, it is only reasonable to demand of them the same degree of identifiability required of such combatants. In this regard, contractors would be under an obligation to show that they have complied with this condition to the same degree as members of the armed forces, for example, by wearing a distinctive sign or uniform, thus balancing their military advantage against the need to protect innocent civilians.

The second condition would require PMSCs providing direct/indirect services to conduct military operations openly.[31] This condition is related to the first (identifiability), since the bearing of arms further distinguishes the combatant from

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[28] Article 4(2)(b) of Geneva Convention III and Article 44(3) of Additional Protocol I.
[29] Chapter 1 (see section 1.2).
[30] Chapter Three (see sections 3.2.1.2.2 & 3.2.1.3).
[31] Chapter Three (section 3.2.1.2.3). As discussed previously, the essence of this condition is captured in the need to 'carry arms openly'.

the civilian. As with identifiability, PMSCs would be required to carry weapons in the same manner and on the same occasions as combatants.[32] Given the diverse circumstances of armed conflict, this rule has to be interpreted in the light of the purposes of the law of war and its aim to balance military necessity and humanity. In this regard, Article 44(3) (a) and (b) of Additional Protocol I appear to provide some guidance on the minimum threshold on what to expect of PMSCs complying with this condition. According to this Article, it is acceptable for a combatant, for the purposes of fulfilling his/her obligation to distinguish him/herself from civilians during certain exceptional circumstances, to simply carry arms during military engagement with the adversary.[33] These guidelines could provide a benchmark for contractors' compliance with this condition.

The third condition for combatant status would require PMSCs providing direct/indirect military services to adhere to the laws and customs of war.[34] Adherence by PMSCs to this condition would indicate their willingness to extend similar rights and protections accorded to them to their adversaries who are also lawful combatants.[35] Their compliance with the laws and customs of war would facilitate the maintenance of a level playing field with other combatants. Evidence of their commitment to the laws of war could be obtained from the company's constitution, policies, reports on general behavioural practices and other internal documents.[36]

Lastly, PMSCs would need to meet the requirements of a measure of organisation, hierarchy and internal discipline. It should be evident that PMSCs personnel fall under the umbrella of an organised and disciplined entity through which compliance

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[32] Chapter Three (section 3.2.1.2.3).
[33] Chapter Three (section 3.2.1.2.3).
[34] Chapter Three (section 3.2.1.2.3). As some of the delegates to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) insisted with regard to the extension of combatancy to guerillas, see Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) 192 (Swiss Federal Political Department 1978) 26 May1977, OR XIV 371-372, CDDH/III/SR35, para 80.
[35] A McDonald 'The Year in Review' (2003) 6 *Yearbook of International Humanitarian Law* 239 at 263.
[36] Chapter Four (see section 4.2.1.2). These could provide evidence of practices like compulsory IHL training for staff, the existence of instructions to staff that are IHL compliant, reports written by field staff to their managers that embody various IHL considerations etc.

with the law of war can be exercised.[37] In this respect, they are distinct from loose groups of fighters (such as the marauders of earlier times) or freelance mercenaries.[38] The rationale for this condition emanates from Article 43(1) of Additional Protocol I, which defines combatancy in relation to 'organi ed armed forces … under a command responsible … [and] subject to an internal disciplinary system'.[39] This essentially calls for the establishment of a system command responsibility in accordance with Article 4A(2)(a) of Geneva Convention III.[40] As the purpose of this condition is to ensure compliance with the laws of war, it will be sufficient to show that a PMSC's manager/supervisor has the power to regulate conduct in accordance with legal obligations. Evidence of such power could be discerned from existing reporting lines as well as the PMSC contract with the employee.[41]

6.2.3 Re-Classification of Contractors in the Combatant/Civilian Categories

Depending on the nature of their activities and their compliance with the aforementioned conditions, it is clear that PMSC personnel would fall into either of the two categories of combatants and civilians. PMSCs that offer direct/indirect military services and comply with the aforementioned conditions meet the requirements for lawful combatancy, irrespective of whether or not they are endorsed by, or dependent on a state belligerent. PMSC personnel not hired to provide direct/indirect services, and thus not involved in direct participation in hostilities, could be afforded civilian status in keeping with Article 50 of Additional Protocol I.[42] Those PMSCs providing direct/indirect services that amount to direct participation in hostilities without observing the stipulated conditions for combatancy would be in the same position as that of other unprivileged belligerents and be regarded as 'unlawful combatants'.

Combatant PMSCs would receive combatant privileges to engage in hostilities

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37 Chapter Three (see section 3.2.1.2.1).
38 Chapter Three (see section 3.2.5.3).
39 Chapter Three (see section 3.2.1.3).
40 Chapter Three (see sections 3.2.1.2.1 & 3.2.1.3). This Article requires combatants to 'commanded by a person responsible for his subordinates'
41 Chapter Four (see sections 4.2.1.2 & 4.2.1.3).
42 Chapter Three (see section 3.2.2) & Chapter Four (see section 4.2.3).

provided that they do so within the boundaries of the principles governing the conduct of hostilities.[43] They would form legitimate targets for the adversary without the enhanced shelter that accompanies civilians.[44] In addition, they would receive the highest form of protection reserved for fighters, that of prisoner of war status, along with its extensive range of guarantees.[45] Furthermore, in the event of capture, such contractors would claim immunity from prosecution for engaging in acts that may have resulted in killing, wounding or destroying enemy personnel or objectives (including incidental damage to civilians).[46]

In contrast, civilian PMSCs will have no authority to participate directly in hostile actions. They will be entitled to greater protection, such as protection from intentional attacks by the enemy.[47] Their interaction with the military may, however, mean that this degree of protection is subject to the principles of precaution and proportionality. In the event of capture, the treatment of this group of contractors will depend on the relationship they have with the parties to the armed conflict. Where PMSC personnel accompany the armed forces of a state and qualify as 'persons accompanying the armed forces' as outlined in Article A( ) of Geneva Convention III, they are entitled to the rights of prisoners of war. Private contractors that do not fall within this special group would be treated as ordinary civilians. Unlike combatants, such civilians do not receive prisoner of war status. They are protected under the Geneva Convention I if they fall within the notion of the 'protected civilian'[48] and, more generally under Additional Protocol I. As civilians such PMSC personnel will be protected from intentional attack by enemy forces and are also entitled to the heightened protection provided by these treaties.

PMSCs engaged in direct/indirect services without complying with the stipulated conditions for combatancy will be in the same position as unlawful combatants, The failure/reluctance to meet the conditions means that they are neither innocent

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[43] D Jinks 'The Declining Significance of POW Status' (200) 5 *Harvard International. Law Journal* 367 at 436-437.
[44] Chapter Three (see section 3.2.3).
[45] Ibid
[46] Ibid.
[47] Chapter Three (see section 3.2.4).
[48] Ibid. As pointed out in this section the notion of 'protected civilians' provided for by Geneva Convention IV concentrates on enemy nationals and civilian within occupied territories.

civilians nor lawful combatants. As unlawful combatants, they will not be entitled to the full rights, nor be bound by the full responsibilities that attach to combatants. Such PMSC personnel will not be entitled to combatant immunity for taking part in hostilities. In the event of capture, they will also not have the right to be treated as prisoners of war and may be exposed to punitive action under domestic law for engaging in direct hostilities.[49] Although such personnel will not be entitled to treatment as prisoners of war, they will receive minimal humanitarian guarantees.[50] Finally, not being innocent civilians, such contractors will also not be protected against direct attacks by an adversary.[51]

6.3 OBJECTIONS BASED ON THE JUST WAR THEORY

The idea of a proposal opening up lawful combatancy to private contractors is likely to meet criticisms rooted in the just war theory which determines who is and is not entitled to engage in warfare. As discussed earlier, the just war tradition rests upon two main components, *jus ad bellum* (the right go to war) and *jus in bello* (the rights during war). Inherent in the former are principles, such as legitimate authority, just cause and right intention that militate against extending combatancy to private actors like PMSCs. The sections below, discuss arguments rooted in these principles against the view advocated by this thesis and, more importantly, make an attempt to respond to those arguments.

6.3.1 Legitimate Authority Related Objections

As previously highlighted, the principle of legitimate authority holds that a legitimate body must authorise war.[52] The dominant view is that which endorses the state as the principal entity that is *duly constituted* to exercise force on behalf of citizens. This

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[49] Chapter Three (see section 3.2.4).
[50] Ibid.
[51] Ibid.
[52] Chapter Two (see section 2.3.2.1).

view is reflected at national and international levels[53] and explains why the larger proportion of humanitarian law treaties address state-to-state conflicts[54] and link lawful combatancy only to state authorised agents. Furthermore this view undergirds objections to the provision of security by private actors based upon governance models that preserve the legitimacy of such services for state sanctioned entities.[55] Such objections argue that the state as the representative of its citizens is better able than private entities to control violence.[56] It is therefore argued that the movement of security services undermines the public nature of these services,[57] undermines the democratic accountability over the provision of the services[58] and represents a loss of the sovereign power of the state. Furthermore, it is argued that increasing the number of actors that provide coercive services on the international platform would increase the likelihood of humanitarian violations.[59]

The restriction of security services to the state rest on an illusory line between the private and public sector that is not reflected in reality. Throughout history there has never been a clear division between public and private domains. This thesis has shown that societies have historically relied on private military services to wage

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[53] Ibid & Chapter Two (see sections 2.3.1 & 2.3.2.1). At the national level, the state is seen as the authority responsible for security against external or internal threats. At the international level, the monopoly over violence is a fundamental condition for statehood and the right to authorise force is restricted to state or state-created organisations.

[54] Chapter Two (see section 2.3.2.1) & Chapter Three (section 3.4.2). Conflicts where the state is viewed as the main agent of belligerency

[55] H Tonkin State Control over Private Military and Security Companies in Armed Conflict (2011) 21.

[56] J Burnheim *Is Democracy Possible?: The Alternative to Electoral Democracy* (2006) 21; S M Barranca 'Unbecoming Conduct: Legal and Ethical Issues of Private Contractors in Military Situations' International Society for Military Ethics Conference, San Diego (January 2009) available at http://isme.tamu.edu/ISME09/Barranca09.pdf [accessed on 12 October 2012]; Z Sal man 'Private Military Contractors and the Taint of a Mercenary Reputation' (2007) 0 *New York Journal of International law & Politics* 852 at 866-872; J Burnheim *Is Democracy Possible?: The Alternative to Electoral Democracy* (2006) 21.

[57] In that such a move of security services to private hand may lead to restricted access to services that should be freely available to all citizens – Z Sal man ibid; D Avant 'The Privati a tion of Security and Change in the Control of Force' (200) 5 (2) *International Studies Perspectives* 153 at 155; L A Dickinson 'Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law' (2005) 47 *William and Mary Law Review* 135 at 168-178 & 191-198.

[58] S S Brown (ed) Transnational Transfers and Global Development (2012) 204; P R Verkuil Outsourcing Sovereignty: Why Privatization of Government Function Threatens Democracy & What We Can Do about It (2007) D Avant op cit note 57; D D Avant The Market Force: The Consequences of Privatizing Security (2005) 81.

[59] D Avant op cit note 57; C Voilat 'Private Military Companies: A Word of Caution' *Humanitarian Exchange Magazine* (28 November 2004) available at http://www.odihpn.org/humanitarian-exchange-magazine/issue-28/private-military-companies-a-word-of-caution [accessed on 1 May 2013].

war.[60] This belies the dogmatic view that restricts legitimate violence to the state. Furthermore, the disproportionate attention paid by humanitarian law treaties to state-to-state conflicts is also misleading in as far as the participation of private actors during war is concerned. It reflects a paradigm on war that dominated the period when the primary treaties emerged, where state armies fought conventional wars according to the principles laid down by Von Clausewitz.[61] It is important to recognise that radical changes have taken place since the adoption of these treaties, and today armed conflict has moved from the state-centric model to include multiple actors including insurgents and private military contractors.[62]

Moreover, objections to extending the provision of security to private actors based upon governance models are contestable today where neo-liberalism is the preferable system for apportioning goods and services, including security services.[63] In this context, constricting violence to the public function fails to distinguish between the provision of such public service and the public nature of the service itself. What is problematic is curtailing the public nature of the services, that is, restricting its availability to all, than the nature of the service provider (whether this is a private entity or the state).[64]

Furthermore, the alleged loss of democratic control over the use of violence ignores many oversight mechanisms such as the use of international and domestic licensing and registration systems that society can use to control the actions of private actors that discharge public functions.[65] These mechanisms can be used to regulate PMSCs. In any case, outsourcing should not be viewed as a loss of sovereignty. In fact,

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[60] Chapter Two (see sections 2.2).
[61] Chapter Two (see sections 2.2.2 & 2.3.3).
[62] J Burk *The Adaptive Militay: Armed Forces in a Turbulent World* (1998) 59; R J Bunker *Non-State Threats & Future Wars* (2003) vii, 193; K Mulaj *Violent Non-State Actors in World Politics* (2010) 414.
[63] Chapter Two (see section 2.2.4).
[64] P Spicker 'The Nature of Public Service' (2009) 32 International Journal of Public Administration 970-991; S Chesterman (eds) Private Security, Public Order: The Outsourcing of Public Services (2010) 123.
[65] H Born & A Bu a tu 'Recommendations for the Council of Europe Parliamentary Assembly for Effective Regulation of Private Military and Security Companies' The Geneva Centre for the Democratic Control of Armed Forces, Geneva (1 September 2008) 30-31; S Chesterman & C Lehnardt (eds) *From Mercenaries to Market the Rise and Regulation of Private Military Companies* (2007) 218. This could also be done through introducing public law values through governmental contracts with PMSCs.

outsourcing may be used to help the state to fulfil its obligation to its citizens.[66] For example, hiring a PMSC can help the state to better ensure security and peace.[67]

In conclusion, it is argued that in whatever form or shape it takes, the principle of legitimate authority should not be used to preserve lawful combatancy for only those actors tied to the state. Not only do such efforts run counter to past and present realities, they are also susceptible to the counter arguments advanced above. More importantly, it is argued that the fundamental question as to whether PMSCs have legitimate authority to engage in war ought to be governed solely by their conduct during war and not by considerations pertaining to who is the legitimate party to a war.[68]

6.3.2 Just Cause and Right Intention Related Objections

Extending combatancy to PMSCs also faces challenges drawn from the principles of just cause and right intention. As shown in Chapter Two, these principles exclude fighters whose motivations fall outside a 'just cause' and who do not have the 'right intention'. These principles have influenced the development of international humanitarian law in relation to mercenaries. According to Article 47 of Additional Protocol I, mercenaries do not enjoy the right of lawful combatancy and its corresponding protections.[69] The intent of Article 47 was summed up by the Indonesian Representative to the Plenipotentiary Working Group that: '[the Article] was to discourage mercenary activity and prevent irresponsible elements from getting the rights due to a combatant'.[70]

Commentators have pointed to the fact that PMSCs, like mercenaries, are private

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[66] S S Brown (ed) *Transnational Transfers and Global Development* (2012) 204; N Tzifakis 'Contracting Out to Private Military and Security Companies' Centre for European Studies, Brussels (2012) 28, available at http://thinkingeurope.eu/sites/default/files/publication-files/contracting_out_private_military_and_security_companies.pdf [accessed on 30 January 2012].

[67] R Mandel 'The Privati a tion of Security' (2001) 28(1) *Armed Force and Society* 129 at 139-143.

[68] As shown in the discussions under Chapter Six (see section 6.4).

[69] Chapter Three (see section 3.2.5.3).

[70] Statement of Mrs Sudirdjo of Indonesian 6 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) 192 (Swiss Federal Political Department 1978) para 94, at 159 CDDH/SR41, 26 May1977.

agents that provide services for profit.[71] Such actors operate for an unworthy cause and do not have a right intention because they engage in hostilities for financial gain rather than out of loyalty to their state[72] and accordingly, contravene the principles of just cause and right intention. Even if PMSCs are hired by a state, the fact that they provide military services for money still remains.[73] Moreover, in such situations, states stand the risk of being accused of contravening the principle of just cause by shifting the use of violence from a system driven by democratic norms to one rooted in profit-making[74] and the hiring state of human beings as mere instruments of killing.[75] Reliance on PMSCs in this manner is also seen as profiteering from conflict and post-conflict situations since the primary cause and intention of war is subordinated to their overriding drive for profit.[76]

It is questionable whether the principles of just cause and right intention provide sufficient grounds for excluding PMSCs from combatancy. Attempts to exclude PMSCs based on the prohibition of mercenarism are susceptible to challenges. One of the major challenges is that there is no consensus in international humanitarian law about such a prohibition. Thus, apart from Article 47 of Additional Protocol I, no humanitarian law treaties contain such prohibition.[77] On the contrary, treaty provisions such as Articles 4 and 6 of the 1907 Hague Convention V suggests that

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71 M Sapone 'Have Rifle with Scope, Will Travel: The Global Economy of Mercenary io lence' (1999) 30 *Californian Western International Law Journal* 1 at 5; Z Salzman op cit note 56 at 872-874, 879-88 ; E L Gaston 'Mercenarism 2.0 – The Rise of the Modern Private Security Industry and is Implications for International Humanitarian Law Enforcement (2008) 49 *Harvard International Law Journal* 221 at 228-238; F Mathieu & N Dearden *Corporate Mercenaries: The Threat of Private Military and Security Companies* (2009).

72 D Richemond-Barak 'Rethinking Private Warfare' (2011) 5 Law & Ethics of Human Rights 159 at 168-172; G Blakely 'Marketi ed Soldiering: How Private Military Companies Challenge Global Governance, Erode Accountability and Exacerbate Conflict' Simon Fraser University Library (2006) 66 at 133; J Kimberlin & B Si e more 'Blackwater: Inside America's Private Army' The ir ginian-Pilot 23 July 2006; C Fabre 'In Defence of Mercenarism' (2010) 40 British Journal Political Science 539–559.

73 S Percy 'Mercenaries: Strong Norm Weak Law' (2007) 61 International Organi atio n at 372; J Scahill Blackwater, The Rise of the World's most Powerful Mercenary Army (2007) 16, 67.

74 A R Markusen 'The Case against Privati in g National Security' (2003) 16 ( ) Governance: An International Journal of Policy, Administration, and Institutions 471 at 472, 474.

75 C Fabre op cit note 72 at 553–554.

76 Ibid at 555. Since this aim could sabotage efforts to end the war and prolong suffering during war.

77 The UN Mercenary Treaty & the OAU Mercenary Treaty are not IHL specific instruments and go beyond the context of regulating the behaviour of actors in war.

mercenary recruitment was not entirely forbidden and were viewed as equal to other combatants. [78]

The widespread practice of hiring PMSCs hints at the existence of a norm of customary international law that affords the use of such actors in war.[79] The fact that PMSCs have received endorsement or have been hired by many states suggests that they are either an exception to the anti-mercenary rule or that the rule has been eroded altogether.[80] Indeed it appears that states have generally not condemned the use of PMSCs in general and in particular based on grounds related to their profit motivations. PMSC are present in over fifty states, and in some countries where their operations are based, governments have endorsed the use of private military and security companies.[81] For example, during the recent Libyan crisis, Britain suggested that PMSCs could be contracted to aid or train Libyan rebel forces, and urged Arab countries to hire them for those purposes.[82]

The objection based on the principle of right intention is also unsatisfactory. The principle assumes that the motive of soldiers (presumably national interest) are more

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78 Article 4 of the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention V) 1 Bevans 654 (18 October 1907) provides that 'combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.' Article 6 of the Hague Convention states that '[t]he responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.' Thus neutral states were only forbidden from recruiting mercenaries in their territories and such recruitment could happen outside their territories. Furthermore, such states were not under a duty to prevent individuals from crossing their borders to serve as mercenaries for a belligerent. The four Geneva Conventions appear to have followed this approach of not treating mercenaries differently from other combatants. This may suggest that Article 47 of Additional Protocol I deviates from the standard approach according equal treatment to belligerents.

79 J N Maogoto and B Sheehy Contemporary Private Military Firms Under International Law: An Unregulated Gold Rush (2006) 26(2) Adelaide Law Review 245 at 250-2.

80 U Petersohn 'Outsourcing the Big Stick: The Consequences of Using Private Military Companies' Working Paper Series, Weatherhead Center for International Affairs, Massachusetts (2008) 59, available at http://www.wcfia.harvard.edu/sites/default/files/Petersohn_Outsourcing.pdf [accessed on 8 May 2013].

81 S Shameem 'Report of the Special Rapporteur: Use of Mercenaries as a Means of io lating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination' Commission on Human Rights' 61st Session, UN Doc. E/CN.4/2005/14 (8 December 2004) 12.

82 P Wintour 'Libyan Rebels should Receive Training Funded by Arab Countries, Says Britain: British Defence Sources are also Looking to Hire Private Security Companies to Help Strengthen Rebels Position on the Battlefield' The Guardian, 6 April 2011, available at http://www.guardian.co.uk/world/2011/apr/06/libyan-rebels-training-funded-arab [accessed 7 April 2011].

beneficial than those of PMSCs.[83] However, discerning motives is not easy, and indeed, the motivations of the armed forces of states and PMSCs may not be distinguishable. Economic considerations drive soldiers as much as they do PMSC personnel.[84] Moreover, PMSC personnel, just like soldiers, may be drawn to a conflict for non-financial reasons.[85] The point here is that right intention should not be presumed to be the domain of the state. In addition, allegations that the motivations of PMSCs are likely to result in profiteering from war assume that the involvement of private combat services will prolong misery during war more than will the use of traditional armed forces. This view ignores the history of serious and gross violations of humanitarian law committed by states, which are presumed to fight with the right intention and for a just cause.[86]

The objection to commoditisation as not related to precluding the use of PMSCs is really an argument to ensure proper treatment of such forces.[87] As seen above this rests on the view that states have a duty to regulate and control the private contractors they hire (as they do with their armed forces).[88] This duty relates to the need to deploy such forces in accordance with *jus in bello* principles (such as proportionality and military necessity). A state would be morally guilty if it contracted private contractors without discharging this duty of care (as it would be with respect to its soldiers). In the same way, PMSCs would be equally guilty of failing to discharge a similar duty of care where they use their personnel as mere profit-making instruments.

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83 J McMahan 'On the Moral Equality of Combatants' (2006) 1 Journal of Political Philosophy 377 at 379-80.

84 T Lynch and A J Walsh 'The Good Mercenary?' (2000) 8 Journal of Political Philosophy 133 at 143-149.

85 J Wolfendale 'The Military and the Community: Comparing National Military Forces & Private Military Companies' in A Alexandra, D-P Baker & M Caparini (eds) Private Military and Security Companies: Ethics, Policies & Civil-Military Relations (2008) 218. Including noble causes such as human rights and democracy, sheer adventure as well as national patriotism)

86 A J Bellamy Massacres and Morality: Mass Atrocities in an Age of Civilian Immunity (2012) 161. Moreover, the assertion of profiteering from war selectively targets PMSCs and ignores a host of other private firms (such as weapons manufacturers) who could be similarly accused.

87 C Fabre op cit note 72 at 554.

88 S G Mestrovic The Good Soldier on Trial: A Sociological Study of Misconduct by the US Military Pertaining to Operation Iron Triangle, Iraq (2009) 3. In the same way, the states must respect the lives of their soldiers.

Even if it was accepted that PMSCs are motivated primarily by profit, a moral case could be made for extending combatancy to them in certain circumstances. Such justification could be based on an appeal to other grounds derived from *jus ad bellum.* As already mentioned, the exceptions to the prohibition of force provided in Article 2(4) of the UN Charter could each form a basis for the hiring of contractors by a state exercising its *jus ad bellum.*[89] For example, a state could be forced to turn to contractors for support in engaging in a just action of self-defence against an aggressor. The assistance rendered by PMSCs in Sierra Leone and Croatia in the 1990s are cases in point.[90] In such cases the overriding desire to safeguard the state from an unjust attacker provided legitimacy to the use of PMSCs. A similar situation may arise when a state hires a PMSC to help in a humanitarian war to prevent genocide. In such a case, the cause may be so compelling as to using PMSCs to fight for the state.[91]

In summary, PMSCs ought to have the freedom to provide combat services for whatever motive as do state soldiers. Their situation is not far from that of the state soldier that exercises his/her freedom to sell combat services in exchange for a salary. Incorporation and the underlying rationale behind their motives do not discount the fact that both individuals provide combat services for which they are remunerated. The only difference is that one is engaged by the state and the other by a private company. The discrepancy in these two cases highlights the difficulties that arise whenever the rationale based upon *jus ad bellum,* in this case the motives of actors, forms the basis for their treatment during war. The exclusion of PMSCs from combatancy on ground related to the principles of right intention and just cause has no relevance in war where the primary focus should remain that of achieving the objectives of *jus in bello*.

89 Chapter Two (see section 2.3.4).
90 Chapter Two (see section 2.2.4).
91 Chapter Two (see section 2.3.2.2). Since the premise of the jus ad bellum is that war is fought for just cause and any harm deriving from it should not exceed the good.

6.3.3 An Argument for Classification Based Solely on *Jus In Bello*

Objections to extending combatant rights to PMSCs during war (that is within the domain of *jus in bello)* on the basis of arguments located in *jus ad bellum* (the principles of legitimate authority, just cause and right intention) blurs the lines between these two components of the just war theory. As previously discussed, this confluence comes at a great cost to the effective implementation of humanitarian law as it makes the law susceptible to the highly politicised and ambiguous nature of *jus ad bellum*. Further, such confluence compromises the fundamental need to ensure equality among belligerents. Where belligerents are not viewed as equal, there is a risk that humanitarian law could be undermined as each belligerent justifies the denial of humanitarian rights to their adversary or populations associated with it.[92]

The challenges that arise from subjecting humanitarian law to *jus ad bellum* reasoning is amply demonstrated by the Additional Protocol I which distinguishes the treatment offered to different fighters on the basis of their reasons for joining a war. While the Protocol prevented mercenaries from enjoying combatant privileges, it extended these privileges to guerrillas.[93] The danger in this approach can be seen in the gross violations that were meted out to mercenaries and their supporters, simply for being unprivileged belligerents.[94] Similar treatment is likely to be meted out to meet PMSCs that find themselves in the same position by virtue of being on the 'wrong side' of *jus ad bellum*.[95]

The full application of humanitarian law can only be realised by unshackling humanitarian law from arguments embedded in *jus ad bellum.* This is all the more paramount for PMSCs, which stand at odds with the presuppositions of *jus ad bellum* but whose reality within armed conflict cannot be ignored. In this regard, the

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92 Chapter Two (see section 2.3.4).
93 Chapter Three (see section 3.4.3).
94 For example many mercenaries were executed for simply being mercenaries. For example, in 1976 thirteen men where executed in Angola pursuant to the Luanda Convention (Draft Convention on the Suppression of Mercenarism) which declared mercenarism an international crime. – see J E Thompson Mercenaries, Pirates and Sovereigns: State-Building and Extra-Territorial Violence in Early Modern Europe (1994) 26.
95 Chapter Two (see section 2.3.4); See Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) 192 (Swiss Federal Political Department 1978) 26 May1977 XIV, 260-261 CDDH/III/SR28, para 8, where it was states that if 'international humanitarian law … was not to become a dead letter, it was essential first, that the rules ... should be equally binding on all … parties … [and] should constitute a well balance compromise between humanitarian considerations and military necessity.

classification of PMSCs should be guided solely by the objective and principles of humanitarian law, which is not to apportion blame to actors in the battlefield, but rather to regulate the behaviour of actors in order to protect the rights of all parties involve or affected by armed conflict.[96] The re-classification of PMSCs proposed herein focuses on the actions of PMSCs during war and their compliance with conditions that are fundamental to protecting human dignity.

6.4 BENEFITS OF THE RE-CLASSIFICATION

The re-classification of PMSCs along the lines suggested in this Chapter has the effect of restoring the primacy of *jus in bello* considerations and objectives in determining how PMSCs should be treated during war. There are several benefits that could be derived from this approach. A number of these address some of the concerns discussed in the previous chapter.[97] For one, the classification of PMSCs in this manner has the potential to better align their rights and responsibilities with their status. Secondly, this approach could enhance the protection of the wider civilian population. Finally, elevating certain PMSCs to combatancy status and thus placing them on par with soldiers may enhance their accountability in international law. Each of these aspects is discussed below.

6.4.1 PMSCs' Rights and Responsibilities

This thesis has shown that PMSC personnel are currently regarded as civilians even when they provide direct/indirect military services amounting to 'direct participation in hostilities', to be labelled as unlawful combatants. What is proposed avoids imposing a one-size-fits-all approach on all PMSCs by drawing a distinction based on the nature of their services. Such division is likely to enhance the extent to which the status of individual personnel corresponds to their treatment in war in line with humanitarian law's aim of protecting those not involved in conflict, while at the

96 Chapter Two (see section 2.3.3) & Chapter Three (see section 3.4.1).
97 Chapter Five (see section 5.2.3).

same time not hindering the attack of those directly participating in hostilities. This outcome is possible because the division provides PMSCs with the opportunity to acquire lawful combatant status and to escape from the disadvantageous position held by unlawful combatants.

The enhanced privileges granted to PMSCs who are combatants would be accompanied by greater responsibilities under international law. In the first place, such personnel will be presumed, as are other combatants, to have agreed to be legitimate targets. Under the present legal regime where such contractors are regarded civilians, even though the enemy can target them, this can only happen within the strict wording of Article 51(3) of Additional Protocol I, that is, 'for such a time as they take a direct part in hostilities'. This creates uneven responsibilities among belligerents since lawful combatants, such as armed forces, are subject to attack at all times, while contractors could effectively limit their potential to be targeted. This allows them considerable leeway in launching attack against an adversary and exiting the battlefield. Secondly, combatant PMSCs will be expected to undertake their operations in a manner that complies with the principles governing the conduct of hostilities. Essentially, this will mean that they will be required to put into place sufficient measures to ensure that their personnel are aware and able to implement the rules contained in Additional Protocol I.

By providing an avenue by which PMSCs can access lawful combatancy, its rights and obligations, the re-classification facilitates the clear apportionment of rights and obligations among members of the industry. For example, PMSCs performing non-combatant functions will be treated as civilians and thus be entitled to heightened protections of humanitarian law including the prohibition of intentional attacks against them.[98]

Furthermore, regarding some of the PMSC personnel as combatants may incentivise PMSCs to respect the laws of war. This is because the privileges of combatancy are linked to conditions that require fighters to behave in accordance with humanitarian principles, such as distinguishing oneself from civilians and observing the laws and

98 Chapter Four (see section 4.2.3).

customs of war. PMSCs seeking combatant legitimacy and privileges could be motivated to comply with such conditions. As discussed earlier, it was such reasoning that spurred developments in humanitarian law towards granting combatancy to guerrillas who met similar conditions. In particular, Article 44(3) of Additional Protocol I redefined combatancy to include guerrillas who in extreme circumstance were willing to observe fundamental aspects of the obligation to distinguish themselves from civilians.[99]

6.4.2 Protection of the Civilian Population

As previously discussed, regarding all PMSCs as civilians irrespective of their functions undermines civilian protection by making it difficult for belligerents to distinguish between combatants, civilian contractors who provide direct/indirect military services and ordinary civilians who perform non-combatant logistical functions.[100] This problem is compounded by the fact that since the law as it currently stands does not treat PMSCs as combatants, PMSCs do not have the obligation to distinguish themselves from civilians. This problem would not arise if PMSCs were granted combatant status.

6.4.3 State Accountability for Acts of PMSCs

By according combatant status to PMSCs, the gap in the application of the doctrine of state responsibility between the members of the armed forces and private entities could be diminished.[101] While responsibility for the armed forces is automatic and unqualified under Article 4 of the ILC Draft Articles, responsibility for PMSCs requires a more rigorous process to establish attribution under Articles 5 and 8 of the

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99 Chapter Three (see section 3.2.1.3). The rules for an armed conflict are not static and were deliberately adapted to include guerrillas based on the reality of their presence and the fact that they would not disappear by simply excluding them, see the points made by the delegates in the Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) 192 (Swiss Federal Political Department 1978) 26 May1977, XIV 317-385, CDDH/III/SR33-36.

100 Chapter Five (see section 5.3.2).

101 Chapter Five (see section 5.3.3).

ILC Draft Articles is demanded.[102] Elevating PMSC personnel to combatancy could address this in the following ways.

First, it may be easier to prove that PMSCs who are lawful combatants meet the requirements of governmental authority under Article 5. Governmental authority requires the existence of a specific law empowering the private contractor to undertake the functions in question.[103] Such authorisation could be implied where states hire PMSCs that are recognised as combatants under international law. Arguably, the need for an express domestic law reflects the present restriction of legitimate violence to the state. In this case outsourcing of violence to a private contractor presents a *prima facie* indication of delegating 'governmental authority' that must be corroborated by law in order to confer the empowerment envisaged by 'governmental authority'.[104] This position would change if PMSC personnel are admitted as legitimate combatants under international law. A case can be made that where the state hires such PMSC personnel it has outsourced one of a critical states function state functions to an entity endorsed by international law, and thus delegated governmental authority.

Second, extending combatant status to PMSCs may narrow the discrepancy between a state's armed forces and PMSCs by virtue of Article . Under this Article, the difference in state responsibility revolves around the divide between public and private entities.[105] Admitting PMSCs as lawful combatants may dilute the effect of this divide since it could be argued that such PMSCs ought, for the purposes of state responsibility, to be treated the same as other lawful combatants (in this case, soldiers).[106] If the present right of the state to conduct war through its soldiers is

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102 Chapter Five (see section 5.3.3). As noted in that section, in these cases, responsibility will only be established if the contractor acts under governmental authority, which will only apply to limited exceptions. Responsibility under Article 8 will also face the additional hurdle of having to prove the standards, established by international jurisprudence, regarding the degree of control that a state must exercise over a private actor. Finally, the extent of responsibility in these cases will fall below the unqualified responsibility that a state has over the armed forces.

103 Chapter Three (section 3.5.4) & Chapter Five (see section 5.3.3).

104 Chapter Three (see section 3.5.4).

105 Chapter Five (see section 5.3.3). Armed forces are public or state organs and attract automatic and unqualified responsibility while PMSCs are private entities that require a more rigorous process to establish attribution and give rise to qualified responsibility.

106 It could be argued that the present nature of automatic and unqualified state responsibility over soldiers is reflective of an environment where it is presumed that a states fighting force is made of

extended to its right to use PMSCs for the same purposes, the same nature of state responsibility that presently arises in respect of soldiers should arise in its use of combatant PMSCs.[107] The nature of engagement between such PMSCs and the state is more or less similar to that existing between a state and its armed forces and state responsibility should not diminish in respect of violations committed by either combatant.[108] Such an interpretation is in keeping with the purpose of the law of state responsibility, which is to ensure that the state does not circumvent international liability.[109]

Lastly, the general obligation under Common Article 1 to the four Geneva Conventions to 'respect and ensure respect' of humanitarian law could diminish the differences in responsibility between soldiers and PMSCs considered to be lawful combatants. As shown before, state duty under this Article may go beyond that under the ILC Draft Articles and give rise to general or specific obligations.[110] These obligations could be interpreted to match state responsibility for combatant PMSCs (for example, with regard to training and vetting) with those applicable in relation to their own armed forces.

It should be mentioned that the differences in state responsibility between private contractors and the armed forces would only be diminished with respect to PMSCs that are now considered lawful combatants. State responsibility for violations committed by contractors operating as unlawful combatants would remain subject to

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its soldiers. This can be discerned from provisions such as Article 3 of Hague Convention IV and Article 91 of Additional Protocol I, which link unqualified responsibility to states armed forces.

107 If a state now has the opportunity to use PMSCs as legitimate combatants the nature of responsibility evident in these provisions, that is, automatic and unqualified state responsibility, ought to be extended to combatant PMSCs.

108 Though not formally affiliated to the state so as to be considered an organ of the state, these PMSC actors occupy the same position as soldiers (that is, as legitimate fighters) on the international platform, so that responsibility for the actions of one set of combatants should not be diminished in comparison with the other.

109 An interpretation that extends automatic unqualified responsibility to such combatant PMSCs appears to be in line with this overall purpose since it prevents the use of the private/public divide under Article to frustrate the essence of a state's duty in relation to its use of any kind of combatant force.

110 The Article could also be read alongside specific treaty provisions to impose positive obligations upon a state. For example, the protection of civilians under Article 27 of Geneva Convention IV, could give rise to a duty to exercise diligence so that this protection is not undermined by PMSCs conduct.

the present onerous process of attribution.[111] The potential exists for using such contactors to avoid the higher standards of responsibility that arise in relation to combatant contractors. A possible solution to this challenge may lie in interpreting a state's general obligation to respect humanitarian law under Common Article 1 to the four Geneva Convention as imposing a restriction on the types of entities that it can hire to undertake military functions. Such an interpretation is supported by the current restrictions under humanitarian law on the military recruitment by states of certain individuals (such as children).[112] Even though states have discretion regarding those they recruit into their armed forces,[113] they are nonetheless barred from conscripting individuals whose use as combatants violates humanitarian principles.[114] In the same way it could be argued that state responsibility ought to be strictly interpreted in cases where it hires PMSC personnel that do not comply with the conditions of combatancy, to undertake direct/indirect military services.[115]

6.4.4 Direct Accountability of PMSC Superiors

The direct accountability of PMSC superiors may be improved by shifting the status of PMSC personnel from 'civilians' to 'combatants'. As discussed in the previous chapter, this accountability is reduced because the standards necessary to establish superior responsibility within the civilian context are higher than those applicable in the military context.[116] The difference in accountability reflects opposition to extending to civilian superiors the standard applicable to military commanders.[117] This opposition is logical where the business of war is presumably in the hands of the state's military forces with little involvement from civilian where those who exercise

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111 Chapter Three (see section 3.5.4) & Chapter Five (see section 5.3.3).

112 Article 4(1) of the Optional Protocol on the Involvement of Children in Armed Conflict prohibits armed groups from recruiting children under 18 years of age. Under Article 4(2) of this treaty states are to take all measures to criminalise this practice; Further, Article 5 of the Rome Statute has made conscription of children below 15 a war crime.

113 Chapter Three (see section 3.2.1.1).

114 Such as in the case of children

115 The assertion here is, just as it is in the case of recruitment of children in the armed forces, that the hiring of such PMSCs by states should be interpreted as giving rise to automatic and unqualified responsibility

116 Chapter Three (see section 3.5.5). The civilian status of PMSC personnel dilutes the effectiveness of using the doctrine for PMSC superiors in comparison to military commanders. This is because the requirement of the doctrine — control, precautionary measures and knowledge — are more easily satisfied in relation to military commanders than to civilian superiors.

117 Ibid.

command over fighters are military commanders.[118] Here a more rigorous standard is required of military commanders than of civilian authorities whose involvement in war is minimal. However, the involvement of 'civilian' PMSCs in war alters this context. By re-classifying such PMSCs as combatants, the application of the elements of command responsibility between PMSC superiors and military contractors is harmonised.[119]

The first element of command/superior responsibility, that is, evidence of control through a superior/subordinate relationship, the conditions laid down for PMSCs to access combatancy — the need for hierarchical organisations with internal discipline — suggests that such firms will reflect the same nature of control exhibited by military units.[120] Furthermore, as the formal recognition of such PMSCs as combatant is on par with the armed forces, it is illogical to apply *de jure* authority to one set of combatants, that is, the armed forces, while limiting superiors of combatant PMSCs to the more difficult standard of *de facto* authority.[121] Where a PMSC manager/supervisor has oversight of subordinates, *de jure* authority will suffice as evidence of control for the purpose of superior responsibility, as it would in the case of the military commander.

Consequently, the precautionary/punitive measures that a PMSC manager/supervisor will be expected to take to meet the requirements of the second element will be in accordance with such a manager/supervisor's *de jure* authority and not, as previously, limited to his/her *de facto* authority.[122] In this regard, the expectations of PMSC managers/supervisors will mirror those of military commanders.[123] Similarly,

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118 This context is located in a paradigm dominated by conventional wars where states use armies against other armies, and do not rely upon non-military personnel in their confrontation. Here, the incidence of civilians exercising direct authority over military forces is rare eg in the case of civilian political heads that have command over military forces.

119 The re-evaluation of such PMSCs will leads to a laconic shift that has transformed the application of the three requirements of the doctrine in relation to such firms.

120 Chapter Six (see section 6.2.2). Eg in the case of civilian political heads that have command over military forces.

121 In order not to diminish the application of the doctrine to all combatants, the nature of control demanded of all combatant units would have to be identical, that is, de jure authority.

122 Chapter Five (see section 5.3.4.1). Thus, the assessment on preventive and punishment measures to be taken by PMSC superiors will be equivalent to those expected of a military commander, that is, based upon the de jure authority of the PMSC manager/supervisor.

123 This would lead to a situation where preventative activities are strictly interpreted for PMSC superiors in the same way they would be for military commanders. Similarly, in relation to

the re-classification of the PMSCs as combatants will remove discrepancies that arise from applying a more difficult standard of knowledge to civilian superiors than to military commanders.[124] It is untenable to apply to one set of combatants (the military), a standard of objective negligence, while applying to another group of combatants (combatant PMSC), a standard of wilful negligence.[125]

In sum, elevating certain PMSC personnel from civilian to combatant status improves the accountability of managers/supervisors of such firms by improving the operation of command/superior responsibility to such firms.[126] Admittedly this improvement will only apply to combatant PMSCs, leaving out PMSCs who provide direct/indirect services without meeting the requisite conditions for combatancy. As mentioned earlier however, such PMSCs risk being considered as unlawful combatants who lack substantial privileges and protections.[127] Thus, while such PMSCs could theoretically avoid the more rigorous application of command responsibility, this will come at the cost of the loss of substantial privileges. This trade-off will weigh heavily in the minds of the directors of such firms when deciding whether to provide direct/indirect services as lawful combatants bearing the requisite responsibility of a superior, or risk entering zones as unprivileged belligerents.[128]

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punitive measures, PMSC superiors will be duty bound to investigate violations by subordinates to the full extent of their de jure authority, which could at the very least will obligate them to collaborate with competent state organs for criminal investigation and sanction in order to ensure violations by subordinates are appropriately repressed and dealt with.

124 It would be reasonable to expect the nature of the knowledge requirement of managers/supervisors of combatant PMSCs to be the same as that applicable to other lawful combatants, including a state's military forces.

125 Chapter Three (see section 3.5.3) & Chapter Five (see section 5.3.1). Application based upon such differences militates against the purpose of the doctrine of command responsibility to enhance accountability for humanitarian law violations. While an adjudicating authority may have hesitated to apply the military test to a civilian superior, this would not be the case in relation to a manager/supervisor of a combatant PMSC.

126 Practically, this move accentuates the utility of the doctrine as a tool for ensuring the respect of humanitarian law in situations where PMSCs provide direct/indirect military services.

127 Chapter Three (see section 3.5.3) & Chapter Five (section 5.3.1).

128 It is not unreasonable to speculate that such leaders may be more amenable to operating as lawful combatants with greater liability under command responsibility, than occupying the undesirable position of unlawful combatants.

6.5 CONCLUSION

This chapter has outlined a proposal as to how the diverse contractors could be accommodated within the legal framework of humanitarian law. This consists in aligning the criteria for combatancy with the nature of services provided by PMSCs, and the extent that such PMSCs comply with core conditions observed by other combatants. In so doing the industry would not be treated as a holistic unit with PMSCs, but instead certain personnel would now qualify as combatants while others would retain their civilian status and yet others would be deemed to be unlawful combatants. Accordingly, each of these different categories would attract different rights and responsibilities that more accurately reflect the nature of their services and the degree to which their behaviour resonated with the objectives of the laws of war.

This approach breaks rank with the present limitations within the law to confine legitimacy to only persons affiliated to the state, and advocates for the treatment of PMSCs on the basis of *jus in bello* considerations. PMSCs should be judged by how they behave during conflict and not upon how or why they get into the conflict. Such *jus ad bellum*-based judgements are highly contestable and dilute the application of humanitarian law. If humanitarian law were to be accorded the primacy it deserves during conflict it is crucial that *jus ad bellum* fears of granting legitimacy to PMSCs are completely divorced from their treatment during war. Far more worrisome than such fears, however are the adverse consequences discussed in the previous chapter that arise when such actors are used as a substitute for soldiers.

More can be gained by admitting PMSCs as combatants based on conditions drawn from the norms that further humanitarian law. This admission is likely to better align with their status the rights and responsibilities of individual PMSC personnel. It will enhance the rights of combatant PMSCs presently labelled as unlawful combatants by equating them with other lawful combatants. This novelty may also go some way towards enhancing the protection of the civilian population, and addressing the consequences of uncertainties that arise when all PMSCs are conflated into one group (civilians). Finally, elevating certain PMSCs into combatancy may enhance their accountability under the doctrines of state and command responsibility. In terms

of state responsibility, the grant of combatancy will increase the likelihood of PMSCs meeting the requirements of governmental authority under Articles 5 and narrow the discrepancy in state responsibility that exists with the armed forces as a result of Article 4. As far as command responsibility is concerned the differences between PMSC managers/supervisors and military commanders, evident from the application of the elements of the doctrine, will be reduced on account of their acquisition of combatant status. The benefits that ensue out of what is proposed in this chapter are not a panacea to the multiple concerns that stem from the use of PMSCs in conflict. Equally important is the question on how to harmonise the ethical values of combatant PMSCs with those pertaining to military units will require further reflection. While these questions are important, the appropriate response to them lies outside the domain of *jus in bello* and, for this reason, the proposals in this chapter have endeavoured to maintain the truly agnostic nature of humanitarian law towards dilemmas that are beyond the parameters of war.

CHAPTER SEVEN: CONCLUSION

7.1 SUMMARY OF FINDINGS

The study set out to explore the difficulties attendant in the current approach taken by international humanitarian law to the involvement of PMSCs in armed conflict. At the heart of this exploration is the question of whether combatancy should be revised to accommodate PMSCs whose services in conflict situations may amount to direct participation in hostilities. The sections that follow reiterate the four main findings of the study.

7.1.1 An Enduring Reality of Reliance on Private Military Services

The first of these findings is that states have relied on private military services for a long time. Chapter Two demonstrated how this reliance preceded the rise of national armed forces and continued with the emergence of the state.[1] The factors behind this dependence were tied to the gap between the supply and demand for military services. This reliance has historically been marked by concerns about the independence of private actors and the conflict between their motivations and the wider interest of the societies in which they have operated.[2] Although the dramatic changes that accompanied the emergence of the state, including the consolidation of security instruments under its central command, reduced the reliance on private military services[3] it did not completely eliminate their presence. These changes established a paradigm that dominates the present understanding of who is entitled to legitimately participate in violence and present perceptions towards the participation of private actors in conflict.

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1 Chapter Two (see section 2.2.1).
2 Ibid.
3 Chapter Two (see section 2.2.2). State nationalism became a consolidating force of identity that led to changes in the reasons for war and those who would fight them. War was fought on behalf of the national interest of the state whose defence became an obligation for all citizens. In the long term professionalized citizen soldiers replaced private armies, and the state deliberately brought all coercive instruments under its control.

In the context of this history and the central question of who is a legitimate fighter, Chapter Two discussed the just war doctrine, the main philosophy governing the conduct of war, and its components — *jus ad bellum* (right to go to war) and *jus in bello* (rights in war). [4] The participation of private actors in war appears to run counter to the emphasis on *jus ad bellum* and its associated principles of legitimate authority, just cause, and right intention.[5] This position is contrasted with *jus in bello* principles and concepts, such as non-discrimination and innocence, that accord primacy to the functions of an actor as the primary factor for distinguishing actors in war. [6] Furthermore, the history of the interaction between the two components of the just war doctrine strongly suggests the need to maintain a distinction between the division of *jus ad bellum* and *jus in bello* in order not to compromise the application of the latter.[7] These discussions are relevant to PMSCs, given that some of the criticisms against their activities in war originate from *jus ad bellum* arguments and thus may raise similar concerns as to whether it is appropriate to resort to *jus ad bellum* factors as grounds for establishing the legitimacy of an actor during war.[8]

7.1.2 The Status of PMSCs under the Present Legal Regime as Civilians

The second finding relates to the status of PMSCs under international the humanitarian legal regime. Chapter Three introduced the relevant legal provisions that determine the status of actors during conflict, and Chapter Four used these provisions to ascertain the status of PMSC personnel. An application of the relevant legal criteria on the status of individuals in international armed conflicts led to the primary conclusion that the majority of PMSC personnel do not meet the requirements for combatancy. They are not members of the armed forces mainly because of the difficulty posed by their formal incorporation.[9] In addition, they do not fall within the groups of irregular forces due to the onerous hurdles that have to be overcome in order to belong to a state party, and to meet the cumulative

4 Chapter Two (see section 2.3).
5 Chapter Two (see sections 2.3.1 & 2.3.3).
6 Ibid.
7 Chapter Two (see section 2.3.4).
8 Chapter Six (see section 6.4).
9 Chapter Three (see section 3.2.1.1).

conditions required of such forces in order to be considered as combatants.[10] From this premise, the conclusion based upon the mutually exclusive nature of the combatant/civilian dichotomy is that PMSCs are civilians and are expected to behave and be treated as such.

In non-international armed conflicts, where there is no express mention of the combatant/civilian dichotomy, PMSC personnel could be regarded as forces that belong to state armed forces or organised non-state armed forces because they render coercive services on their behalf; as civilians that independently take an active part in hostilities (where they are contracted to provide civilian services but end up engaging in hostilities; or as general civilians that do not directly participate in hostilities.[11] Different interpretations on how they should be treated suggest that a distinction needs to be made based upon whether or not they engage in hostilities.

The civilian/combatant dichotomy and, consequently, the identity of PMSC personnel is influenced by the concepts underpinning the just war doctrine discussed in Chapter Two. In line with *jus in bello*, this dichotomy attempts to strike a balance between the military necessity of the belligerent and the need to provide humanitarian protection to those not engaged in hostilities.[12] Conversely, the influence of *jus ad bellum* is evident in the concept of combatancy. This status is restricted to persons that are linked to the state, affirming the dominant understanding of the concept of legitimate authority.[13] Additionally, the preoccupations of *jus ad bellum* with the motivations of actors are revealed in the divergent manner in which combatant status is extended to certain irregular forces, such as guerrillas fighting in pursuance of the right to self-determination, and denied to other irregular forces, such as mercenaries, whose motivations stand at odds with *jus ad bellum* concepts.[14]

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10 Chapter Three (see sections 3.2.1.3 & 3.2.1.4).
11 Chapter Three (see section 3.3).
12 Chapter Three (see section 3.4.1).
13 Chapter Three (see section 3.4.2).
14 Chapter Three (see section 3.4.3).

7.1.3 Shortcomings of the Present Legal Regime

The above conclusion regarding the status of PMSCs as civilians leads to to the third important finding of this study. Several challenges arise when the personnel of such PMSCs provide services that amount to direct participation in hostilities. As Chapter Five revealed, there are many instances in which the actions of PMSCs providing direct/indirect military services will amount to direct participation in hostilities.[15] The provision of such services under the banner of a civilian unit has enormous implications on their individual rights and/or the environment of armed conflict. Within the context of international conflict where the combatant/civilian dichotomy is expressly recognised in the treaties, the rights and obligations of PMSC personnel will be substantially diminished in comparison with those of members of the armed forces undertaking similar functions.[16] This is primarily because these PMSCs risk being labelled unlawful combatants. In this position they will neither be entitled to the privileges that accompany lawful combatancy nor the protection that is due to civilians.

Apart from the impact upon the individual rights of such PMSCs, their potential participation in hostilities as civilians also has a profound impact on the protection of the general civilian population that is not involved in hostilities.[17] The protection of civilians rests largely on the ability of belligerents to distinguish between combatants and civilians. Belligerents will find it difficult to distinguish between combatants and civilians when contractors perform *de facto* combatant functions. In this type of conflict terrain, belligerents will be tempted to exercise less restraint in complying with the obligation to distinguish combatants from civilians, ultimately jeopardising the lives of the civilians not involved in hostilities.[18]

Moreover, when PMSCs who perform direct/indirect services commit violations of humanitarian law, their status as civilians reduces the effectiveness of accountability mechanisms such as the doctrine of state responsibility. Key differences arise

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15 Chapter Five (see section 5.2).
16 Chapter Five (see section 5.3.1).
17 Chapter Five (see section 5.3.2).
18 Ibid.

regarding the state's responsibility over its armed forces and over PMSC personnel.[19] Unlike the armed forces, contractors remain private entities and not state organs. A more onerous burden of proof is required to establish the responsibility of a state for wrongful acts of PMSCs than that demanded in relation to the armed forces. Furthermore, the scope of state responsibility for contractors is less extensive than that for its armed forces.[20] Thus, in the same way that lawful combatancy is reserved for persons belonging to the state, the extent of state responsibility is more comprehensive for them. The end result is lower levels of state responsibility for private contractors.

Similarly, differences emerge in the standards of command responsibility applicable to military commanders in contrast to those applicable to PMSC supervisors/managers overseeing the actions of subordinate employees. The disparity primarily flows from the fact that the applicability of the doctrine to PMSC superiors is embedded in a civilian context, while the application of the same to commanders is rooted in a military context. Each of the three elements of the doctrine required to be established, namely, control, taking feasible measures and knowledge, will demand a higher threshold of satisfaction for civilian superiors than is required for military commanders.[21] In practice, this suggests that the potential for PMSC superiors to escape liability is greater, a fact that adversely impacts the utility of the command responsibility doctrine as a tool for ensuring respect for humanitarian law.

7.1.4 Rethinking the Status of PMSCs under International Humanitarian Law

This study has argued that PMSC industry should not be treated as a homogenous unit but rather distinguished on the basis of its services in order to respond effectively to the challenges they pose in the context of armed conflict. This would ensure that PMSCs rendering direct/indirect services and complying with conditions of combatancy be treated as combatants irrespective of their link to a state. Other personnel of PMSCs performing non-combatant functions would be rightly

19 Chapter Two (see section 5.3.3).
20 Chapter Two (see section 5.3.3).
21 Chapter Five (see section 5.3.4).

considered civilians, while those that continue to provide direct/indirect military services without meeting conditions for combatancy would be deemed to be unlawful combatants. Accordingly, PMSCs falling in each of these different categories would attract different rights and responsibilities, which would more accurately reflect the nature of their services and better promote/advance the underlying objectives of the laws of war.

This approach breaks rank with the present approach that restricts lawful combatancy to state-affiliated groups. It affirms the need to look at these entities based strictly upon *jus in bello* without taking into account *jus ad bellum* considerations. PMSCs should be judged by how they behave during conflict and not how (by state endorsement or not) or why (for profit or not) they get into the conflict in the first place. Not only are such *jus ad bellum* arguments highly contestable and unsatisfactory, they also have the potential to dilute the application of humanitarian law to belligerents.[22] If humanitarian law is to be accorded the primacy it deserves during conflict, it is crucial that *jus ad bellum* based arguments against PMSCs are completely divorced from the application of *jus in bello* to them. The primary purpose of expanding combatancy to PMSCs is therefore not to give them *jus ad bellum* legitimacy, but to ensure that the humanitarian law accommodates the present reality of their usage during armed conflict.

Far more worrisome than granting PMSCs *jus ad bellum* legitimacy are concerns related to loopholes through which state belligerents may use PMSCs without granting them corresponding rights and obligations. The proposal put forward in Chapter Six re-aligns the legal response to these actors so that such use is strictly based on whether PMSC behaviour during war conforms to the rules of *jus in bello.*[23] This proposal is likely to ensure the protection of the rights of individual PMSC personnel while at the same time creating more room for holding them responsible for their actions. It may also go some way towards enhancing the protection of the civilian population, since PMSCs would have to comply with the principle of identifiability as a condition for their engagement in hostilities.

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[22] Chapter Six (see section 6.3).
[23] Chapter Six (see section 6.4).

7.2 DEVELOPMENT OF A TREATY

In summary, the findings of this study recommend the revision of the present criteria for combatancy by removing elements that oblige individuals to be linked to the state, but maintaining other elements crucial to the respect of international humanitarian law. This recommendation may form the basis for an investigation on how to expand the coverage of international humanitarian law to new waves of non-state actors involved in conflict.[24] In order to implement the recommendation of the study, it may be necessary to adopt an international treaty.[25] Such a treaty could take the form of an Additional Protocol.[26] The new Additional Protocol would explicitly extend combatant status to those PMSCs whose services fall within prescribed conduct parameters and comply with prescribed minimum conditions through five main headings.

Part I: Scope of Application

This part would clarify that subject matter of the treaty. The new convention would be addressed to States and expressly govern those contexts where private military contractors conduct activities within zones of conflict. The contexts would include all types of private military and security support provided to non-state actors, and not just contracts with a state.

Part II: Prescribe the criteria to be met by contractors to qualify as combatants

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[24] The research has confined itself to PMSCs on account of their propensity to intrude into the realm of direct participation in hostilities while generally being considered to be civilians. This problem is not unique to contractors and is mirrored by a range of non-state actors (such as insurgents etc) whose presence in conflict also attracts *jus ad bellum* based criticism, and whose inclusion as combatants may translate to a higher adherence to humanitarian norms.

[25] The International Committee of the Red Cross, which has expertise and a long history in the development of humanitarian law, could be at the centre of negotiating such as treaty. Its special place is acknowledged in various IHL articles, such as Article 9 of Geneva Convention I, Article 9 of Geneva Convention II, Article 125(3)(3) of Geneva Convention III, Article 14(2) of Geneva Convention IV, as well as in the Statutes of the International Red Cross and Red Crescent Movement.

[26] Or a similar process to build consensus on a subject was done with the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Additional Protocol III), 8 December 2005, available at http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/615 [accessed on 20 May 2013].

This part would indicate that contractors brought into zones of conflict to render prescribed services are combatants provided they meet the requirements discussed in Chapter Six, namely that such forces: must be identifiable, display a degree of openness in conducting military operations, comply with the laws of war and maintain a degree hierarchical organization and control.

The range of prescribed services covered here would be read alongside the culmination of the work undertaken by experts exploring the notion and ambits of the direct participation in hostilities. To this end, the convention would incorporate the following PMSC services: PMSCs that offer direct combat services, and PMSCs that offer indirect military support services to combatants.

Part III: Affirm remaining contractors as civilians and outline rights and responsibilities of the various contractors

This part would follow the legal approach of mutually exclusive categories by affirming all remaining contractors that do not meet the requirements above as civilians. In addition, this part would reiterate the application of the Article 4A(3) of Geneva Convention III to individual private contractors authorised to accompany state forces and provide logistical services similar to the ones listed therein.

Part III would also reiterate the rights and responsibilities that would attach to contractors depending upon their classification. This would restate the obligations of those considered to be combatants to adhere to the laws of war and conduct of hostilities in accordance with the principles of humanitarian law e.g. distinction, precaution and proportionality. Furthermore, it would reiterate the application of the doctrine of command responsibility to superiors of PMSC outfits that are considered to be combatants. Additionally, it would affirm their rights to combatant privilege to participate in hostilities within the frame of the laws of war, and retain combatant immunity for violent acts inflicted within these ambits. It would also make it clear that captured contractors are combatants entitled to prisoner of war status.

Part V: State responsibility

Finally, the new convention would reiterate the principle obligations upon states to

respect and ensure the respect of humanitarian law by contractors within their territory and/or in their contractual service. In addition, this part would restate the applicability of the principles of state responsibility as articulated in the ILC Draft Articles by including a provision similar to Article 91 of Additional Protocol I. Such a provision would make it clear that a state would be responsible for all acts committed by any combatant contractors that it may hire.[27] In conclusion, a provision similar to that of Article 77(2) relating to children, could be inserted urging the states to take all feasible measures in order to ensure that contractors who do not meet combatant requirements do not take a direct part in hostilities, and to refrain from hiring such contractors.

7.3 COMPLEMENTING THE TREATY WITH OTHER REGULATORY MECHANISMS

At present, there is no international binding initiative that specifically aims to adjust the criterion for status under humanitarian law in order to accommodate PMSCs as combatants. Present international attempts to respond to PMSCs consist mainly of non-binding frameworks[28] such as Montreux Document, which endeavours to establish good practice for the security industry. This, however, does not provide for the use of force by PMSCs within the bounds of International Humanitarian Law as advocated in this study. Furthermore, unlike an international convention, the Montreux Document is not binding upon the states and creates no binding obligations on them.[29] This lack of a credible enforceable accountability mechanism limits its impact. Fundamental rules that govern human interactions in the extreme circumstances of armed conflict cannot be in the hands of non-binding instrument.

However, an international treaty may not be sufficient to address the problems discussed in this study. Implementation of treaties is dependent upon their

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[27] Much in the same way as Article 91 Additional Protocol I makes it clear that the state remains responsible for the actions of its armed forces.

[28] Chapter 1 (see section 1.3).

[29] J Cockayne 'Regulating Private Military and Security Companies: The Content, Negotiation, Weakness and Promise of the Montreux Document' (2008) *Journal of Conflict & Security Law* 401 at 427- 28; J Cockayne, E S Mears, I Cherneva, A Gurin, S Oviedo & D Yaeger, 'A Feasibility Study for a Standards Implementation and Enforcement Framework for the Global Security Industry' 2008 available at www.ipinst.org/GSI [accessed on 11November 2013].

domestication at national level. In this regard, the aspirations of the treaty could easily be incorporated into national laws and immediately enhance the regulation of PMSCs at this level even before the treaty has been widely adopted. Furthermore, since it may take time to draft, negotiate and get states to become parties to an international convention, it is prudent to consider other alternatives, both at domestic and international level, that could extend or reinforce the norms one hopes to realise through a treaty.

Although a treaty may be better placed to redefine the criteria for combatancy and the rights and obligations of PMSCs, states through their domestic provisions have more effective means of sanctioning PMSCs for violating these obligations. The aspirations of such a treaty could inform and serve as the baseline for domestic standards, providing a ground for harmonisation and avoiding a situation in which PMSCs drift towards states with the lowest regulatory framework. Practically, national approaches could consist of licensing and oversight mechanisms that align PMSC services with standards elaborated herein. Examples of such approaches are evident in South Africa and the USA. As mentioned earlier, South Africa enacted the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006[30] to replace the Foreign Military Assistance Act of 1999, and address gaps in relation to the activities mercenaries and PMSCs working out of the country.[31] Under this statute, firms apply to the National Conventional Arms Control Committee to provide military services and authorization may be denied for various reasons.[32] Similarly, the US Arms Export Control Act of 1968[33] and the International Traffic of Arms Regulations (ITAR),[34] regulates the contractor services as part of arms export transfers that require licensing. Companies offering military services to foreign entities must obtain a license from the state department.[35]

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[30] Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict (PMAA) Act No 27 of 2006.
[31] S Gumedze op cit note 93 at 16.
[32] According to section 7 of the PMAA such permission may be denied where the services conflict with international law, result in human rights violations, destabilize the region, support terrorism, affect South Africa's interests or be 'unacceptable for any other reason'. The legislation may be applied extraterritorially[32] and infringement may result in a fine or imprisonment.
[33] International Traffic Arms Regulations 22 CFR §120(8) (2004).
[34] Ibid.
[35] Failure to do so is a punishable offence. In addition, the US Congress must be notified where the military services exceeds $50 million.

Similar mechanisms could be used at the national level employing licensing would distinguish between the treatment of PMSCs providing direct/indirect military services and that of those providing non-combatant services, so that the former comply with international humanitarian law. This process could also be used to ensure that superiors in these firms are held accountable to the same extent as military commanders.

In addition, pending upon the adoption of a treaty, voluntary international regulatory instruments could expedite the core of what is proposed and furthermore, present an opportunity to provide legal certainty on a range of issues pertaining to PMSCs, including non-humanitarian law concerns.[36] Such concerns could form an international accreditation process that establishes a code of conduct around the core elements that form this proposal, where firms could be vetted and licensed under an international authority possibly established by states and other key stakeholders. It would also be necessary to develop effective monitoring systems to vet registered companies for compliance as well as follow up on the activities of companies. Such a system would require support from the industry itself since its core element relies on market-based mechanisms that penalise PMSCs that would violate the norms established therein.

7.4 CASE FOR FURTHER RESEARCH

This study has highlighted anomalies that arise between the present legal classification of PMSCs and the reality of their activities. Consequently it has made a case for altering the present elements determining combatancy in order to better accommodate PMSCs in conflict areas. the research does not claim to have exhaustively covered the questions pertaining to PMSCs, recognising that these actors raise myriad concerns which cannot be covered in a single study. What is more, it is recognised that a proposal to extend combatant status to PMSC personnel is likely to generate further inquiry on what this might outside the strict boundaries of international humanitarian law, that is, within the scope of *jus in bello*. For these reasons, this study would not be complete without outlining there areas where further research would be beneficial.

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[36] Such as labour exploitation, trafficking of persons, circumventing of international sanctions etc.

The study needs to be distinguished from concerns beyond the boundaries of war (*jus in bello)*. As observed previously, concerns will continue to persist in the realm of *jus ad bellum* regarding how to infuse ethical values that prevail in military schools to private entities providing military services for commercial interest. In particular the nature of the link between a PMSC employee contractor hired by a state or non-state party, will sharply contrast with that of the soldier and the state that he serves. Individual contractors remain interchangeable personnel with other individuals since contractually it is the company that remains obligated to provide the services. The employee's contractual obligation is to the company and they could terminate his contract without attracting adverse legal consequences from state or non-state clients who remain third parties to this primary relationship.[37] In contrast, a soldier is bound to his country and could suffer severe consequences for desertion, including charges of treason.[38] In this regard it may be helpful to explore how to avoid weakening the ethical standards of military duty where military services are fulfilled under a contract. This study does not address such questions and there is scope to pursue further research around how such ethical differences can be harmonised.

Furthermore, this study has only been concerned with the activities of PMSCs within the boundaries of armed conflict and the ways in which the borders of the civilian/ combatant dichotomy could be re-designed in order to foster their compliance with humanitarian law. What is excluded from the picture are concerns accompanying the provision of coercive or lethal services by PMSCs in situations outside armed conflicts, such as internal disturbances and tensions occurring within a state. In such situations, private contractors may be used by state authorities against their own citizens, for example, to quell demonstrations, and in so doing, they could commit gross violations of human rights.[39] Such questions do not fall within the purview of humanitarian law, but instead remain subject to human rights law and the relevant domestic regime. It is precisely in these circumstances that PMSCs may exploit similar shortcomings in the legal frameworks in their identity, where it is unclear if

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[37] A Alexandra, D P Baker, M Caparini *Private Military and Security Companies: Ethics, Policies and Civil-Military Relations* (2008) 255.
[38] Ibid.
[39] Chapter One (see section 1.2).

they ought to be treated as organs of the state, bound by human rights obligations, or simply private individuals.[40]

Moreover, this study may form the basis an investigation on how to expand the coverage of international humanitarian law to new waves of non-state actors involved in conflict such as guerrilla movements, insurgencies, etc. The research has confined itself to PMSCs on account of their propensity to intrude into the realm of direct participation in hostilities while generally being considered to be civilians. This problem is not unique to contractors and is mirrored by a range of non-state actors. The thrust of this proposal seeks to separate the treatment of PMSCs under humanitarian law from the condemnation they may attract on the basis of *jus ad bellum.* In so doing it invites them into the framework of the law as was done with guerrillas during the 1970s in the hope that their inclusion would translate to a higher adherence to humanitarian norms. A similar case could cautiously be advanced in respect of other non-actors to distinguish them from those that are better left unrecognised.

Finally, the provisions of humanitarian law focus on the status of individuals and not on collective entities like companies. Thus the determination of combatancy rests upon the individual personnel of PMSCs and not the corporation. Likewise, the rights and responsibilities arising out the status determination will attach to the individual, and not the corporate entity itself.[41] It may be worthwhile to explore the direct responsibility of corporations for breaches of international law and, in particular, humanitarian law. While international law has developed to the extent that it recognises individuals as subjects of international law that bear responsibilities for international crimes such as genocide, crimes against humanity and war crimes, corporations have yet to be regarded as international personalities that bear responsibilities for violations of humanitarian law.[42] Proposals to broaden the responsibility of the superiors of these companies, and the concomitant responsibility

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[40] Depending upon private actors to perform functions originally reserved for state instruments can be accommodated in order to enhance the accountability and conduct of private contractors operating in such contexts.

[41] This notwithstanding, it has still been important to look at the company as a whole, since its functions and contracts inevitably determine the behaviour and activities of its individual employees.

of states, in respect of violations that may be committed by the individual contractors, would be further enriched by scrutinizing how the companies themselves could be made directly responsible for violations committed by their employees.

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