

Private Security and Military Companies under the International Law of Armed Conflict

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1 Introduction

The increasing involvement of private security and military companies in scenarios of international and non-international armed conflict requires an accurate determination of their status under international humanitarian law. Every employee of such a company who is deployed to an environment of armed conflict is extremely vulnerable to becoming a victim of belligerent action. Moreover, as far as they are authorized to carry arms or to work as contractors alongside the armed forces of a party to the conflict, they run a high risk of violating the law of armed conflict themselves.

Accordingly, the two main sections of this article deal with the status of military contractors and other security forces under the two separate legal regimes of international and non-international armed conflict, respectively. With regard to the actors concerned, the article focuses primarily on the employees of private security and military companies who are employed as contractors by a state party to an armed conflict to support the armed forces during the conduct of military operations. Most companies in the private military sector specialize in providing logistic support services, including supply, transportation, communication, maintenance, and housing. Beyond this, the spectrum of potential tasks also comprises training and consulting, protective operations to shield certain objects and persons, as well as direct combat support (Holmqvist 2005: 3; Kümmel 2005: 142; Singer 2003a: 88). Furthermore, the article will also touch upon settings in which international and non-governmental organizations, transnational corporations, and other private persons engage security firms to provide for their safety while pursuing business in instable and insecure surroundings. It will be demonstrated that the existing norms of international humanitarian law, as embodied in the Geneva Conventions and their Protocols as well as enshrined in international customary law, provide an appropriate foundation to define precisely the rights and obligations of private security and military forces operating within scenarios of armed conflict.

2 Contractors in International Armed Conflict

International armed conflicts are governed in detail by the Hague Regulations concerning the Laws and Customs of War on Land as annexed to the Fourth Hague Convention of 1907, the four Geneva Conventions of 1949 (GC I–IV), the First Additional Protocol to the Geneva Conventions of 1977 (AP I), and an extensive body of customary international humanitarian law. One of the basic principles enshrined in these norms is the distinction between combatants and civilians (Henckaerts 2005: 3). This distinction serves as a starting point to determine the rights and obligations of contractors in a specific situation of international armed conflict.

2.1 *The Primary Status of Contractors under the Law of International Armed Conflict*

Only combatants have the right to participate directly in hostilities. This general principle of international humanitarian law is expressly reflected by Art. 43(2) AP I. Moreover, combatants who have fallen into the power of the enemy are to be treated as prisoners of war according to Art. 4 GC III and thus are entitled to specific protection under this convention.

2.1.1 Legal Basis

Any combatant must be subordinate and responsible to a party to the conflict which itself has to be a subject with legal personality under international law. (Ipsen 1994: 57; Preux 1987: 517). Art. 43(2) AP I specifies that all members of the armed forces, other than medical personnel and chaplains, are combatants. Pursuant to paragraph 1 of this provision, the armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by an adverse party. Further on, according to this paragraph, such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the law of armed conflict. This all-inclusive definition of armed forces is complemented by Art. 4A GC III which also subsumes members of integrated militias or volunteer corps under the notion of armed forces for the purpose of granting prisoner-of-war status to these persons. According to paragraph 2, even members of other militias and volunteer corps, including those of organized resistance movements, belonging to a party to the conflict are entitled to prisoner-of-war status and, therefore, are recognized as combatants, provided that such persons are being commanded by a responsible authority, wear a fixed distinctive sign, carry

their arms openly, and conduct their operations in accordance with the laws and customs of war.

According to Art. 50(1) AP I, reflecting a general principle of international humanitarian law, any person who is not a combatant according to these provisions must be considered a civilian, even in case of doubt. Civilians are especially protected by GC IV and AP I, but they are usually not entitled to prisoner-of-war status under GC III.

2.1.2 Military-Contractor Relationship

The decisive criterion to determine the status of a contractor in international armed conflict is his formal legal relationship with the armed forces (Schaller 2006: 52). Each state decides independently on the organization of the internal structure and composition of its armed forces. This also includes setting the conditions under which individual persons shall be integrated into this structure. In most cases soldiers are formally recruited, subordinated under military discipline, command and control, and vested with combatant status by a sovereign act of jurisdiction. In the same way, a civilian may become a member of the armed forces and a combatant by official incorporation on an ad hoc basis until he is permanently demobilized by the responsible command (Preux 1987: 515).

However, the dramatic post-Cold War reduction in the numbers of military personnel coinciding with increasing deployments of military forces, especially in the context of international peace operations, has driven governments to outsource and privatize tasks that were traditionally performed by soldiers. Instead of permanently developing additional military capacities many modern armies prefer outsourcing and privatizing certain functions since this seems to be a more flexible and cost-effective approach in order to adapt to the changing conditions of today's military operations as well as to the increasing technical complexity of advanced weaponry (Guillory 2001: 11). The employees of private companies who perform military support functions on the basis of a commercial contractual agreement concluded with the competent military authorities are not subject to any recruitment procedure or formal subordination under military service. Usually such agreements do not convey any sovereign rights and obligations to the contractor. In any case, a mere commercial contract is not a sufficient instrument to confer combatant status upon a person (Ipsen 1994: 59). Accordingly, the US Armed Forces doctrine routinely excludes contractors from the military command and control structure. For example, it is explicitly stated in a US Army Manual that "[m]anagement of contractor activities is accomplished through the responsible contracting organization, not the chain of command.

Commanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees); only contractors manage, supervise, and give directions to their employees. Commanders must manage contractors through the contracting officer.” (US Headquarters, Department of the Army 2003: sec. 1–22)

However, the exclusion from military command and control does not mean that force commanders are deprived of any influence on the contractor’s performance in the field. Most agreements provide for an accelerated procedure and a specific line of communication between force commanders, special liaison officers and the contractor’s management which has the primary authority to instruct and supervise its employees on site. In the case of a violation of the contractual obligations by an individual employee the force commander may, through these channels, request the contractor to withdraw and replace this person or to react in any other way in order to sanction and correct individual misconduct (US Headquarters, Department of the Army 2003: sec. 4–47). Moreover, if contractors are entrusted with military essential functions, for example with supporting the troops in a specific combat situation, it has to be assumed that the respective contract provides commanders with the authority to exercise a more immediate influence on contractor performance during the operation.

2.1.3 Civilians Accompanying the Armed Forces

In order to clarify the civilian status of their contractors, the US Armed Forces routinely provide most of them with individual identification cards. These cards document a special authorization for civilians to accompany the armed forces without actually being members thereof.¹ According to Art. 4A(4) GC III persons with such an authorization are to be treated as prisoners of war, although they are civilians. This status was already created by Art. 13 of the Hague Regulations in 1907.

An express and unambiguous declaration by the armed forces clarifying that a contractor is not entitled to combatant status, but only authorized to accompany the troops as a civilian, leaves no room for any deviating reinterpretation of this status. This even applies if the person concerned is in fact taking active part in hostilities. The primary status of a person under the law of international armed conflict is not in any way affected by the person’s factual conduct. Although civilians have no right to participate directly in hostilities they do not lose their status if they violate this prohibition (Gasser 1994: 169). However, this does not mean that their conduct remains unsanctioned. As long as they take active part in combat they are temporarily excluded from any specific protection afforded to other civilians as expressly

¹ The formal requirements for an Identity Card are displayed in Annex IV(A) to GC III.

recognized by Art. 51(3) AP I. In this situation they may become the target of armed countermeasures conducted by enemy forces in accordance with the laws and customs of war (Turner/Norton 2001). Moreover, such an unlawful participation in hostilities by civilians may be subject to national criminal prosecution. Therefore, it has to be clearly expressed that every state sending persons into combat without granting them combatant status does not only undermine the fundamental principles of international humanitarian law, but also deliberately exposes these persons to a particularly dangerous situation.

2.2 *Legal Protection of Contractors*

Civilian contractors enjoy the full range of protective rights under GC IV, AP I, and customary international humanitarian law. Moreover, if they are authorized to accompany the armed forces they are automatically entitled to prisoner-of-war status according to GC III.

2.2.1 Protection as Civilians

The norms referred to above strictly prohibit attacks and reprisals against civilians as long as they do not take part directly in hostilities. Indiscriminate attacks, which are of a nature to strike military objectives and civilians or civilian objects without distinction, are especially prohibited. The principle of discrimination between civilians and combatants as enshrined in Art. 48 AP I is one of the fundamental pillars of the humanitarian law of international armed conflict (Henckaerts 2005: 3) Yet, because of their physical and functional proximity to the armed forces contractors bear a much higher personal risk than other civilians. They always are in peril to become the victim of an armed attack whether collaterally affected or deliberately targeted by enemy forces. This is all the more the case when contractors support combat units, accompany military convoys, or are deployed within the surroundings of sensitive installations. Where there is no clear frontline between the warring parties, even logistic providers who operate within some distance to the theater of combat are exposed to such dangers if the enemy forces aim to cut support lines.

The fact that civilians work side by side with military personnel or within military facilities does not prevent enemy forces from targeting these objectives as long as the attack is not expected to cause incidental loss of civilian life or injury to civilians that would be excessive in relation to the concrete and direct military advantage anticipated. This principle of proportionality, as codified in Art. 51(5b) and repeated by Art. 57 AP I, is established as a norm of customary international law (Henckaerts 2005: 46). It obliges the adversaries to take all feasible precautions to avoid, and in any event to minimize,

incidental loss of civilian life, injury to civilians and damage to civilian objects. On the other hand, the parties shall not direct the movement of civilians in order to attempt to shield military operations or military objectives from attacks. Instead, each party must take all feasible precautions to protect civilians under their control against the effects of attacks. To this extent it must also remove civilians from the vicinity of military objectives (Art. 58 AP I). If this is not possible, as in the case of contractors performing military essential tasks, force protection measures have to be extended accordingly to mitigate hostile actions against such personnel.²

2.2.2 Secondary Legal Status upon Capture

Art. 4(A)(4) GC III encompasses all persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, supply contractors, or members of other services responsible for the welfare of the troops, provided that they have received authorization from the armed forces which they accompany. The enumeration as contained in this over 50-year-old provision is certainly not exhaustive and may, therefore, be easily construed in a dynamic way in order to cover the wide spectrum of modern private military services performed by civilians accompanying the armed forces. Contractors who have received such authorization shall be provided with an identity card. This card does not itself create the legal status, but merely serves as a means to prove this status. The legal conditions under which such authorization is granted are set forth by each state independently. Should any doubt arise as to the status of an individual contractor, he is presumed to be a prisoner of war until his status has been determined by a competent tribunal pursuant to Art. 5(2) GC III and Art. 45(1) AP I.

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. Measures of reprisals against prisoners of war are prohibited. These and other basic guarantees are provided for by Art. 13 et seq. GC III. After the cessation of active hostilities prisoners of war shall be released and repatriated without delay. In accordance with the provisions set forth in GC III the detaining power has the right to take judicial or disciplinary measures in respect of an offense committed by a prisoner of war. This situation may arise if a contractor is under suspicion of having actively taken part in hostilities. However, even criminal proceedings based on an accusation con-

2 US 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 (US Headquarters, Department of the Army 2003: sec. 6–3).

cerning the commission of war crimes neither affect the suspect's primary legal status as a civilian nor his secondary status as a prisoner of war.

Other contractors who are not authorized to accompany the armed forces and who are, accordingly, not entitled to prisoner-of-war status, instead, enjoy comprehensive protection by GC IV and AP I in situations of internment or imprisonment during an international armed conflict (Articles 68ff., 79ff. GC IV; Articles 72ff. AP I). In any circumstance they shall be treated humanely and in accordance with the fundamental guarantees of international humanitarian law as codified in Art. 75 AP I (Doswald-Beck 2005: 299).³

2.3 *Operational Responsibilities and Restrictions*

Due to their civilian status under the law of international armed conflict contractors are subject to many operational constraints when supporting the armed forces on the battlefield. In any case, the rights and obligations emanating from this status must not be jeopardized and violated by the ways in which contractors provide their service. The responsibility for assuring that security and military contractors act in conformity with this status does not only rest with the employing state, its armed forces and other organs, but also with the companies themselves as well as with each individual employee.

2.3.1 *Combat Support and the Prohibition of Direct Participation in Hostilities*

As already mentioned above, civilian contractors have no right to participate directly in hostilities. However, the meaning and scope of the notion of direct participation in hostilities has not yet been settled under the law of armed conflict (Turner/Norton 2001). Solely Art. 49(1) AP I which presents a definition of the term 'attacks' leads to the assumption that even an act of violence against the adversary which is defensive in nature may constitute a direct participation in hostilities. In the absence of a legal definition it is even more important to develop a coherent practice of interpretation on a case-by-case basis. One of the most clear-cut-cases is the active use of conventional arms and weapons in order to cause actual harm to the personnel and equipment of the enemy armed forces. Admittedly, only a very small number of companies on the open market seem to offer services performed by private military units which are especially trained and equipped for conducting conventional combat operations (O'Brien 2000a: 43; Musah 2000: 76).

3 Article 45(3) AP I even extends these fundamental guarantees to persons who have taken part in hostilities.

However, it has to be assumed that the prohibition does not only cover any form of traditional combat action, but also extends to more advanced means and methods of modern warfare such as the use of high-tech weaponry. The abstract wording of many provisions within the Geneva Conventions provides an opportunity for dynamic interpretation in order to adapt these norms to the challenges of modern-day armed conflicts. One of these challenges is the rapid advancement of arms and weapons technology as, for example, displayed by the operation of the Predator Unmanned Aerial Vehicle of the US Air Force. Many such weapon systems are supported by contractors across the range of military operations, including maintenance, training, and real-world operations. Buying-in external know-how in the high-tech sector has more and more become an inevitable option not only for smaller and less advanced armies, but also for the major military powers to ensure the operability of their weaponry over a long-term period (Boldt 2004: 506).⁴ Another critical example is the conduct of offensive information operations. The programming of a computer network attack against public supply systems or a nuclear facility which causes fatal consequences may even be considered an armed attack in the sense of Art. 51 UN Charter triggering a state's right to self-defense (Dinstein 2001: 166). Thus, there is some reason to argue that such an operation also constitutes a direct participation in hostilities.

Against the backdrop of these developments the question arises where to draw the line between direct participation in hostilities and actions short of this prohibition. To mark this line becomes especially difficult if civilian contractors work hand in hand with military personnel. The US Army, for example, fosters habitual relationships between military units and contractors. This type of relationship "establishes a comrade-at-arms kinship, which fosters a cooperative, harmonious work environment and builds confidence in each other's ability to perform" (US Headquarters, Department of the Army 2003: sec. 1-35). The more complex the division of labor appears to be in connection with the operation of high-tech weapons, the more difficult it is to separate and attribute individual acts (Schaller 2006: 57).

In order to avert the expansion of a grey area it seems necessary to construe the notion of 'direct participation' in a broader sense. The International Committee of the Red Cross supported an interpretation according to which this concept covers "acts of war which are intended by their nature or their

4 According to the practice of the US Army, system contractors may also deploy with the force to both training and real-world operations. "The relationship between the Army and some weapon-system contractors may be long-term and continuous. Accordingly, the Army may not be able to deploy these weapon systems without also deploying the supporting contractors." (US Headquarters, Department of the Army 2003: sec. 1-10, 1-36).

purpose to hit specifically the personnel and the ‘matériel’ of the armed forces of the adverse Party” (Preux 1987: 516). Accordingly, any person who participates in the use of a weapon or a weapon system in an indispensable function would commit a violation of this prohibition (Ipsen 1994: 57). What functions are indispensable has to be determined in each case with regard to the technical requirements of the specific system. In any case, military commanders ought to proceed with utmost care when deploying civilian contractors with a nexus to active combat. Any indispensable function has to be performed by a person entitled to combatant status. Should, however, an exigency arise for the military to make use of external expertise in the field of combat operations, it still has the option to formally integrate the relevant persons into the force structure and to vest them explicitly with combatant status. On the other hand, it is understood that not every civilian support of the war effort falls under the prohibition of direct participation. Thus, large parts of the service spectrum offered by private security and military companies, such as logistics and consultancy, are not forbidden under the law of armed conflict. Still, there are other areas of the spectrum which also might raise some legal concerns.

2.3.2 Protective Tasks and Issues of Self-Defense

One of the key branches of business in the private security and military sector concentrates on risk assessment and the physical protection of public and corporate entities in zones of conflict. For example, when operating in an insecure and instable environment, transnational corporations frequently seek for private services to provide for the safety and security of their personnel, facilities and installations. In the same way, international governmental and nongovernmental organizations as well as diplomatic missions increasingly rely on professional protection. Again, Iraq is the most prominent example to study in this context (Isenberg 2004). Even the armed forces in some instances might draw on contractors for physical protection of their installations. In any circumstance civilian security guards run a high risk of becoming involved in active combat when being attacked by enemy forces or armed bands. This is particularly true if the protected object is located close to the theater of combat or if its destruction or neutralization offers a military advantage.

Although the use of force for protective purposes is generally defensive in nature it may nonetheless be legally interpreted as a direct participation in hostilities, especially if the measure is not directed against a criminal non-state actor, but against a member of the enemy forces of a state party to the conflict. As pointed out above, pursuant to Art. 49(1) AP I even defensive violent acts against an adversary constitute an attack within the meaning of

this Protocol. Nevertheless, the defensive use of force may well be justified by the individual right of self-defense as enshrined in criminal law. According to this conception every individual person has the right to defend himself or herself or another person against an actual or imminent and unlawful use of force in a manner proportionate to the degree of danger. This right is not only rooted in most national criminal law systems, but also in international criminal law (Werle 2003: 122).⁵ Its application leads to the exclusion of individual criminal responsibility.

Therefore, it is decisive to determine what kind of force during an armed conflict is to be considered unlawful in order to trigger the individual right of self-defense. In situations of international armed conflict this question can again only be answered by international humanitarian law. These norms contain the sole reference for assessing the legality of an act of warfare, especially with regard to its duration, means and methods, and possible targets. In this context it is very important to note that the legality of such an act of warfare within an international armed conflict has to be judged irrespectively of the legality of the overall use of force itself, i.e. the decision of the relevant state to go to war. The humanitarian *ius in bello* which must be separated strictly from the mistakably so-called *ius ad bellum* has to be respected by any party to the conflict notwithstanding the fact that one of the parties might have violated the prohibition on the use of force under Art. 2(4) of the UN Charter. Likewise, the individual right of self-defense under criminal law is to be distinguished accurately from the right of a state to defend itself against an armed attack under international customary law and Art. 51 of the UN Charter.⁶ Because the humanitarian law of international armed conflict prohibits any attack against the civilian population, individual civilians, and civilian objects, such an attack would trigger the individual right of self-defense. This implicates that the use of physical force by private security guards in order to protect a civilian or a civilian object against an attack, whether it is conducted by state forces or armed bands, may generally be justified on the basis of the right of individual self-defense with regard to criminal prosecution.

However, a different legal assessment is valid if civilian contractors are assigned by the armed forces of a state to protect military objectives. Pursuant to Art. 52(2) AP I military objectives are defined as “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in

5 The concept of individual self-defense is also enshrined in Art. 31 § 1c of the Rome Statute of the International Criminal Court.

6 This distinction is also implicitly recognized by Art.31 § 1c, second sentence, of the Rome Statute.

the circumstances ruling at the time, offers a definite military advantage". To distinguish between military targets and civilian objects can become very difficult in the reality of conflict (Oeter 1994: 132). Objects which are normally used for civilian purposes during peacetime, such as industrial facilities and public transportation lines, in times of war may all of a sudden be occupied and utilized exclusively by the military and thus become military objectives.

Since the parties of an international armed conflict are allowed to attack military objectives in accordance with the laws and customs of war such an attack does not constitute a case of self-defense from the perspective of civilian security forces who are under a clear and strict obligation not to participate in these hostilities. This evaluation is buttressed by the parties' complementary obligation to remove civilians under their control to the extent feasible from the vicinity of military objectives. If civilian contractors operate within the surroundings of military facilities and if they actively intervene in the course of hostilities in order to defend these facilities they are not in a position to invoke an individual right of self-defense for justification against criminal charges.

2.3.3 Quasi Law Enforcement and Humanitarian Obligations

The assignment by a state of key security and law enforcement tasks to a private company always raises manifold legal questions. If the contractors are solely deployed on the territory of the state which has ordered these services, normally no further specific problems under international humanitarian law will arise. Rather the focus will be directed towards the constitutional and administrative legal order of the state itself in order to determine the legality of such a delegation of powers from a domestic perspective. If, however, the state undertakes to exercise control over the territory of the enemy state, then the situation is governed by the law of occupation as codified in section III of the Hague Regulations concerning the Laws and Customs of War on Land, and in GC IV. According to Art. 43 of the Hague Regulations the occupant shall take all the measures in his power to restore, and ensure, as far as possible, public order and life. This provision in connection with the relevant norms of GC IV may also serve as a legal basis for the occupying power to employ local or foreign contractors in order to be able to fulfill its obligations under the law of occupation.

Within such a scenario particular concerns arise if specific executive powers are delegated to private contractors. This may, *inter alia*, include the proactive monitoring of public space, traffic checks, the investigation of criminal acts, and the administration of prisons. All these functions inherently hold a certain risk of infringing upon the human rights of individual persons.

Moreover, the conduct of private contractors may not always be subject to a clear and transparent chain of command, control, and attribution. A blatant example for such a lack of responsibility is the incident at the Abu Ghraib military prison facility in Iraq involving private interrogators in the mistreatment and torture of Iraqi prisoners. Beyond this extreme case, less obvious violations of humanitarian law and human rights may also occur in the day-to-day fight against insurgents, suspected terrorists and criminals, especially in post-conflict scenarios.

Although an occupying power has the responsibility to maintain law and order within the occupied territory, if necessary, by repealing and suspending existing domestic penal laws and by imposing new laws on a temporary basis, it is not entitled to bypass the binding norms of international humanitarian law and a core set of fundamental human rights guarantees. The occupant may not circumvent these guarantees by way of outsourcing key executive functions to private proxies who are not liable to the same standards of command and control as state organs. Contractor personnel who are operating on behalf of a party to an international armed conflict are bound by international humanitarian law to the same extent as any member of the armed forces.

The humanitarian law of international armed conflict differs from the vast majority of international norms, inasmuch as it is specifically designed not only to regulate the behavior of the state parties, but also to provide individuals with certain rights and obligations (Greenwood 1994: 29; Wolfrum 1994: 440). In contrast, most other norms of international law traditionally have a binding effect on states only. The rationale behind this concept is that any armed conflict has extremely negative implications especially for the civilian population. An effective enforcement of humanitarian principles cannot be guaranteed by solely obliging states to apply these principles. Instead, humanitarian law must directly address each individual combatant and civilian alike by defining the person's legal status in the most clear and unequivocal manner. Hence, even in cases not covered by the Geneva Conventions both categories of persons are equally bound to respect the principles of international humanitarian law derived from established custom, from the principles of humanity, and from dictates of public conscience.⁷ Moreover, according to the Geneva Conventions each state is under an obligation to prosecute or extradite persons alleged to have committed grave breaches of humanitarian law regardless of their nationality. In the same way serious violations of fundamental human rights standards are directly sanctioned by

7 See Art. 1(2) AP I reflecting the Marten's Clause as contained in the preamble of the Fourth Hague Convention.

international criminal law in the cases of genocide, crimes against humanity, and war crimes.

3 Contractors in Non-International Armed Conflict

The only norm within the Geneva Conventions which applies directly to cases of non-international armed conflict is common Art. 3 GC I–IV containing minimum standards for the protection of victims. These standards are further developed and supplemented by the Second Additional Protocol to the Geneva Conventions of 1977 (AP II). Moreover, conflicts of a non-international character are covered by a growing body of customary principles. According to an extensive analysis sponsored by the International Committee of the Red Cross determining the current state of customary international humanitarian law, most of the fundamental protective guarantees afforded to civilians in international armed conflict have come to be applied also to non-international armed conflicts (Henckaerts/Doswald-Beck 2005).

3.1 General Issues

According to the general principles enshrined in common Art. 3 GC I–IV, and Articles 4 and 13 AP II all persons, as long as they do not take a direct part in hostilities, must be treated humanely and shall enjoy protection against military attacks and other acts or threats of violence. Thus, the armed forces of the state as well as any non-state party to the conflict have the obligation at all times to distinguish between persons involved and persons not involved in combat. Indiscriminate attacks on civilians are strictly prohibited by the law of non-international armed conflict.

It is important to note that this body of law does not recognize combatant status and that it does not provide members of a non-state party with the right to participate directly in hostilities. Instead, the legal status of non-state actors taking part in violent action is determined by domestic law. Usually the state concerned is going to sanction such conduct on its territory by means of criminal prosecution, irrespective of the person's nationality. From this assertion it follows that private security and military companies are entitled to contribute to the maintenance of public security and order only on the basis of a sovereign authorization by the state on whose territory the conflict is fought. The legality of such an authorization is not prescribed by international law, but exclusively by the constitutional and administrative legal order of the state concerned. As it is understood that the privatization of certain law enforcement functions might have some negative implications on the state's monopoly on the use of physical force, this problem is not an issue

under international law. Apart from this, private security guards may also be employed by civilians, corporate entities or humanitarian personnel for protection against non-state violent attacks and raids in situations of non-international armed conflict, insofar as any use of force in self-defense has to comply with the same legal requirements as stated above in the context of international conflicts.

Since the law of non-international armed conflict does not recognize combatant status, it consequently does not grant prisoner-of-war status. Persons who are deprived of their liberty by a party to the conflict enjoy, as a minimum standard, the guarantees set forth by the provisions quoted above with regard to humane treatment. In addition, the state itself is bound by a core set of the most fundamental human rights which may not even be suspended in times of war. As in situations of interstate conflict, these norms cannot be bypassed just by outsourcing certain enforcement tasks to private security and military companies.

3.2 Some Issues of Responsibility in Cases of External Military Intervention

Much more critical are cases of military intervention in which one state transfers troops and civilian contractors into the territory of another state in order to settle a non-international conflict, whether invoking a Security Council mandate or on the basis of an express invitation of the host state. The case of Iraq gives an account of how difficult it is to exactly identify the character of a dynamic conflict which is changing from an interstate war into a non-international conflict. Moreover, it highlights the complexity of any attempt to hold accountable foreign contractors signed by coalition states to support their troops. This is particularly true if such persons violate international humanitarian law or commit offenses under domestic law.

According to an order of the Coalition Provisional Authority in Iraq, which is still in force even after the transfer of power, foreign contractors “shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract”.⁸ This order shifts the responsibility for prosecution of criminal offenses from the Iraqi authorities towards the sending states. Yet, so far no judicial proceedings against civilian contractors involved in the Abu Ghraib incident have been successfully completed in the United States. In order to explain this deficit, one

8 Coalition Provisional Authority, Order No. 17 (Revised): Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, 27 June 2004, sec. 4(3); Order No. 100: Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority, 28 June 2004, sec. 3(8).

might draw on some legal uncertainties with regard to the applicability of US criminal laws in cases of crimes committed by contractors outside US territory. Nevertheless, Iraq as a state party to the four Geneva Conventions is as much as any other state under an international legal obligation to prosecute persons suspected of having committed grave breaches of the Geneva Conventions during an international armed conflict. Therefore, at least war crimes which have been committed by foreign contractors during the war against Iraq in 2003 are not covered by any immunity orders of the Coalition Provisional Authority, irrespective of the nationality of the perpetrator.

4 Conclusion

The arguments set forth in the preceding discussion warrant the conclusion that the involvement of private security and military companies and their employees in international and non-international armed conflicts is fully covered by the existing norms of international humanitarian law. At least with respect to these norms private security and military companies do not operate within a legal vacuum or grey area (Schaller 2006). Instead, another critical issue which cannot be dealt with in this article pertains to the adequacy of national laws as well as to the ability and willingness of the competent institutions to implement these standards of international humanitarian law effectively at the domestic level. Since the Geneva Conventions do not provide for an international mechanism to enforce their implementation the primary responsibility rests with every single state (Beyani/Lilly 2001; Holmqvist 2005; Schaller 2005).

The fact that the vast majority of persons deployed by security and military companies to zones of armed conflict neither fall under the narrow and ineffective definition of mercenaries as contained in Art. 47 AP I nor under the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989 does not have any negative implications with respect to determining the international legal status of these persons.⁹ In international armed conflict an accurate distinction between combatants and civilians is decisive. Within this conception mercenaries who engage in combat have to be simply considered as a sub-category of civilians illegally taking a direct part in hostilities. Hence, Art. 47 AP I merely constitutes a declaratory affirmation of the general principle according to which persons only have a right to participate directly in hostilities if they are formally subordinated to the overall authority of a state party to the conflict and if they are officially entitled to combatant status. A simple commercial contract is not

9 On the shortcomings of both instruments see Boldt 2004: 532; Schaller 2005: 9, 17.

enough to warrant such a formal subordination. In situations of non-international armed conflict any person taking a direct part in hostilities without being authorized by the state concerned does not enjoy the protection afforded to civilians and, furthermore, is subject to domestic criminal prosecution.

Admittedly, the more closely civilian contractors are affiliated with the armed forces in situations of combat, the higher is the risk for these persons of factually losing the protection afforded to civilians by international humanitarian law. One of the greatest challenges with regard to applying the existing norms of international armed conflict to contractors is brought about by the rapid advancement of modern arms and weapons technology which makes it particularly difficult to determine the individual role of each person against the backdrop of the prohibition of direct participation in hostilities. In the light of these challenges the Geneva Conventions have to be interpreted in a pragmatic and dynamic way in order to further keep them an authoritative legal tool to regulate the conduct and mitigate the impact of modern armed conflicts.