

**PRIVATE SECURITY COMPANIES
IN THE OCCUPIED PALESTINIAN
TERRITORY (OPT): AN
INTERNATIONAL
HUMANITARIAN LAW
PERSPECTIVE**

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Introduction

Recent incidents involving private security companies¹ (PSCs) in Iraq have raised questions among governments and international agencies regarding the appropriate legal framework to regulate these organizations as well as to determine both company and employer liability under international humanitarian law (IHL).² While the use of PSCs in the Occupied Palestinian Territory (OPT) has remained more limited than in Iraq,³ the growing presence of PSCs, especially at military checkpoints and crossings, has raised concerns among humanitarian practitioners. The purpose of this policy brief is to assess current *uncertainties concerning the legal status of PSCs* as they relate to the work of humanitarian agencies, the integrity of military chain of command, and the protection of civilian populations.

A central issue lies in determining the extent to which PSC employees are to be considered agents of the Occupying Power and therefore no different, in legal terms, from any member of the Israeli Defense Forces (IDF), or whether they represent a new and separate legal entity whose behavior cannot be directly attributable to the Occupation Power under IHL.⁴ For example, what are the legal duties and responsibilities of PSC employees in terms of facilitating humanitarian workers' access to the occupied population? In the event that PSC employees are involved in military engagements in occupied territory, or if they detain, injure, or kill civilians, what accountability structure applies to their actions? In interviews with humanitarian practitioners in both the UN and the NGO communities, HPCR researchers found that these questions are beginning to trouble those responsible for the coordination and delivery of humanitarian assistance to the Palestinian population.

For some commentators and humanitarian professionals, the highly political nature of the situation in the OPT diminishes the value of a legal discussion on PSCs, especially given apparent disregard for and even gaps in the law. However, the importance of IHL in the OPT

¹ Following the logic presented in Caroline Holmqvist, "Private Security Companies: The Case for Regulation," SIPRI Policy Paper No. 9, January 2005, p. 5 (available at: http://editors.sipri.se/pubs/SIPRI_PolicyPaper9.pdf), this brief employs the term "private security companies" to refer to the full range of what are sometimes separately called "private security companies" and "private military companies," thus covering firms providing both "defensive" and "offensive" security services.

² Luc Reydams, *A la guerre comme à la guerre: patterns of armed conflict, humanitarian law responses and new challenges*, International Review of the Red Cross, volume 88 number 864, December 2006, at page 749. For factual detail on the involvement of PSC in Iraq, see: *New York Times*, *Enraged Mob in Fallujah Kills Four American Contractors*, March 31, 2004, available at: <http://www.nytimes.com> and BBC News, *Iraq to review all security firms*, September 18, 2007, available at: <http://news.bbc.co.uk>. Associated Press (AP), *A look at some of the incidents involving private contractors firing on Iraqi civilians*, September 17, 2007, available at: <http://www.iht.com>.

³ The State of Israel Ministry of Industry, Trade and Labor, Industrial Cooperation Authority, *Learning from Israel's Experience*, <http://israel-industry-trade.gov.il>.

⁴ The law of occupation is the IHL regime applicable to the OPT, although the extent of its applicability is disputed. While Israel is not a state party to the Hague Convention IV Respecting the Laws and Customs of War on Land 1907, it applies the Articles 42-56 of the Regulations annexed to that Convention as they are recognized as binding in customary international law. While Israeli scholars dispute the formal applicability of the Fourth Geneva Convention 1949 to the OPT, an unspecified set of "humanitarian provisions" from that Convention are applied. Israel is not a state party to Additional Protocol I to the Four Geneva Conventions of 1949 (API, 1977), but selected provisions of AP I are accepted as customary international law. There are further disputes involving the applicability of the law of occupation to the Gaza Strip following Israel's Disengagement in September 2005.

should not be underestimated, because it sets the vocabulary and planning framework within which military operations are devised, negotiated, and implemented. Moreover, military commanders receive legal advice and training from IHL specialists within their own legal departments, and their decisions may eventually be subject to review by a judicial body. Thus, it can be constructive for practitioners to engage in persuasive dialogue, grounded in IHL, with the higher echelons of the Israeli military, and in high-level interventions with the Ministries of Defense and Foreign Affairs. Such discourse becomes more difficult when an increasing range of activities traditionally carried out by the military is delegated to PSCs, as it becomes less clear which entities are factually and theoretically responsible for giving and carrying out the orders that impact the daily lives of humanitarian personnel and civilian populations. Perceived gaps in legal regulation of PSCs in situations of armed conflict and occupation present significant practical obstacles to humanitarian professionals as they negotiate for humanitarian access and civilian protection.

As with all policy briefs in this series, this paper focuses on providing humanitarian practitioners with a clear understanding of the legal framework available for protecting civilians in the context of the Israeli-Palestinian conflict, as well as the legal regime applicable to key players in the conflict. It highlights ongoing debates in the field of IHL without attempting to present definitive answers. HPCR's intent in releasing this paper is to raise awareness of the potential practical and legal challenges arising from increasing use of PSCs in the OPT and to engage humanitarian practitioners in debate over the implications of these challenges for civilian protection and humanitarian access. Ultimately, our aim is to strengthen the capacity of humanitarian professionals to utilize and negotiate with the law while developing strategies to enhance the protection of civilians.

Part I of this brief presents an overview of the extent of involvement of PSCs in the OPT. Part II employs the IHL framework to examine whether PSC employees meet the legal definition of combatants, civilians, or civilians taking a direct part in hostilities. Part III explores arguments for and against the idea that the law of occupation may impose obligations on an Occupying Power to control and account for the activities of PSCs to which military and/or security functions have been delegated. Part IV looks into structures of accountability for the acts of PSCs, both in international law and in non-binding international frameworks.

I. PSC Activities in the OPT

Allegations of the use of force by PSCs

News reports and dispatches from NGOs have drawn attention to several incidents in recent years involving the alleged use of force by PSCs against Palestinian civilians. The Israeli NGO B'Tselem has alleged that a private security guard was involved in the shooting of a 14-year-old boy from Bitunya, Ramallah, on February 15, 2005, and it has also reported other incidents in which individuals were killed by a "settlement security officer" or "security guards" at a bank and at the Separation Barrier.⁵ It is not known whether these security personnel were members of Israeli or foreign PSCs, individual contractors, or residents of the settlements (who have a right of self-defense under Israeli law).

In another case, the UN reported that a 15-year-old boy from Beit Liqya, Ramallah, was shot on July 8, 2005 while working in his family's field by a PSC employee guarding the Separation

⁵ B'Tselem, Casualties List, available at: http://www.btselem.org/english/Statistics/Casualties_Data.asp?Category=3.

Barrier.^{6,7} On May 21, 2007, media reports indicated that four security guards employed to guard the Separation Barrier shot at journalists near the West Bank settlement of Efrat.⁸ Less than a week later, on May 26, 2007, news outlets reported that two Israeli security guards and a Palestinian bystander were also shot and wounded in a gun battle between private security guards and several Palestinian gunmen near the village of Sheikh Said in East Jerusalem.⁹ On August 11, 2007, a man who grabbed a pistol from a private security guard in Jerusalem's Old City was allegedly shot and killed, and ten others were injured by shots fired in the chase that ensued.¹⁰

In some instances in which PSCs have been used to control demonstrations, further violence has ensued. In August 2006, *Le Monde Diplomatique* reported that 200 people were injured as a result of demonstrations in Bil'in, in which "[t]he army, border guards, police and private security firms were deployed against protesters, with clubs, teargas, rubber bullets and live fire."¹¹ According to its own website, the Beni Tal International Security company's services include, among others, the "removal of resisting populations," "demolition of illegal constructions," and "aggressive extractions."¹²

Checkpoints controlled by PSCs

PSCs are actively involved in searches at multiple checkpoints in the West Bank and at the Erez Crossing in Gaza.¹³ Media reports suggest that a widespread program of privatizing checkpoint duties is under way.¹⁴ The Modi'in Ezrachi Company conducts searches alongside the IDF at the checkpoints around Jerusalem at Qalandiya and Al-Ram.¹⁵ With the exception of a single IDF soldier at the Palestinian entrance, the "Shin-Bet" company (an abbreviated name for "Shmira Uvitahon," or "Guarding and Security"—not to be confused with the colloquial name for the Israeli domestic intelligence service) is solely responsible for the privatized checkpoint at Reihan, near Jenin in the northern West Bank.¹⁶ *Haaretz* reported in September 2007 that an elderly Palestinian woman on her way to the hospital died at the Reihan checkpoint after having been delayed by the employees of a PSC.¹⁷ Media allegations in the same month pointed to the use of

⁶ OCHA-OPT, *Protection Of Civilians – Weekly Briefing Notes*, 12 July 2005, available at: <http://domino.un.org/UNISPAL.NSF/2ce9468747556b2d85256cf60060d2a6/b35e244299f7058685257057004e4c1!OpenDocument>.

⁷ The PSC employee claimed that the boy, part of a group of demonstrators against the Wall, threw stones at the compound where engineering tools and machines are kept. The same online source alleges that two relatives of the deceased boy were killed two weeks earlier, while playing football in the vicinity of the Wall. See: http://www.kibush.co.il/show_file.asp?num=5547 and http://www.kibush.co.il/show_file.asp?num=5550.

⁸ Israel News – Ynet News, *Separation fence guards shoot at journalists*, 21 May 2007, available at: <http://www.ynetnews.com/articles/0,7340,L-3403082,00.html>.

⁹ *Two Israeli Security Guards Wounded in Shooting*, 26 May 2007, <http://archives.tcm.ie/breakingnews/2007/05/26/story312500.asp>.

¹⁰ The Guardian, *Man Killed in Jerusalem after Grabbing Gun*, 11 August 2007, available at: <http://www.guardian.co.uk/israel/Story/0,,2146537,00.html>.

¹¹ *Le Monde Diplomatique*, *Settlers on Israel's Eastern Frontier*, August 2006, at: <http://mondediplo.com/2006/08/04settlers>.

¹² Beni Tal International Security's website is at: <http://www.bts-security.com/index.html>.

¹³ According to the Associated Press, the Erez checkpoint is now controlled by the White Snow company: http://www.fmep.org/reports/vol16/no2/04-settlement_timeline.html.

¹⁴ Meron Rapoport, *Outsourcing the Checkpoints*, 2 October 2007, <http://www.haaretz.com/hasen/spages/909291.html>.

¹⁵ See: <http://www.modiin-ezrachi.co.il/> (in Hebrew) and Meron Rapoport, *Outsourcing the Checkpoints*, 2 October 2007, <http://www.haaretz.com/hasen/spages/909291.html>.

¹⁶ *Ibid.*, note that the Shin-Bet company (an acronym "Shmira Uvitahon," Guarding and Security) is distinct from the Shabak military intelligence agency, which is also known as Shin Bet.

¹⁷ Gideon Levy, *Twilight Zone/Charlie's Angels*, September 1, 2007, <http://www.haaretz.com/hasen/spages/899356.html>: "During recent months, the main contact the Palestinians

an underground detention facility at the same Reihan checkpoint in which a Palestinian man was alleged to have fainted, though the Israeli Ministry of Defense argued that the man was in the underground facility for less than three minutes.¹⁸ The Office for the Coordination of Humanitarian Affairs in the OPT (OCHA-OPT) has also reported on the negative implications of private checkpoint control for humanitarian access.¹⁹

PSCs Guarding Settlements

PSCs protect many of the more than 460,000 Israeli settlers currently living in the OPT. Additionally, settlers themselves sometimes act as settlement security guards, and media reports do not always differentiate between incidents involving settlers who are security guards and PSC employees who are guarding settlements. *Haaretz* reported that the duties of PSCs in settlements were being expanded, in coordination with the IDF, to cover hitch-hiking posts at settlement entrances.²⁰ In April 2007, a security guard from the Hebron area settlement of Givat Havot is alleged to have beaten a 16-year-old Palestinian shepherd on land near the settlement.²¹

In March 2002, the Danish company Group 4 Falck paid US \$30 million for a controlling interest in Israel's largest PSC, Hashmira, which at the time employed over 100 armed guards stationed at settlements in the West Bank. A *Guardian* investigation in the settlement of Kedumim showed that Hashmira's guards cooperated closely with the IDF. The investigation reportedly found that the guards (many of whom were settlers themselves) impeded Palestinians from accessing farming land, traveling to schools, hospitals, and shops in nearby towns, and receiving emergency medical assistance. Intimidation and harassment were also reported. A Hashmira newsletter claimed:

Suddenly, without any advance warning, [our security guards] were required to carry out missions similar to those usually performed by the police and the border police. We had to recruit high-quality personnel and, in a very short time, to train them to use long-range weapons for facing new risk factors: an enemy population equipped with firearms.²²

Copenhagen's *Politiken* newspaper raised the question of whether Hashmira's guarding of settlements in itself implicated Group 4 Falck in breaches of Article 49 of the Fourth Geneva Convention and other abuses. The combined media pressure and questions by politicians led Group 4 Falck to withdraw its interest in Hashmira.²³ In answer to a parliamentary question, the

have had at the Reihan checkpoint... has been with the employees of a private security company. The residents miss the soldiers who were there before: With them, they say, you could sometimes talk. Instead the tough guys from the private firm came, with rifles and dogs, and the treatment, say residents, has become even more inhumane.²⁴

¹⁸ *Machsom Watch: Roadblock operating "dungeon"*, September 4, 2007, reprinted at: www.ynetnews.com - this story alleged that a man who was detained by security guards at the Reihan checkpoint near Jenin, fainted in an underground dungeon after having been held for over an hour. The Israeli Defense Ministry argued that the man was in the underground facility for less than three minutes.

¹⁹ See inter alia, OCHA-OPT, *Increasing Need, Decreasing Access: Humanitarian Access to the West Bank*, 10 September 2007, at: www.ochaopt.org/documents/Fact-sheet-10Sept07.pdf. See <http://www.humanitarianinfo.org/opt/docs/UN/OCHA/WBN162.pdf> relating to the checkpoints at Turkarm-Efrayim (page 11) and Tulkarm-Qalqiliya (page 15). Mikud Security won the tender to operate the Efrayim crossing near Tulkarm, and has fully replaced military police soldiers: <http://www.mikud-security.co.il> (company website in Hebrew).

²⁰ <http://www.haaretz.com/hasen/spages/899356.html>.

²¹ http://www.fmep.org/reports/vol17/no4/05_settlement_timeline.html.

²² <http://www.guardian.co.uk/international/story/0,3604,807093,00.html>.

²³ "Falck skal sikre sig Israel," *Politiken*, 28 March 2002; "Falck bærer våben for Israel," *Politiken*, 14 September 2002; "Falck i Israel: Falck bevogter ulovlige bosættelser," *Politiken*, 14 September 2002; "Myndigheder sagde god for køb," *Politiken*, 15 September 2002; "Group 4 security firm pulls guards out of West Bank," *The Guardian*, 9 October

Danish Foreign Minister, Per Stig Møller, firmly argued that any company activity could not be imputed to the Danish state, on the basis that international law regulates states and not private entities.

PSCs Guarding the Separation Barrier

PSCs are mandated to protect construction crews working on the Separation Barrier. In 2003, the *New York Times* reported that two PSC employees were gunned down near Abu Dis in East Jerusalem as they were guarding the Separation Barrier.²⁴ PSC guards were alleged to have shot at journalists who were seeking to interview people protesting the construction of the barrier near the settlement of Efrat.²⁵ The Permanent Observer Mission of Palestine to the United Nations has alleged that PSC guarding the Separation Barrier near Mutilla harassed villagers and prevented them from collecting uprooted olive trees.²⁶

PSCs in East Jerusalem

According to media reports, the UN observed in the mid-1990s that private security guards participated in the seizure of Arab houses in East Jerusalem.²⁷ One Israeli NGO reports that the Housing Ministry has devoted NIS 32 million per year to subsidize private security to protect settlers in East Jerusalem (territory annexed by Israel but still considered by the international community to be occupied).²⁸ However, a government committee has recommended the transfer of all East Jerusalem security functions to police forces, and the 2007 budget subsequently removed funding for private security, although it is alleged that subsidies may be continuing.²⁹

PSCs Guarding Foreign Nationals

Some PSCs are employed to protect foreign nationals in Israel and the OPT. One such company is Dyncorp Services, a US company deployed in both the West Bank and Gaza Strip for the protection of USAID and other US government officials.³⁰ Materials available on the internet suggest that Israel Special Forces (again, a private Israeli security company, not to be confused with an arm of the Israeli state military) may also guard individuals, but it is not clear whether the company is involved in this activity in the OPT specifically.³¹

II. Status of PSC Employees under IHL

Does IHL apply to PSCs?

While PSCs as private companies cannot be bound by IHL, PSC employees as individuals *can* be so bound. Therefore, it is essential to clarify the status of PSC employees under IHL, as their classification as either civilians or combatants has different consequences in terms of their rights

2002; Udenrigsudvalgets spørgsmål nr. 118 af 18. September 2002.

²⁴ *New York Times*, 2 Israelis, 2 Palestinians Shot to Death, 23 November 2003, available at: <http://query.nytimes.com/gst/fullpage.html?res=9C0CE5DC103BF930A15752C1A9659C8B63>.

²⁵ *Separation fence guards shoot at journalists* at: <http://www.ynetnews.com/articles/0,7340,L-3403082,00.html>.

²⁶ www.un.int/palestine/docs/appendices.pdf at page 25, Closure of Gates.

²⁷ See “Falck I Israel: Falck bevogter ulovlige bosættelser,” *Politiken*, 14 September 2002.

²⁸ <http://www.peacenow.org/mepr.asp?rid=&cid=1436>.

²⁹ Correspondence with Daniel Seideman, legal advisor of the Israeli NGO Ir Amin.

³⁰ See *inter alia*: US State Department, Daily Press Briefing, 15 October 2003, at: <http://www.state.gov/r/pa/prs/dpb/2003/25203.htm>; Ambassador Richard J. Griffin, Assistant Secretary of State, US Bureau of Diplomatic Security, October 2007, at: <http://oversight.house.gov/documents/20071002145249.pdf>.

³¹ <http://www.israel-bodyguards.net>.

and responsibilities under the law. The following paragraphs provide a close examination of the definitions of combatant and civilian under IHL.

What is the general legal distinction between combatants and civilians?

PSC employees do not fit easily into the IHL dichotomy between combatants and civilians, a distinction understood by all parties as a core principle of humanitarian protection. This principle is enshrined in both treaty and customary law. Combatants have the right to take a direct part in hostilities and may be targeted in those hostilities. Civilians, on the other hand, are entitled to immunity from attack, “unless and for such time as they take a direct part in hostilities” (Article 51(3) AP I).³² Despite the fact that a number of prominent states, including Israel, are not party to AP I, the core distinction between combatants and civilians is widely recognized as binding customary international law— that is, even states that have not ratified AP I are bound by those aspects that are recognized as customary.³³ In order to ensure maximal protection and to avoid gaps in application, IHL does not offer an explicit definition of “civilian.” Rather, treaty and customary law define “combatant” first and then require that all individuals who are not explicitly combatants be considered civilians. This brief employs the same pattern, considering first whether PSC employees working in the OPT may be considered combatants under the law.

Are PSC employees combatants under IHL?

Article 4(A) of the Third Geneva Convention defines “combatant” by reference to those individuals who would be entitled to prisoner of war (PoW) status in an international armed conflict. Under IHL, the label “combatant” is primarily intended for members of the regular armed forces of the State. However, it may also refer to those who maintain a sufficient nexus to the State while engaging in hostilities (e.g. armed militia, paramilitaries, and resistance movements), to the extent that they meet the following criteria of Article 4(A)(2):

- That of being commanded by a person responsible for his subordinates (having a responsible *command structure*);
- That of having a fixed *distinctive sign* recognizable at a distance;
- That of *carrying arms openly*;
- That of conducting their operations in *accordance with the laws and customs of war*.

Individuals who are not members of the regular armed forces – or of other organizations that meet the above criteria – are to be considered civilians. If detained, they are not entitled to PoW status and may be prosecuted for any hostile acts they have performed.

Emanuela-Chiara Gillard holds that there are likely to be very few instances globally in which PSC employees are sufficiently integrated into the armed forces of a state to be considered part of those armed forces as provided by Article 4(A)(1).³⁴ IHL does not set the meaning of “forming part” of a state’s armed forces, and national law is most relevant to whether PSC functions are fully “contracted out” of the military hierarchy, or whether PSC employees are

³² The ongoing debate over the definition of civilians taking a direct part in hostilities and the length of time for which they may be targeted is considered in a separate HPCR policy brief, “Civilian Participation in Hostilities in the Occupied Palestinian Territory (OPT),” December 2007, available on the IHL in OPT online portal: www.ihlresearch.org/opt.

³³ The ICRC Study on Customary IHL, *supra*, Rule 1, page 3.

³⁴ Emanuela-Chiara Gillard, *Business goes to war: private security/security companies and international humanitarian law*, International Review of the Red Cross 525.

subject to military justice and the army's chain of command.³⁵ Article 4(A)(2) does not mention PSCs explicitly, and it is submitted that PSC employees may not be considered "members of militias and members of other volunteer corps, including those of organized resistance movements."

Gillard suggests that PSC employees are likely to fulfill only one of the four cumulative conditions specified by Article 4(A)(2): "that of having a fixed distinctive sign recognizable at a distance" (Article 4(A)(2)(b)). Based on the information currently available, it seems that PSC employees operating in the OPT are not necessarily commanded by a person responsible for his subordinates (Article 4(A)(2)(a)); do not necessarily carry arms openly (Article 4(A)(2)(c)); and do not necessarily conduct their operations in accordance with the laws and customs of war (Article 4(A)(2)(d)). PSC employees are most likely to fall into the civilian category described in Article 4(A)(4), as "persons who accompany the armed forces without actually being members thereof." Such persons described in Article 4(A)(2)(d) include war correspondents, supply contractors, and members of labor units or welfare services for the armed forces. However, the functions of PSCs in the OPT seem to be somewhat broader than these ancillary functions.

Are PSC employees civilians under IHL? Are they "civilians participating in hostilities"?

Several legal commentators argue that PSC employees should be considered civilians rather than combatants.³⁶ Under IHL, in the case of doubt as to whether a person is a civilian for the purposes of targeting, the person shall be considered a civilian.³⁷ As detailed in Part I, PSC employees carry out a wide range of functions in the OPT. In some cases, PSC employees may be carrying out civilian support functions; in others, they may be using force without being explicitly regulated by IHL; in still others, they may be considered civilians who are taking a direct part in hostilities.³⁸

The ICRC Study on Customary International Humanitarian Law has concluded that there is no clear and uniform definition of "direct" participation in hostilities in state practice.³⁹ Both the ICRC Commentaries on the Geneva Conventions and the International Criminal Tribunal for the former Yugoslavia (ICTY) have defined "direct" participation in hostilities as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."⁴⁰ They further note that determining what is "direct" participation

³⁵ Ibid., 533.

³⁶ Michael Schmitt, *Humanitarian law and direct participation in hostilities by private contractors or civilian employees*, Chicago Journal of International Law, No. 5 (2005), Lindsey Cameron, *Private Military Companies: Their status under international humanitarian law and its impact on their regulation*, International Review of the Red Cross, number 863, p. 22 (2006).

³⁷ AP I Article 50. This should not be confused with the presumption of PoW status under Article 5 of the Third Geneva Convention, the difference being that a person will be presumed to be a PoW when he has committed a belligerent act and has fallen into the hands of the enemy. The present situation does not concern persons in the hands of the enemy.

³⁸ While there has been much discussion in recent years regarding civilian participation in hostilities in the context of the Israeli-Palestinian conflict, this has been considered almost exclusively with regard to the lawfulness of targeting Palestinian militants, not with the legal status of Israeli civilians participating in hostilities as members of private security firms. Regarding the parallel issue of the lawfulness of targeting Palestinian militants, see *Public Committee against Torture in Israel v. Government of Israel*, H.C.J. 769/02, Judgment, Dec. 14, 2006, available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf [hereafter "Targeted Killings" case], HPCR Policy Brief, *IHL and "Targeted Killings"*, available at: <http://www.ihlresearch.org/opt/feature.php?a=65>, and Anthony Dworkin, *Israel's High Court on Targeted Killing: A Model for the War on Terror?*, available at <http://www.crimesofwar.org/onnews/news-highcourt.html>.

³⁹ The ICRC Study on Customary IHL, *supra*, at 23.

⁴⁰ ICRC Commentary on AP I, *supra*, at 1944. *Galic*, *supra*, at paragraph 48 (using almost identical language). Many experts have understood this as a requirement of causal proximity. See, e.g., Michael N. Schmitt, "Direct Participation in Hostilities' and the 21st Century Armed Conflict", in *Crisis Management and Humanitarian Protection*:

requires a margin of judgment because direct participation includes more than just combat and active military operations but at the same time must not be so broadly defined as to include the entire war effort.⁴¹ A PSC employee engaged only in searches at checkpoints, and not authorized to use weapons, may not be taking a direct part in hostilities, whereas a PSC employee assisting in a “targeted killing” operation may well qualify as a civilian taking a direct part in hostilities, thereby losing his or her civilian immunity from attack “for such time as” he or she continues so to participate.

A contentious issue arises when PSCs provide security for military objectives, such as training facilities, military leadership, or military or security installations. One possible interpretation is that this in itself comprises direct participation in hostilities. If PSC employees are civilians, then Israel as the Occupying Power has the obligation to remove them from the vicinity of military objectives. PSC civilian employees may not be used to defend military objects from attack, or to shield, assist in, or impede military operations (AP I Article 51(7)). Yet, according to AP I, such conduct does not release other parties from their obligations to respect civilians (AP I Article 51(8)). *To the extent feasible*, Parties shall endeavor to remove civilians *under their control* from the vicinity of military objectives (AP I Article 58).⁴²

There is also discussion regarding whether the voluntary nature of a human shield should affect the determination of whether he is directly participating in hostilities.⁴³ If so, there would certainly be more situations in which PSC employees would be considered direct participants in hostilities. It must also be noted that PSC employees who operate high-tech weapons systems, even from long distances, are participating in hostilities, and thus are subject to attack.

What is the significance of other legal frameworks applicable to PSCs?

IHL is not the only legal framework applicable to PSCs operating in the OPT. For example, IHL does not preclude national legal regulation of the right to self-defense in constitutional or criminal law. Two different States in which PSCs are deployed may have contrasting domestic law mechanisms for regulating who may carry and use weapons, and in what circumstances. In Israel for example, it is permitted to carry and to use weapons in self-defense. Thus, any PSC employee who carries and uses a weapon is not necessarily acting as a combatant. The important question is where to draw the line between self-defense and direct participation in hostilities, and under what circumstances defending objects or persons constitutes direct participation in hostilities. As a general rule, the defense of military objects and persons constitutes direct participation in hostilities, while the defense of civilian objects and persons does not. However, wherever any aspect of the civilian-combatant distinction becomes blurred, as in the West Bank and Gaza, the regulation of PSCs – and clarification of their status under both international and domestic law – becomes all the more important.

III. Obligations of an Occupying Power in Relation to PSCs

Festschrift für Dieter Fleck, at page 509 (Berlin: BWV, Horst Fischer et al eds., 2004) available at: <http://www.michaelschmitt.org/images/Directparticipationpageproofs.pdf>.

⁴¹ ICRC Commentary on AP I, *supra*, at 1679.

⁴² The “control” requirement here would seem to be broader than that required for state responsibility, as it does not deal with issues of attribution, but the double qualifications make it a rather weak duty. See D. Rothwell, “Legal Opinion on the Status of Non-Combatants and Contractors under International Humanitarian Law and Australian Law”, 24 December 2004, available online at http://www.aspi.org.au/pdf/ASPIlegalopinion_contractors.pdf.

⁴³ For support of a distinction between voluntary and involuntary human shields, see Michael Schmitt, *Humanitarian law and direct participation in hostilities by private contractors or civilian employees*, Chicago, *Journal of International Law*, No. 5 (2005), and for the contrary position, see Lindsey Cameron, *Private Military Companies: Their status under international humanitarian law and its impact on their regulation*, *International Review of the Red Cross*, number 863, p. 22 (2006).

As noted in the sections above, PSCs are used in many capacities in conflicts around the world, and they are often employed by governments, private companies, militaries and even humanitarian organizations. This paper focuses on the obligations of a particular type of actor within the legal framework of international humanitarian law: the occupying power. Given the specificity of IHL regarding the rights and obligations of the occupying power for the duration of their effective control over a foreign territory, this paper argues that while there may be ongoing debate and legal uncertainty over the status of PSC employees in particular contexts such as capture, the occupying power is clearly responsible for controlling PSCs carrying out the activities which fall under the responsibility of the occupying state.

One of the central questions regarding the state responsibility for the behavior of private actors in conflict is the degree to which states can be held accountable for violations of the law by such actors. For humanitarian professionals, however, it is equally if not more important to clarify whether states must exercise some degree of control over the actions of private actors as they conduct activities within the territory. While the question of responsibility for violations, and especially grave violations such as those alleged in Iraq, is of concern to the international legal community, HPCR researchers found that in OPT it is far more important for practitioners to have clarity about command responsibility for PSCs.

Are the acts of PSCs legally attributable to Israel?

Whether or not a State may be held legally responsible for specific violations of IHL depends upon whether the acts in question may be *legally attributed* to that State. For example, once this threshold of attribution is met, a war crime – a grave breach of IHL – committed by a PSC could be considered an act of the State, and the State leadership could in theory be held legally responsible for it as such. Clearly, then, this question of whether or not acts of PSCs are legally attributable to Israel is of great importance when considering the scope of individual criminal liability for any war crimes that might be committed by PSCs within the OPT.⁴⁴

The Fourth Geneva Convention provides that the acts of entities considered “agents” and “authorities” of the Occupying Power may be legally attributed to the Occupying Power. For example, the Palestinian Authority and the Palestinian Police⁴⁵ have been considered “agents” of Israel under Article 29 of the Fourth Geneva Convention (GC IV), which obliges Israel as Occupying Power to be responsible for the treatment of protected persons (civilians in occupied territory) by its agents “irrespective of any individual responsibility which may be incurred.”⁴⁶

According to Article 32 of GC IV, the obligations of an Occupying Power with respect to protected persons include prohibitions on murder, torture, corporal punishment, mutilation, and medically unnecessary medical or scientific experiments.⁴⁷ These prohibitions are explicitly extended “also to any other measures of brutality *whether applied by civilian or military*

⁴⁴ Jonathan Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict*, ASIL Insight, Volume 10, Issue 21, August 24, 2006. Available at: <http://www.asil.org/insights/2006/08/insights060824.html>.

⁴⁵ Justus R. Weiner, *Human Rights in Limbo during the Interim Period of the Israel Palestinian Peace Process: Review, Analysis, and Implications*, 27 N.Y.U. J. Int'l L. & Pol. 761.

⁴⁶ Fourth Geneva Convention 1949, *supra*, available at: <http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument>.

⁴⁷ Although the Israeli government argues that the Fourth Geneva Convention does not apply *de jure* to the OPT, Article 32 is arguably part of the Fourth Geneva Convention’s “humanitarian provisions,” which Israel does selectively apply to the OPT. See Meir Shamgar, “The Observance of International Law in the Administered Territories,” *Israel Yearbook of Human Rights*, vol.1, p 263-66. See also HPCR, “Review of the Applicability of IHL to the Occupied Palestinian Territory,” July 2004, available at: <http://www.ihlresearch.org/opt/feature.php?a=31>.

agents” (emphasis added). The ICRC Commentary to Article 29 emphasizes the importance of disregarding “all formal criteria” for determining agency, noting that the Occupying Power is legally responsible if it instigates an unlawful act which is then committed by an agent, whether or not that agent is formally a part of the State apparatus. The State escapes legal responsibility for violations *only if* the acts of “local authorities” with respect to protected persons are truly independent of the State.⁴⁸

This supports the claims (1) that PSCs may be considered “agents” of Israel as the Occupying Power, insofar as the IDF gives orders to PSC employees, and (2) that PSCs are regulated by the law of occupation, at least as regards the specific prohibitions in Article 32. According to this position, the law of occupation imposes additional responsibilities on Israel as an Occupying Power to monitor the activities of PSC employees and to be accountable for any unlawful acts by PSCs. This argument is strengthened by the apparent breadth in the definition of “civilian or military agents” in Article 32.

The International Law Commission Draft Articles on the Responsibility of States for Internationally Unlawful Acts (DASR),⁴⁹ while not yet binding as international law, provide a useful indication of the current status and direction of development of customary legal norms in this arena. Article 4(1) DASR covers situations in which a PSC would be considered an “organ of the state,” for example, if it is integrated into the state armed forces. Thus, referring back to the preceding discussion on the status of individual PSC employees, if they would be considered combatants in the sense of Article 4(A) GC III or Article 43 AP I, then they would also be considered “organs” of the State of Israel for the purposes of attributing state responsibility for their actions.

Article 5 DASR covers persons or entities exercising “*elements of government authority*” – a somewhat looser relationship – but requires the person or entity to be “empowered by the law of that State” to do so. The Commentary to the Articles points out that the required nexus between the internal law and the government authority performed makes it a “narrow category.” However, some experts claim that many PSC functions may still fall under this category, as they intrinsically go to the core of government authority (e.g., supervising detainees, exercising police-like functions), and that the concept of “law of that State” should not be limited to a specific authorization.⁵⁰ A potential problem identified by the same experts is that the very nature of delegation of traditional governmental activities to PSCs may in fact reduce the scope of “governmental authority.”

It is likely that PSCs with the authority to restrict movement of persons in occupied territories would be covered by Article 5 DASR. The 2005 Israeli Authority for Maintaining Public Safety Law allows the Internal Security Minister to authorize private security guards to exercise powers of search, identification, and temporary detainment. Article 7 DASR determines that, in the case of both preceding Articles 4 and 5, the state will be responsible, “when the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.” Article 7 DASR may be particularly useful for the regulation of PSC employees, but it fails to include acts performed in a purely personal capacity.

⁴⁸ Commentary, available at: <http://www.icrc.org/ihl.nsf/COM/380-600034?OpenDocument>.

⁴⁹ A full text version of the Articles and an academic commentary is available at: <http://assets.cambridge.org/97805218/13532/sample/9780521813532ws.pdf>.

⁵⁰ For a detailed discussion on the meaning of ‘government authority’, ‘the law of the state’ and the implications of PSC activity, see University Centre for International Humanitarian Law (UCIHL): *Expert Meeting on Private security Contractors: Status and State Responsibility for Their Actions*, Geneva, August 2005, p. 16-17 [hereinafter UCIHL expert meeting].

Two main sources of international legal practice bearing on the question of state responsibility for non-state acts are the *Nicaragua* judgment of the International Court of Justice (ICJ) and the *Tadic* decision of the Appeals Chamber of the ICTY. In its *Nicaragua* decision, the ICJ ruled that in cases of “complete dependence,” persons, groups of persons, or non-state entities (such as PSCs) may be equated with state organs, even in the absence of formal domestic legal status as such, thereby engaging the responsibility of the state.⁵¹ In *Tadic*, the ICTY considered even private acts of armed forces members attributable to the state.⁵² This judgment’s reasoning would only apply to members of armed forces, meaning that in most cases the private conduct of PSC employees would not be attributable to the state. This is especially relevant to “off duty” incidents of violence.

A counter-argument is that PSCs do not constitute state agents in the OPT and that therefore Israel is not bound by their actions. A lack of clarity regarding the relationship between PSCs and the IDF raises doubts as to whether or not PSC employees truly do act as agents (whether civilian or military) of Israel. Some humanitarian practitioners worry that the widespread contracting-out of certain military functions to PSCs, combined with the absence of a robust chain of command between IDF commanders and PSCs operating in the West Bank, suggest an aim to remove official State responsibility for those functions. However, even if potential IHL violations of PSCs – for example, violations of GC IV Article 31 with respect to the treatment of protected persons in custody – cannot be attributed to the Occupying Power, Israel still has a more general obligation under IHL to exercise “due diligence” in preventing PSCs from violating international law in the OPT.

The principle of “due diligence” in occupied territory

It is important to note that the existing legal standards leave no legal gaps for states to escape accountability for military acts carried out as an extension of the occupying power. This legal coverage must, however, be read against the widespread dilemmas in implementation of IHL and the many challenges to *practically* extending regulations to PSCs. In this light, an additional means for assuring accountability to the state attribution described above is the emerging principle of “due diligence,” meaning that occupation law imposes obligations on the Occupying Power to exercise “vigilance” or “due diligence” over the actions of PSCs in occupied territory.

Article 43 of the Hague Regulations obliges the Occupying Power to “take all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” The authoritative French text imposes a broader definition of “public order and safety” – “*l'ordre et la vie publics*” – which may be considered to include almost any aspect of civil life. The obligation to restore and ensure public order can create an obligation to control the activities of individuals or groups who might disrupt that public order, including those who might commit crimes, subject to the other provisions of the law of occupation. This responsibility might be considered an obligation to exercise “due diligence” or “vigilance” over non-state actors, similar to the oft-cited “due diligence” obligation of states parties to the Convention on the Elimination of All Forms of Violence against Women (CEDAW) to prevent violence against women by non-state actors.

⁵¹ Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) Merits, Judgment of 27 June 1986, at: <http://www.icj-cij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5>.

⁵² Prosecutor v Dusko Tadic, ICTY Case No.: IT-94-1-T, Appeals Chamber Judgment of 15 July 1999 at: <http://www.un.org/icty/tadic/appeal/judgement/index.htm>.

Assuming that this vigilance requirement binds Israel, the state would be required to regulate the activities of PSCs operating in the OPT in order to ensure that violations of IHL or International Human Rights Law (IHRL) do not occur. Israel might be required to enact penal legislation creating jurisdiction over crimes against humanity and war crimes committed in the OPT by PSCs or state actors, and to investigate and prosecute any PSC employee (or other individual) involved in the perpetration of these crimes. Contracts between PSC and the Government of Israel should not facilitate impunity for any crimes committed by PSC employees, for example, by agreeing to immunity from prosecution for any PSC employee alleged to have perpetrated violations of IHL or IHRL.

The responsibility of an Occupying Power for acts of non-state actors in a situation of occupation has recently been addressed by the ICJ in the *Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda)*.⁵³ After finding that Uganda was an occupying power in the Ituri province of the Democratic Republic of the Congo (DRC) at the relevant time, the Court concluded that the Ugandan state violated international law through “*lack of vigilance in preventing violations of human rights and international humanitarian law*” by armed groups, even though they were acting outside the realm of Uganda People's Defense Force (UPDF) authority.⁵⁴ The ICJ concluded that Uganda had violated Articles 27, 32, and 53 of the Fourth Geneva Convention, as well as a host of IHRL provisions.

In arguing against the Occupying Power's obligation of due diligence with respect to the actions of PSCs operating in occupied territory, one could cite the fact that the judgment in *Congo vs. Uganda* is the only one asserting such a duty in IHL. The principle of due diligence is well-established in IHRL, and it is often asserted that IHRL applies in occupied territory as a result of “effective control” of the territory in question, but Israel has consistently denied the applicability of IHRL norms in the OPT.⁵⁵ However, it should not be necessary to establish the applicability of IHRL in the OPT in order to establish the duty of due diligence, as the wording of Common Article 1 of the Geneva Conventions itself does support such duty.⁵⁶

Specific considerations of military necessity and the security of protected persons

The following paragraphs look into how the considerations of military necessity and the security of protected persons might limit or enhance the obligations of the Occupying Power to control the activities of PSCs in relation to the evacuation or destruction of property, humanitarian assistance, assigned residence, and internment.

Article 49 of the Fourth Geneva Convention allows for “total or partial evacuation of a given area if security of the population or imperative military reasons so demand.” Article 53 allows for destruction of real or personal property only “where such destruction is rendered absolutely necessary by military operations.” A question arises as to whether PSC activities can comprise “military reasons” or be considered “military operations” in the sense of these provisions. A careful reading of Article 53 of the Fourth Geneva Convention indicates that only the Occupying Power is in a position legally to determine that house demolitions are “absolutely necessary” by reason of “military operations.” If PSCs are not organs of the state, then they may not make such assessments, much less conduct house demolitions independently of the state.

⁵³ International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda)*, December 19, 2005, available by a search for Judgments at: www.icj-cij.org.

⁵⁴ *Ibid.*, at paragraphs 178/179.

⁵⁵ HPCR Policy Brief, *IHL and IHRL in the OPT*, August 2007, available online at www.ihlresearch.org/opt.

⁵⁶ Common Article 1 reads: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”

Similarly, a debate may arise as to whether PSC employees (especially those involved in security functions or at checkpoints) may permissibly make decisions to restrict humanitarian access. Again, a close reading of the Fourth Geneva Convention's provisions on humanitarian access indicates that, ultimately, the Occupying Power has the obligation to *facilitate* the operation of humanitarian organizations and to allow relief consignments. It could be argued that the widespread use of PSCs with a decisive authority in this matter does not fulfill the legal obligations of the Occupying Power with respect to humanitarian access.

IV. Accountability

The use of PSCs, and the specific allegations of the use of force by PSC employees in Iraq and in the OPT, gives rise to legitimate concerns that existing international and national legal frameworks may be insufficient to provide genuine accountability for any unlawful acts of PSC employees.

It has been alleged that PSCs have been employed by the US government in detention facilities in Iraq deliberately in order to shield the state from accountability for aggressive interrogation techniques.⁵⁷ It has also been pointed out that while the Abu Ghraib scandal resulted in courts martial for military personnel, implicated PSC employees have so far evaded accountability. PSC employees were offered comprehensive immunity in Coalition Provisional Authority Order 14 in 2004, which was overturned by the Iraqi Parliament in late October 2007.⁵⁸ It is unclear to what extent this parliamentary action might reduce impunity in practice. State Department officials offered an immunity deal – the details of which were not disclosed – to Blackwater PSC employees who were implicated in the shooting of civilians in Iraq.⁵⁹ Impunity persists with regard to PSC employees alleged to have been involved in prostitution rings in Bosnia-Herzegovina.

Caroline Holmqvist has called attention not only to the impunity for abuses committed by PSC employees, but also to the “long-term implications of a lack of transparency and democratic accountability in the security sector.”⁶⁰ Humanitarian professionals have reason to be concerned that legal gaps in regulation of PSCs may result in widespread impunity for abuses by PSCs. This Part assesses the options for improving accountability in international criminal law, in international standards relating to state responsibility for unlawful acts, and in non-binding regulatory frameworks.

Improving accountability in international criminal law

Accountability in international law might be improved by a commitment by states to train all PSC staff in IHL and IHRL and to legislate for the investigation and prosecution of violations of IHL and IHRL in domestic law. Such commitments may be implied by common Article 1 of the Four Geneva Conventions, which states an undertaking by all states parties to respect and ensure adherence to IHL.

⁵⁷ Valerie C. Charles, *Hired Guns and Higher Law: A Tortured Expansion of the Military Contractor Defense*, 14 *Cardozo J. Int'l & Comp. L.* 593, 610-612.

⁵⁸ *New York Times*, *U.S. Military to Supervise Iraq Security Convoys*, 31 October 2007, at: http://www.nytimes.com/2007/10/31/washington/31contractor.html?_r=1&oref=slogin.

⁵⁹ *New York Times*, *Immunity Deals Offered to Blackwater Guards*, 29 October 2007, at: <http://www.nytimes.com/2007/10/30/washington/30blackwater.html?n=Top/Reference/Times%20Topics/People/J/Johnston,%20David>.

⁶⁰ Caroline Holmqvist, *The Private Security Industry, States and the Lack of an International Response*, March 2007, available at: www.tagsproject.org.

Article 144(2) of the Fourth Geneva Convention requires that “[a]ny civilian, military, police or other authorities” who assume responsibilities in relation to protected persons during armed conflict must possess the text of the Convention and have received special instruction in its provisions. Although the Commentary to Article 144 does not define “authorities,” one argument suggests that “authorities” require a formal delegation of functions from the occupying power. A PSC might be considered such an “authority” as a result of a formal contractual delegation of functions. Even if this argument is incorrect and Article 144(2) does not clearly encompass PSC as “authorities,” Article 144(1) still provides a soft obligation to disseminate the Convention generally and, where possible, to instruct in its provisions.

Articles 146 and 147 of Fourth Geneva Convention (as well as similar articles in the other Geneva Conventions and AP I) create a regime of mandatory jurisdiction over the enumerated offences, meaning that all state parties also have the obligation to prosecute (or extradite for the purpose of prosecution) anyone committing, or ordering to be committed, any of the enumerated grave breaches. Consequently, any PSC employee who has allegedly committed, or ordered the commission of, a grave breach against a Palestinian civilian or other protected person in the OPT should be investigated and prosecuted (or extradited) under the domestic law of his or her own country. As PSC employees might be variously combatants, civilians, or civilians taking a direct part in hostilities, depending on their activities and circumstances of employment, domestic legislation should be crafted to ensure that any PSC employee suspected of having committed grave breaches of IHL or violations of IHRL are tried either in courts martial or in civilian courts as appropriate. States might also usefully clarify the chain of command between their armed forces and private security contractors and thereby clarify the jurisdiction of courts martial or civilian courts.

Despite their ambiguous position in IHL’s combatant-civilian distinction, PSC employees may bear individual criminal responsibility in international law for war crimes and crimes against humanity.⁶¹ Lindsey Cameron emphasizes that individual criminal responsibility can apply to combatants and civilians alike, and that the impunity for the alleged torture of detainees at Abu Ghraib by PSC staff resulted from a lack of political will to investigate thoroughly and prosecute.⁶² Cameron asserts that there is no international legal vacuum as regards PSC employees. However, as Israel is not a state party to the ICC Statute, it is unlikely that the ICC would have jurisdiction over crimes committed in the OPT by PSC employees who are Israeli nationals (although the ICC would have jurisdiction over PSC employees or officers who are working in Israel but nationals of ICC member states).⁶³

State responsibility for unlawful acts

Individual criminal responsibility can accrue directly through perpetration of IHL violations, as well as indirectly through facilitation (aiding and abetting) of violations, ordering violations, participating in a common purpose with violators, or having “command responsibility” over violators. The provisions of command responsibility in international criminal law might theoretically engage the individual criminal responsibility of a military officer in occupied territory if a PSC employee were to commit a war crime or crime against humanity. However, there is a lack of international jurisprudence on corporate superior responsibility, and as Israel is not a state party to the Rome Statute, no IDF officer can be investigated or prosecuted in the

⁶¹ *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-I, Judgment (Appeals Chamber), 1 June 2001, para. 444, cited in Lindsey Cameron, *Private Military Companies, their status under International Humanitarian Law and its impact on their regulation*, International Review of the Red Cross, Volume 88 Number 863 September 2006.

⁶² *Ibid.*, 594.

⁶³ See the detailed rules of jurisdiction under ICC Statute articles 12 and 13.

ICC for any acts, whether involving PSCs or not. Criminal acts committed by PSC employees or officers which are not in the context of an armed conflict and do not amount to crimes against humanity would not be covered by IHL.

Non-binding regulatory frameworks

There are a number of options outside international criminal law and its domestic incorporation to promote accountability for the acts of PSC employees in the OPT. All of these require some discussion as to their relative merits.

First, a new treaty specifically regulating PSCs might be concluded in order to clarify their position and obligations in IHL and IHRL as well as to require legislation to ensure that unlawful acts by PSCs are investigated and prosecuted in national courts. However, the process of concluding a treaty and securing sufficient ratifications may take several years, and states which decline to ratify it may continue to leave an accountability gap as regards the acts of PSCs in their jurisdiction.

Second, domestic contract and corporations law might be amended to promote PSCs' compliance with international law. Military contracts with PSCs might include compulsory clauses requiring full compliance with IHL and IHRL.⁶⁴ Alternatively, corporations law might require the continued compliance of PSCs with IHL and IHRL for initial or continued registration.⁶⁵ Licensing of PSCs and oversight mechanisms are used by the United Kingdom and Swiss governments and may be adapted for use in the OPT.⁶⁶ Cameron suggests that such a licensing scheme might involve a prohibition on the granting of immunity for violations of international law committed by PSCs. Holmqvist suggests the “harmonization of national legislation amongst the key exporting states,” including “operating licenses based on set criteria regarding vetting and training of personnel, rules of engagement and disciplinary procedures.”⁶⁷ Such licensing procedures, especially if accompanied by an international commitment to harmonize national legislation on PSCs, show considerable promise in promoting the compliance of PSCs with IHL, but market forces and industry lobbying of governments may risk leaving intact PSC employees' immunity from prosecution.

Third, self-regulation of the PSC industry may be a viable option. However, it is uncertain how such codes of conducts could be applied and enforced. In March 2005, the US-based International Peace Operations Association (IPOA) introduced industry-wide self-regulation of PSC activities in a Code of Conduct.⁶⁸ Holmqvist notes that the IPOA works as a lobby on behalf of the PSC industry,⁶⁹ leaving doubts as to the efficacy and objectivity of self-regulatory mechanisms in promoting accountability for PSC actions in criminal law. The Voluntary Principles agreed by representatives of the UK, the US, and the Netherlands, aim at the self-regulation of multi-national corporations (MNCs) in the extractive and energy sectors. Holmqvist notes that they would apply to PSCs, but this is inadequate for thorough-going self-

⁶⁴ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 299–310, quoted in Cameron, *supra*.

⁶⁵ Adapted from Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 299–310, quoted in Cameron, *supra*.

⁶⁶ United Kingdom, Green Paper, *Private Military Companies: Options for Regulation*, Stationery Office, London, 2002; Rapport du Conseil fédéral sur les entreprises de sécurité et les entreprises militaires privées, Swiss Federal Council, 2006, esp. Section 6, cited in Cameron, *supra*.

⁶⁷ Caroline Holmqvist, *The Private Security Industry, States and the Lack of an International Response*, March 2007, *supra*, at page 20.

⁶⁸ IPOA Code of Conduct, available at: www.ipoaonline.org.

⁶⁹ Holmqvist, *supra*, page 22.

regulation, and it should be supplemented by a PSC-specific set of principles which include an appropriate emphasis on full compliance with IHL and IHRL. The Swiss Initiative on Private Military and Security Companies, an inter-governmental process on the regulation of PSCs initiated by the Swiss government and the ICRC, aims to “confirm existing legal obligations of the actors and develop non-binding good practices.”⁷⁰ This initiative includes governmental experts, academics, humanitarian professionals, and security industry representatives at its meetings.

Fourth, inter-governmental organizations should take steps to vet PSCs recruited for peace operations and should formulate binding and non-binding standards for the regulation of PSC activities with an appropriate emphasis on IHL. Holmqvist notes that the UN, the African Union, and the European Union have not agreed policies on the vetting, training, and IHL-compliance of PSCs that they recruit for peace operations.⁷¹ The UN has a 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 – a Special Procedure established by the UN Human Rights Commission (and now assumed by the Human Rights Council) in place of the former Special Rapporteur. The Working Group’s mandate obliges it to “draft international basic principles that encourage respect for human rights on the part of those companies in their activities.”⁷² While such a set of draft principles would not be binding as international law, they should refer to the binding nature of IHL alongside IHRL, and they should recommend appropriate changes to domestic law to improve accountability for unlawful acts perpetrated by PSCs.

V. Conclusion

This policy brief has given a factual overview of the involvement of PSCs in the OPT, and it has addressed the legal debates on PSCs' position in IHL with regard to the likely challenges faced by humanitarian professionals encountering PSC employees at the West Bank Separation Barrier and at checkpoints in the OPT. Further, it has examined whether PSC employees might be considered combatants, civilians, or civilians taking a direct part in hostilities.

In Part III, this policy brief explored arguments for and against the proposition that Israel as an Occupying Power might be bound to regulate the activities of PSC with regard to the concept of “vigilance” or “due diligence” in the *Congo v. Uganda* case and in IHRL for the actions of non-state actors, as well as to the Fourth Geneva Convention’s provisions on agents and authorities. These arguments have implications for the supervision of PSCs through the IDF and for the training of PSC employees in IHL. Part III also commented that, under IHL, only the Occupying Power might make determinations of “military necessity and security” and considered the implications of this for PSCs' involvement in humanitarian access, evacuations and demolitions, among other functions.

Part IV considered the impunity or “accountability gap” presented by PSCs’ uncertain position in IHL and explored options to close this gap with regard to individual criminal responsibility in international criminal law and domestic legislation to remove immunity from criminal prosecution; international standards on state responsibility; and other options including a new

⁷⁰ Official website of the Swiss Initiative on Private Military and Security Companies, at: <http://www.eda.admin.ch/psc>.

⁷¹ Holmqvist, *supra*, page 21.

⁷² Commission on Human Rights Resolution 2005/2, The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, E/CN.4/RES/2005/2, at paragraph 12(e).

treaty specifically regulating PSCs, changes to corporations and contract law, licensing and oversight mechanisms, industry self-regulation, and inter-governmental standard-setting.

Given the relatively recent increase in PSCs' deployment in situations of war, occupation, and peace building, international norms which precede this increase are understandably lacking in specificity regarding these groups. This policy brief highlights the risks for widespread impunity if PSCs are frequently deployed without sufficient training in IHL, discipline, or regulation. It is hoped that this policy brief will contribute to the important ongoing discussions on the regulation of PSCs and their position in IHL.



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