Civilian Contractors Operating in the Battlefield: Could They be Mercenaries?

Amer Mahmud, United States Air Force Academy
Civilian Contractors Operating in the Battlefield: Could They be Mercenaries?

by Major Amer Mahmud, United States Air Force JAG Corps
Disclaimer

Major Amer Mahmud serves in the U.S. Air Force Judge Advocate General’s Corps. The views expressed in this paper are solely those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense or the U.S. Government.
Abstract

Civilian contractors operating in the battlefield can easily escape the requirements of being classified as a mercenary under the current international legal regime. By analyzing a hypothetical involving a civilian security detail working with a Provisional Reconstruction Team (PRT) from a deployment in Iraq and applying the current definition of mercenary in Additional Protocol I, it is clear that such contractors will escape classification as a mercenary because the requirements for being considered a mercenary are extremely vague and difficult to apply. Instead, they will be considered civilians accompanying the armed forces, and this status would require that they be protected like a POW if captured by enemy forces, a status which provides for considerable protections. Due to this loose international definition of mercenary, States continue and will continue to use mercenaries to accomplish national security interests.
# Table of Contents

I. Introduction 1  
   A. Use of Contractors in the Battlefield 2  
   B. Angola 5  
   C. Sierra Leone 7  

II. International Law 9  
   A. Treaties 10  
   B. Customary International Law 11  

III. International Law and Mercenaries 14  
   A. Major Int’l Efforts to Deal with Mercenaries 15  
      1. Additional Protocol I 17  
      2. U.N. Mercenary Convention 18  
   B. Characterization under Additional Protocol I 20  
      1. Recruited to Fight in an Armed Conflict 22  
      2. Direct part in the hostilities 23  
      3. Motivated to Take Part 24  
      4. Elements 4, 5, and 6 26  
   C. If Not Mercenary, Then What? 28  

IV. Conclusion 30
I. INTRODUCTION.

Civilian Contractors (CCs) are routinely used by governments in areas of armed conflict across the world. Due to their presence in areas of armed conflict, it’s inevitable that they sometimes are involved in combat situations. As a result, their status under international law has been confounded, especially in the event they are captured by enemy forces. This is because the applicable international laws of armed conflict generally govern State military actions, and thus, a void can exist in international law for civilian contractors that wage war. Some people refer to such contractors as mercenaries, and the international debate about how to handle mercenaries is certainly not new. Indeed the international community has attempted to regulate mercenaries for a long time, but the current international regulatory scheme seems inadequate to deal with the issue. A brief summation demonstrating the vast use of CCs by governments in combat will demonstrate that this is certainly not a novel phenomenon because private parties have been used in the battlefield for years.

---


2 Kristen Fricchione, Casualties in Evolving Warfare: Impact of Private Military Firms’ Proliferation on the International Community, 23 Wis. Int’l L.J. 731, 735 (2005) (the utilization of mercenary forces in battle has been traced as far back as the battle of Kadesh in 1294 B.C., when the Egyptian Pharaoh Ramses II sent hired Numidian soldiers to fight the Hittites. Civilian armies began to spring up in certain ancient Greek city-states, but due to the necessity of specialized skills in war, Alexander the Great and the Roman Empire continued to hire fighters
A. Use of CCs in Battlefield.

During the U.S. Civil War, President Lincoln hired civilian balloonists to gather battlefield intelligence from above, and for this service, they received the staggering sum of ten dollars a day.\(^3\) This is one of the first examples of CCs engaging in combat activities.\(^4\) Then in the mid-90s during peacekeeping operations in Bosnia and Kosovo, because the executive branch was limited by a force cap imposed by Congress on the number of soldiers that could be deployed in the Balkans at any one time, the Department of Defense (DoD) chose to use contractors to cover a widening array of functions, including intelligence analysis, management and control of government property, and security guards for U.S. and coalition installations.\(^5\) Later in responses to Government Accountability Office (GAO) queries, the U.S. Army plainly stated that they had chosen to replace soldiers with contractors in Bosnia to meet the requirements for steady reduction of force levels; one result was that by October 2002, seven years after the start of the


\(^4\) Id.

Implementation Force mission in Bosnia, contractors outnumbered military members by 2 to 1.\textsuperscript{6}

Fast forward to the last decade or so, due to two simultaneous conflicts in Iraq and in Afghanistan, and maybe now a third in Syria, the fighting has stretched the U.S. military thin, and outsourcing allows the military to free up soldiers for actual combat.\textsuperscript{7} For instance, private security firms operating in Iraq protected many of the reconstruction efforts, and provided personal security for U.S. Department of State personnel.\textsuperscript{8} These firms hired persons with security experience from all over the world, and they came from nations that were parties to the conflict, and from nations that were not.\textsuperscript{9} For example, the Philippines were not a party to the conflict in Iraq, yet while it is illegal for its citizens to deploy to Iraq, many remained\textsuperscript{10} as employees of various contractors. As U.S. military efforts in Afghanistan persist, CCs will continue to be vital components for military commanders in achieving military operational, tactical and administrative objectives. And with contractors so involved in U.S. military operations by way of providing security during “outside the wire” missions, it’s inevitable that such

\textsuperscript{6} U.S. Gov’t Accountability Office, GAO-03-695, CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS (June 2003).

\textsuperscript{7} McCormack, \textit{supra} note 4, at 90.

\textsuperscript{8} Id.

\textsuperscript{9} Id.

\textsuperscript{10} Id. at 91.
personnel will be involved in combat situations\textsuperscript{11} that will call into question their status under international law, which ultimately affects how they will be treated if captured by enemy forces, to the extent enemy forces follow the laws of war, of course.

The use of CCs to affect military and national objectives is not a phenomena monopolized by the U.S., and civilian security contractors can also be extremely helpful for countries struggling with civil unrest.\textsuperscript{12} For instance, it is well known that multinational oil and mining companies hold interests and maintain operations in every part of the world.\textsuperscript{13} Unfortunately for these companies, while the flow of oil and mineral resources frequently remains stable over long periods of time, some of the countries in which the oil drilling and mining sites are located suffer from volatile political and cultural circumstances and frequently erupt in civil conflict.\textsuperscript{14} These companies find themselves in situations in which they must find a way to protect their operations and their access to these interests during the civil conflicts.

\begin{itemize}
\item\textsuperscript{11} Ellen L. Frye, Private Military Firms in the New World Order: How Redefining “Mercenary” Can Tame the “Dogs of War,” 73 Fordham L. Rev. 2607, 2610 (2005) (the United States acknowledges that civilian contractors in Iraq have engaged in combat on several occasions).
\item\textsuperscript{12} David Smith, http://www.guardian.co.uk/world/2011/feb/22/gaddafi-mercenary-force-libya (last visited Mar. 24, 2011) (there are widespread reports that Muammar Gaddafi has unleashed numerous foreign mercenaries on his people, in a desperate gamble to crush dissent and quell the current uprising).
\item\textsuperscript{14} Id.
\end{itemize}
or else they will lose their supply of extremely valuable resources.\textsuperscript{15} Along with the weakened governments of the countries in which they operate, these companies hire specialists in the form of private security forces, and these private security forces aid the governments and the oil and mining companies in two main ways: (1) They attempt to quash civil uprisings, thereby bringing "peace" to the country; and (2) They defend the regions in which the oil and mining operations are located and protect them from destruction that could result from the uprisings.\textsuperscript{16} Two African countries provide classic examples of how CCs are often used for operations that would typically be the responsibility of the military of the municipal governments.

\textbf{B. Angola}\textsuperscript{17}

In 1975, Portugal withdrew from Angola, leaving the country without the skills or knowledge necessary to create a functioning state.\textsuperscript{18} Unsurprisingly, civil war erupted immediately, and the United States and the Soviet Union backed their respective guerrilla factions.\textsuperscript{19} The communist, People’s Movement for the Liberation of Angola (MPLA), party was eventually able to seize power in a U.N. supervised election in 1992; however, the United States and South African

\textsuperscript{15} Id. at 292.
\textsuperscript{16} Id.
\textsuperscript{17} CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/fields/2111.html (Angola contains resources such as petroleum, diamonds, iron ore, phosphates, copper, feldspar, gold, bauxite, uranium).
\textsuperscript{18} Fricchione, \textit{supra} note 3 at 767.
\textsuperscript{19} Id.
governments, who backed Union for the Total Independence of Angola (UNITA), continued to fight as a rebel faction. In 1992, due to the instability, Executive Outcomes (EO) was hired by the Angolan state oil company, Sonangol, to secure the Soyo oilfield in Angola. After the field was secured, EO withdrew, but by late 1993, UNITA had retaken the Soyo oilfield. As a result, the Angolan government again called on EO for immediate military services in an extended arms and training contract, reportedly worth $40 million at the time. EO employees, who had previously fought for UNITA as South African Defense Forces (SADF) soldiers, would now fight against UNITA for the MPLA government. In 1994, the UNITA rebels were beaten into a peace accord conditioned on the withdrawal of EO troops. EO’s success clearly made them marketable for similar situations in other countries.

20 Id.
21 As one of the first military provider firms, Executive Outcomes built a niche in the market for military services. Founded by apartheid-era veterans of the South African Defense Force (SADF), EO publicly promoted the following services: strategic and tactical military advisory services, training packages in land, sea, and air warfare, peacekeeping services, advice on weapons selection, and paramilitary services.
22 Fricchione, supra note 3 at 768.
23 Id.
24 Id.
25 Id.
26 Id.
C. Sierra Leone

Following its achievements in Angola, EO offered its services to the embattled government of Captain Valentine Strasser of Sierra Leone, then fighting the rebels of the Revolutionary United Front (RUF). The RUF had waged a campaign of social terror since 1991 against the people of Sierra Leone and had occupied valuable mining territory. Sierra Leone's army, the Republic of Sierra Leone Military Forces (RSLMF), comprised of 3000 poorly trained soldiers, was unprepared to repel the insurgency. The Economic Community of West African States’ Military Monitoring Group (ECOMOG) forces stationed in Sierra Leone, including Nigerian, Ghanaian and Guinean troops, offered support but proved ineffective against the insurgency, and Strasser also enlisted the aid of British security companies, including the Gurkha Security Guards, to help train the new recruits, but they also were unable to stop RUF's advance. When Strasser's government hired EO in 1995, the country was in complete chaos (overrun by organized bandits), and it seemed likely that RUF would overtake the capital of

---

29 Id.
30 Id.
31 Id.
Freetown.\textsuperscript{32} EO sent approximately 120 military trainers to Sierra Leone to tutor the RSLMF and instill discipline in the motley group of government soldiers; as in Angola, it introduced nighttime operations, and it assumed operational control over offensives while using intelligence reports and sheer firepower to surprise and overpower the RUF's insurgency.\textsuperscript{33} EO launched air assaults against RUF bases with devastating effects, and Nigerian Alpha Jets, from its ECOMOG contingent, often provided tactical air support for EO operations.\textsuperscript{34} Ultimately, in December 1996, the parties to the conflict signed the Abidjan Accord, calling for the demobilization and disarming of RUF and the cessation of all EO's activities.\textsuperscript{35}

The above is clearly not an exhaustive list of the use of CCs for combat purposes throughout history. Nevertheless, with states seemingly continuing to hire private military companies to act in zones where armed conflicts are occurring, it begs the question, what is the status of such contractors under the law. As we shall see, if they are determined to be mercenaries, then they are generally determined to be unlawful combatants, and thus, not afforded prisoner of war (POW) status.\textsuperscript{36} To be cast as a mercenary also means that they could possibly be prosecuted for war crimes based on the current legal international regime or by the

\textsuperscript{32} \textit{Id.} at 96
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.} at 97.
\textsuperscript{36} Geneva Convention Relative to the Treatment of Prisoners of War art. 12, Oct. 12, 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135 (general protections afforded to POWs).
municipal government they are operating in. This paper will narrow the discussion to U.S. CC status under international law as they partake in activities closely aligned with combat situations as a result of employment by the U.S. government. Part II is a discussion of international law that demonstrates how difficult it can be to form international law, and thus, regulate CCs acting as mercenaries in the international sphere. Part III argues that the status of CCs in the battlefield is just about impossible to characterize as a mercenary under international law, and offers that they are probably best characterized as “civilians accompanying the armed forces”, and Part IV will conclude this article. Before we can reach the discussion of the status of CCs acting on behalf of governments under international law, it would be prudent to briefly explore the concept of the complicated field of international law to serve as a background in the analysis.

II. International Law.

Any international law student can tell you that the primary sources of international law include: 1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; 2) international custom, as evidence of a general practice accepted as law; 3) the general principles of law recognized by civilized nations; and 4) judicial decisions

---

37 CCs that are not typically subjected to hostile acts because their work precludes them from leaving a base in a combat zone, such as those that might work in a dining facility or at Morale, Welfare and Recreation (MWR) programs are not the intended topic of this discussion.
and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.\textsuperscript{38} For purposes of this Article, only treaties and customary international law (CIL) are discussed,\textsuperscript{39} since only those are generally considered to be the primary sources of international law.\textsuperscript{40}

A. Treaties.

Treaties are definitive sources of international law, and binding treaties are those between states that are memorialized in writing, intend to convey legal obligations or create reliance, and are subject to governance under international law.\textsuperscript{41} There is no legal distinction between the various written instruments because treaties, conventions, and protocols all carry the same weight.\textsuperscript{42} While treaties are generally regarded as binding upon only those states party to them, a treaty can nevertheless bind non-party states insofar as it is declaratory of CIL,\textsuperscript{43} because treaties can also constitute practice of states and, as such, can contribute to

\textsuperscript{39} For comprehensive information on international and CIL, see Malcolm N. Shaw, INTERNATIONAL LAW (6th ed. 2008).
\textsuperscript{40} Restatement (Third) of the Foreign Relations Law of the U.S. § 102 cmt. 1 (hereinafter Restatement) (general principles are a secondary source of international law, resorted to for developing international law interstitially in special circumstances); See also Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 141 n. 43 (2d Cir. 2010).
\textsuperscript{42} Id.
\textsuperscript{43} Id.
the growth of customary law.\textsuperscript{44} So the more universally accepted a particular treaty is by states, the more likely it will be regarded as CIL.

\textbf{B. Customary International Law.}

It’s not terribly difficult to determine what encompasses CIL by examining some of the widely accepted codifications of international law, such as the Restatement\textsuperscript{45} or even the ICJ Statute.\textsuperscript{46} However, to be able to identify when it develops, when it changes in practice, or what it actually says regarding a certain issue can be an entirely different story. This is, in part, because CIL results from political decisions to take the steps necessary to form a rule of law.\textsuperscript{47} Therefore, it’s not a precise entity in the first place.\textsuperscript{48} Ample evidence of this is to be found in the numerous writings of scholars on the subject and in the lengths to which courts go in trying to discover what CIL is on any particular subject at any particular time.\textsuperscript{49} Under both the Statute of the ICJ and the Restatement, CIL is composed of two elements.\textsuperscript{50} Those two elements are met when: 1) there is a relatively uniform and consistent state practice regarding a particular matter; and 2) a belief among

\textsuperscript{44}Restatement, \textit{supra} note 41.

\textsuperscript{45}\textit{Id.}

\textsuperscript{46}International Court of Justice, \url{http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II} (last visited Mar. 8, 2011) (\textit{see} Art 38(1)(b)).


\textsuperscript{49}\textit{Id.}

states that such practice is legally compelled. The first element is termed the objective or practice element, and it looks to the actual practice and behavior of states. The second is termed the subjective element, or the requirement that the particular norm is observed out of a sense of legal obligation. This development may take some time or it may happen quickly, and it is difficult to fix the precise date at which any customary law norm is established. Both the objective and the subjective elements of CIL have undergone extensive examination by scholars, and each has been analyzed from various perspectives. For example, the practice/objective requirement of CIL has been highly scrutinized, as authors have asked how much time exactly is necessary to create custom as well as how much consistency and widespread acceptance is required. These questions of time, consistency, and acceptance have yet to be answered by a concrete test or standard; instead, each issue relying on the application of the doctrine of state practice that is contested before an international tribunal is rarely determined by a documented examination of the actual practice of a broad cross-section of the international community's members, their opinions on the legal character of the practice, their knowledge of the facts that might produce new law, or their unpublicized

51 Sean D. Murphy, PRINCIPLES OF INTERNATIONAL LAW 76 (2006).
52 Ochoa, supra note 51, at 132.
53 Id.
54 Charney, supra note 48, at 536-538.
55 Ochoa, supra note 51, at 132.
opposition to the rule.\textsuperscript{56} What’s more, when there is a dispositive determination made by an international tribunal, those principles technically can’t be used in later proceedings as precedent due to the lack of \textit{stare decisis} resulting from international tribunals.\textsuperscript{57}

Due to the inherent difficulties with the formation of CIL as determined by state practice, the international community has focused on mainly relying on treaties to regulate conduct of CCs that endeavor to wage war on behalf of governments. This is an especially attractive approach since treaty making, comparatively speaking, appears to be the fastest way to form international law on a certain topic. A determination of whether these treaties dealing with mercenaries will later become CIL, which obligates all states, despite being a party or not, is dependent upon the wooly principles described above. Based on this general understanding of the formation of CIL, and the historically vast use of mercenaries throughout the world, and the political decisions driving such decisions, one can see how difficult it is to achieve sufficient international harmonization amongst states to effectively regulate CCs that behave as mercenaries.

\textsuperscript{56} Charney, \textit{supra} note 48, at 537.
\textsuperscript{57} Statute of the International Court of Justice, \textit{supra} note 39, art. 59 (the decision of the Court has no binding force except between the parties and in respect of that particular case).
III. International Law and Mercenaries.

A mercenary is basically "one who fights for an employer other than his home state and whose motivation is economic."\(^{58}\) Four categories of fighter could fit this definition of a mercenary: 1) state-loaned soldiers,\(^ {59}\) 2) state-recruited foreigners,\(^ {60}\) 3) corporate actors,\(^ {61}\) and 4) soldiers of fortune.\(^ {62}\) Mercenaries were actually generally considered a legitimate means of warfare until post-World War II, when they became actively involved in many of the post-colonial struggles for independence.\(^ {63}\) In addition to being associated with severe human rights abuses and other war crimes in those post-colonial struggles, the use of mercenaries was increasingly delegitimized because their involvement potentially prolonged certain conflicts and undermined international principles of self-determination.\(^ {64}\) As a result of this negative historical experience, the push for international provisions

\(^{58}\) Frye, *supra* note 12, at 2607.

\(^{59}\) *Id.* at 2614 (throughout history states loaned their armies, in whole or in part, to other states in exchange for money. For example, during the Viet Nam war, the United States employed South Korean, Filipino, and Thai troops, paying "an overseas allowance, a per diem for each soldier, plus an additional allowance according to rank," and "basically all expenses associated with deploying these forces," to include the cost of replacing these soldiers in their home army).

\(^{60}\) *Id.* at 2617. (Gurkhas are part of the British army but not entitled to the same benefits as other British soldiers. Though citizens of other nations, the loyalty of the Gurkhas to Britain is unquestioned).

\(^{61}\) *Id.* at 2621. (they operate as private companies that offer military services to foreign countries for pay).

\(^{62}\) *Id.* at 2622. (the golden age of these fighters was the 1950s and 1960s in sub-Saharan Africa, where notorious men like "Mad" Mike Hoare and Bob Denard sold their military services to the highest bidder).


\(^{64}\) *Id.*
banning use of mercenaries came primarily from post-colonial African states and often over the objection of Western states.\textsuperscript{65} Resulting international provisions, however, have failed to adequately define a mercenary and remain ineffective in establishing a regulatory scheme that could be applied plausibly to mercenaries\textsuperscript{66} that continue to operate throughout the world.\textsuperscript{67}

\textbf{A. International Efforts to Deal with the Use of Mercenaries.}

The first international statement on mercenaries is found in “Hague V,”\textsuperscript{68} and under Article 4 of this convention, neutral powers are prohibited from forming mercenary armies or allowing recruitment of mercenaries on their territory.\textsuperscript{69} Hague V does, however, tacitly acknowledge the use of mercenaries by prohibiting state-sponsored recruitment of soldiers in neutral territories, but allowing free travel across neutral states by individuals wishing to offer their services to a belligerent nation.\textsuperscript{70} Later, Geneva Law, which emerged from the 1949 Geneva

\textsuperscript{65} Id.

\textsuperscript{66} Govern, and Bales, \textit{supra} note 42, at 67.

\textsuperscript{67} Somalia Will Use Mercenaries to Fight Pirates, \url{http://www.lipmantimes.com/?p=19533} (last visited Mar. 19, 2011) (Saracen, a South African mercenary firm, has been contracted to provide military support for the government and anti-terrorist forces in Somalia, as well as train an anti-piracy force to patrol off the horn of Africa).

\textsuperscript{68} Hague Convention V - Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 Oct. 1907, 36 Stat. 2310, 1 Bevans 654, \textit{see also} Frye, \textit{supra} note 12, at 2624 (the first formal pronouncement of the modern international laws of war).

\textsuperscript{69} Frye, \textit{supra} note 12, at 2624-2625.

Conventions, dealt with the protection of non-combatants,71 including military personnel rendered unable to fight, but the agreements did not mention mercenaries, and scholars generally believe that the drafters did not seek to change the status quo.72 Moreover, the U.N. General Assembly has repeatedly passed resolutions admonishing the use of mercenaries.73 But the international community's long history of using mercenaries meant that there was no real universal desire to challenge the traditional approach until the latter half of the twentieth century.74 In a largely political movement against the West, since the West was accused of using mercenaries to defend its interest in colonial Africa, Nigeria led the charge of African nations pushing for a new definition of

---

71 J. Ricou Heaton, Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces, 57 A.F. L. Rev. 155, 172 (2005) (noncombatants are members of the armed forces who have primary status as combatants, not civilians, but do not take part in hostilities because their own state prohibits them from doing so).
72 Ebrahim, supra note 69, at 202-203.
"mercenary" under international law, and in the end, a feeble, and rather loose, definition of mercenary emerged as part of Protocol I to the Geneva Conventions.\footnote{Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 12 Aug. 1949, 1125 U.N.T.S. 4.} 

1. Additional Protocol I.

Article 47 of the treaty provides that: A mercenary shall not have the right to be a combatant\footnote{Katherine Fallah, Corporate Actors: The Legal Status of Mercenaries in Armed Conflict 606 (vol. 88, no. 863, Sep. 2006) (Additional Protocol I defines a combatant as a member of the armed forces of a party to the conflict (with the exception of medical and religious personnel), available at http://www.icrc.org/eng/assets/files/other/irrc_863_fallah.pdf (last visited Mar. 21, 2011).} or a POW, and a mercenary is any person who: 1) is specially recruited locally or abroad in order to fight in an armed conflict; 2) does, in fact, take a direct part in the hostilities; 3) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; 4) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; 5) is not a member of the armed forces of a Party to the conflict; and 6) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.\footnote{International Committee of the Red Cross (ICRC), http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=S (last visited Mar. 21, 2011) (there are 170 parties to the treaty, but important countries such as the United States, Iran, Morocco, Pakistan, and the Philippines have only signed this treaty, and have not ratified it).} Article 47 clearly expresses a strong moral condemnation of the practice of mercenarism,
emanating largely from the de-colonization process. And although the treaty does not criminalize the practice and conceivably would allow mercenaries to operate at their own risk of capture and prosecution, Protocol I reflects a broad distaste for mercenaries and an effort to discourage their continued use. Due to the vagueness of the elements of mercenary included in Protocol I, the U.N. thought it prudent to develop the law further.


In 1989, the U.N. General Assembly adopted the "U.N. Mercenary Convention". The treaty incorporates the definition of mercenary found in Article 47 of Protocol I, and applies it to all conflicts, international and internal. It also added language specifying that mercenaries were people undermining legitimate governments, by supplementing the definition of mercenaries to reflect that a mercenary is also someone who, in any situation: 1) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at: a) Overthrowing a government or otherwise undermining the constitutional order of a State; or b) Undermining the territorial integrity of a State.

---

78 Ebrahim, supra note 71, at 207.
80 Frye, supra note 12, at 2630.
81 Scheimer, supra note 75, at 617.
Consequently, it’s pretty clear that the drafters created the U.N. Convention not only in response to post-colonial conflict in Africa, but also had specific parties in mind when they drew up the extensive criteria for a "mercenary."\textsuperscript{83}

The treaty, however, has not achieved widespread acceptance like Protocol I. For instance, Article 19 of this convention states that the treaty would enter into force thirty days after the twenty-second nation ratified the agreement, but this did not occur until a decade had passed in 2001, when Costa Rica acceded to the treaty.\textsuperscript{84} Moreover, since the U.N. Convention has far less members that have ratified the treaty than Protocol I, it currently carries far less significance in the development of CIL, but it is clearly operative amongst the member states. Any resolutions promulgated by the General Assembly would also not satisfy the elements (state practice and opinion juris) of CIL, as previously discussed. Protocol I, however, probably does constitute CIL since only five countries have not ratified it, even though one of those five is the U.S. Nevertheless, the treaty arguably sufficiently reflects general state practice to constitute CIL, and to substantiate this view, the U.S. Department of State has recognized the inclusion of

\textsuperscript{82} Ebrahim, \textit{supra} note 71, at 208-209.
\textsuperscript{83} Scheimer, \textit{supra} note 75, at 617.
\textsuperscript{84} Ebrahim, \textit{supra} note 71, at 209 (to date, just twenty-eight of the 194 U.N. member states have ratified the treaty, none of which can be considered a major military power).
the core of Protocol I in CIL.\textsuperscript{85} As a result, despite the historical and regional significance of the U.N. Convention, and the various U.N. resolutions related to mercenaries, this article will proceed with an analysis of mercenaries under the legal definition of Protocol I, since violation of it will have a far better chance of being considered a violation of CIL by the international community because it’s the most synchronized view amongst states. It’s also important to note that the above mentioned treaties certainly do not reflect an exhaustive list of attempts in the international community to regulate mercenaries.\textsuperscript{86} Despite all these efforts to rein in mercenary activity, contemporary CCs operating on behalf of the U.S. government in Iraq or Afghanistan can still, without much difficulty, escape accountability under the most universally accepted international treaty regarding mercenaries, which is clearly Protocol I.

\textbf{B. U.S. CCs Can Easily Escape Being Characterized as Mercenaries Under Additional Protocol I.}

U.S. CC personnel can argue that they are not "mercenaries" if they do not meet the specific criteria in Article 47 of Protocol I. If CCs can avoid even one element of the international definition in Protocol I, then they can escape the

\textsuperscript{85} David Mortlock, Definite Detention: The Scope of the President's Authority to Detain Enemy Combatants, 4 Harv. L. & Pol'y Rev. 375, 382 (2010).

coverage of the entire definition.\textsuperscript{87} Much of how they are characterized is dependent upon what role CCs are performing for the government. For instance, some of the more ambiguous functions CCs provide include intelligence collection, training, equipment transportation, interrogation, and protection of civilians,\textsuperscript{88} which can really confound the issue because typically these function will expose them to enemy combatants, and thus, hostile acts, which can cause CCs to engage the enemy in armed conflict.

To serve as an example, let’s assume that CC “X” has been contracted by the U.S. government to provide security for Provincial Reconstruction Team (PRT)\textsuperscript{89} personnel in Iraq. Security personnel individuals typically accompany PRT officials to various engagements to ensure PRT officials are not harmed, and if attacked by enemy insurgents during the mission, CCs provide defensive combat power to thwart enemy forces to ensure safety of PRT officials. In fulfilling this contract for the government, contractor “X” may find it prudent to fill such positions by employing personnel from other countries, such as South Africa, Britain, Uganda, Philippines, and so forth. Further assume that a PRT is

\textsuperscript{87} Scheimer, \textit{supra} note 75, at 623.  
\textsuperscript{89} U.S. Department of State, \url{http://www.state.gov/p/nea/ci/iz/c21830.htm} (last visited Mar. 23, 2011) (PRTs are relatively small operational units comprised not just of diplomats, but military officers, development policy experts, and other specialists (in fields such as rule of law, engineering, and oil industry operations) who work closely with Iraqi provincial leaders and the Iraqi communities that they serve).
convoying from Mosul, Iraq to Tal’Afar, Iraq to engage with local Sheikhs, City Council members, and the Mayor to advance local rebuilding efforts. The PRT is escorted by four security guards, 2 from the U.S., and 2 from South Africa. While en route in their High Mobility Multipurpose Wheeled Vehicles (Humvees), the PRT is attacked by enemy Al-Qaeda insurgents that results in exchange of heavy small-arms fire. Although the CCs are able to kill several of the enemy, the team is overwhelmed by the number of enemy insurgents, and later one of the South Africans is captured by the enemy and hauled away. The rest of the PRT makes it to Tal’Afar. If this scenario occurs, what is their status under international law? Would the captured South African be entitled to POW status or would he be considered a mercenary, and therefore subject to prosecution under Iraqi law? The following discussion of the elements of Article 47 will analyze who can be considered a mercenary under international law, which will shed some light into the status of CCs working side by side with their military counterparts. However, this article does not endeavor to involve an analysis of all the potential legal statuses under the Law of War.  

1. Person is specially recruited locally or abroad in order to fight in an armed conflict.

Contractors in the above example could fall under element 1 if hired specifically for an armed conflict, and contractors that are hired specifically for

---

90 For a detailed discussion, See Kidane, supra note 89.
PRT operations in Iraq/Afghanistan could arguably fall under this section because the term "armed conflict" encompasses a range of possibilities from outright war to low intensity conflict. However, contractor “X” personnel would have to have been hired specifically to actually "fight" in the armed conflict for them to fall under this element. So, if contractors have been hired for duty intended to be a non-combat role, such as to provide only defense for diplomats (i.e., PRT officials) when faced with aggression, even during a specific conflict, the contractor personnel could escape application of this element because the personnel of “X” are technically supposed to be non-fighters/civilians. Fighting is legally left for military forces, and others taking direct part in in hostilities, or those who have a continuous combat function under international law. The same goes for contractor personnel that are hired for base security duties because they are not hired specifically to fight, although they may be drawn into the conflict by virtue of being on the scene. But even if the contractors were to fall under this element by a liberal interpretation, it certainly does not end the analysis.

2. Person Does, in Fact, Take a Direct Part in the Hostilities.

Element 2 requires that a person actually take direct part in the conflict to be considered a mercenary. Therefore, even if a country hires a contractor to fight in

91 See Commentary to Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Aug. 12, 1949, 1125 U.N.T.S. (emphasizing that the provisions of the Convention will apply to any conflict involving recognized armed forces, regardless of scope and intensity).

92 See generally Scheimer, supra note 75, at 625.
an armed conflict as required by element 1, the contractor could still escape
requirements of element 2 if the contractor does not engage in any direct fighting.\textsuperscript{93} The meaning of taking a "direct" part in fighting probably should be interpreted
quite broadly under the realities of modern conflict because taking direct part in combat requires only a link between some action and harm to the enemy.\textsuperscript{94}

Referring back to the hypothetical, even though the contractors protecting the PRT were acting in self-defense and the defense of the PRT officials, under a liberal view, they technically could be considered to have directly partaken in hostilities despite the fact they were drawn into the conflict by the enemy. Despite the potential characterization under the first two elements, it’s the third element that allows for much legal maneuvering.

\textbf{3. Person is Motivated to Take Part in the Hostilities Essentially by the Desire for Private Gain and, in Fact, Is Promised, By or on Behalf of A Party to the Conflict, Material Compensation Substantially in Excess of That Promised or Paid to Combatants of Similar Ranks and Functions in the Armed Forces of That Party.}

Perhaps the most vague of all the requirements, this element attaches a motivational requirement (mercenaries must be "("motivated to take part in hostilities essentially by the desire for private gain") that is both difficult to prove and easily rebuttable by personal testimony as to one's motivations. Indeed, as the

\textsuperscript{93} \textit{Id.} at 626.
\textsuperscript{94} Frye, \textit{supra} note 12, at 1679 (Protocol I Commentary stating that "direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place").
United Kingdom’s Diplock Committee stated in its 1976 report on the recruitment of mercenaries: Any definition of mercenaries which required positive proof of motivation would … either be unworkable or so haphazard in its application as between comparable individuals as to be unacceptable. Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it.95

Further, Contractor X’s contracts with their personnel may indicate that they pay more than states pay the members of their armed forces, but the requirement that private gain be the essential motivator of a mercenary is tricky because it could be argued that private gain is only one of many factors motivating the contractors, such as fighting for a certain cause. Additionally, this element requires that mercenary compensation be "significantly in excess" of that paid to members of the armed forces of "similar rank and function." Contractors generally advertise their services as highly specialized and professional, and, thus, comparison costs are probably most appropriate between Special Forces operators and CC employees. But it is hard to determine if CC employees really receive wages in excess of the armed forces, because it is unclear whether outsourcing functions to CCs saves money or costs more than the military doing the work.

95 Fallah, supra note 77.
itself. As a result of all the vagueness in this element of the definition, it would be very difficult for the PRT security contractors, or any CC for that matter, to satisfy this element.


The remaining three elements of the Protocol I definition work as exceptions based on nationality. Element 4 defines mercenaries as foreign nationals. It is generally very likely that a contractor will have employees in a conflict zone that fall under this element because contractors recruit individuals from all across the world, as is the case in our hypothetical regarding the South Africans. In order for a person to be a mercenary under element 4, a person "is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict," meaning, for example, all U.S., and British, contractors in Iraq would immediately be exempt, but the employees on the security team from South Africa would not since they are not nationals of a party to the conflict, nor are they presumably residents of Iraq.

96 See generally Scheimer, supra note 75, at 627-628.
98 BBC News, http://news.bbc.co.uk/2/hi/americas/2862343.stm (citing U.S. State Department) (last visited 23 Mar. 2011) (South Africa was not part of the original “coalition of the willing”).
And the final two definitional criteria exempt members of the armed forces of parties to the conflict and nonparties to the conflict sending soldiers on official duty. For instance, element five requires that a person, in order to be a mercenary, not be a member of the armed forces of a Party to the conflict. Security contractors that work with this PRT clearly operate in the private sphere, their guidance would come primarily from the text of their contract or possibly from PRT officials who work for the government instead of military commanders, and they certainly haven’t taken an oath like their military counterparts prior to committing to serve their country. Thus, security contractors, like those serving on this PRT are not members of the armed forces of a party to the conflict so they would meet the requirement of element 5 to satisfy the definition of mercenary.

Element 6 basically says that a person is a mercenary if that a person has not been sent by non-party State on official duty as a member of its armed forces. This element is not relevant to persons from the U.S. or Britain on the PRT because they are clearly a party to the conflict, but the status of the contractors from South Africa is less clear. Unless there is evidence that the South Africans on the PRT are members of the South African armed forces, and they have been sent by the South African government on official duty, their conduct would likely satisfy the sixth element, and thus, they would be considered mercenaries under this element.

---

99 Ebrahim, supra note 71, at 211.
Interestingly, at least one country has found a way to circumvent the prohibitions found in elements 5 and 6 by incorporating potential mercenaries into its armed forces. The United Kingdom, for example, has done so with the Nepalese Gurkhas serving in its army.  

What the definition under Protocol I reveals is that while U.S. contractor personnel could possibly satisfy some elements of the definition of mercenary in Iraq or Afghanistan, the cumulative requirement of Article 47 means that it would be difficult to find a situation where a CC is truly acting as a mercenary under all elements of Article 47. Based on the hypothetical, only the South Africans working for the U.S. contractor would be considered mercenaries, assuming that the motivation element would also be satisfied. As a result, the captured CC from South Africa would not be entitled to POW status after his capture, but he would still be entitled to the minimal due process standards guaranteed civilians in Geneva Convention IV and Article 75 of Protocol I.  

C. If Not a Mercenary, then Probably Civilians Accompanying the Armed Forces.

The vagueness of the mercenary definition does not mean that these CCs can engage in combat because unless civilians are incorporated into a state's armed forces, and therefore become combatants, they remain civilians who may not

---

100 J. Ricou Heaton, Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces, 57 A.F. L. Rev. 155, 175 (2005).
101 Id. at 176.
engage in combat. Signing a contract with a state is, by itself, insufficient to convert a civilian to a combatant.\footnote{Id. at 176.} If they do happen to engage in non-defensive combat,\footnote{See generally, Michael N. Schmitt, Clipped Wings: Effective and Legal No-fly Zone Rules of Engagement, 20 Loy. L.A. Int'l & Comp. L.J. 727, 754-755 (1998) (inherent right to individual self-defense and defense of others stems from Article 51 of the U.N. Charter, and is authorized when confronted with a hostile act by enemy forces).} then they could likely be committing a violation, not only under international law, but also under the laws of the state in which they are operating for which they could be prosecuted because they are not lawful combatants.\footnote{For additional prosecutorial options, see generally 18 U.S.C. 3261 (the U.S. also has provisions to prosecute such individuals under the Military Extraterritorial Judicial Act), and 10 U.S.C. 802 (art. 2 provides for court-martial jurisdiction over civilians accompanying the armed forces during war/contingency operation).}

Protocol I also defines civilians as those persons who are not part of the armed forces, and this definition also includes “civilians who accompany the armed forces.”\footnote{Heaton, supra note 101, at 173-174 (Protocol I provides in art. 50 that a "civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3), and (6) of the Third Convention and in Article 43 of this Protocol." Civilians accompanying the armed forces are referred to in Geneva Convention art. 4(A)(4), which states: Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model).} As a result, if U.S security contractors don’t qualify as mercenaries, or combatants, they certainly could be classified as civilians accompanying the armed forces since they receive authorization from the U.S.
military to deploy, receive appropriate identification cards before deployment,\footnote{See U.S. DEPT OF DEFENSE, INSTR. 1000.1, IDENTITY CARDS REQUIRED BY THE GENEVA CONVENTIONS para. 5.2 (Jan. 1974), available at \url{http://www.dtic.mil/whs/directives/corres/pdf/100001p.pdf} (last visited Mar. 23, 2011).} and usually are provided with transportation to the deployment. In fact, the Department of Defense (DoD) generally views such CCs as civilians accompanying the armed forces.\footnote{See generally Major Rawcliffe, and CPT Smith, OPERATIONAL LAW HANDBOOK 133 (2006), also available at \url{www.jagcnet.army.mil}.} Interestingly, civilians designated as “civilians accompanying the force” have civilian status under international law, but they receive different treatment from other civilians because, unlike almost anyone else with civilian status, they are entitled to POW status when captured.\footnote{Heaton, \textit{supra} note 101, at 174.}

**IV. Conclusion.**

Civilians have been used for years by governments to help accomplish military objectives. However, their use clearly became disfavored after WW II. Subsequently, the international community, led by the African states, attempted to delineate who should be a mercenary, and thus, potentially lose combatant status under international law. Those efforts have been noble, yet insufficient because the international law instruments that have been developed clearly suggest a lack of harmonization amongst states to create an effective legal scheme prohibiting the use of mercenaries, which is why the definition in Protocol I appears diluted and difficult to apply. Additionally, as some militaries have become leaner over the
years, and cost-cutting measures have been instituted, militaries continue to use civilians to supplement their efforts, which seems to undermine the purpose of Art. 47 of Protocol I when those CCs are used in positions that expose them to combat. Naturally not all CCs are involved in combat situations, but when they are, and they happen to meet the nationality requirements of Protocol I, CCs such as those protecting diplomats on “outside the wire” missions, fall into a nebulous zone that forces them to straddle the line between civilians and an unlawful combatants. Until the international political will required by international law shifts in favor of a more robust effort against the use of mercenaries, regulation will remain fuzzy and ineffective.

The clarity of the status of contractor personnel is especially crucial since it potentially preserves the essential moral difference between a soldier and a murderer; the difference between doing one's duty and committing a war crime; the difference between coming home in honor or coming home in shame, with the attendant effects for both the soldier and society.109 Unfortunately to determine who exactly is a mercenary under Protocol I appears to be rather disingenuous since just about everyone can escape its application. Commentators have noted that this is an extremely narrow definition of mercenaries, and it prompted one commentator to suggest that "any mercenary who cannot exclude himself from this

109 Kidane, supra note 89.
definition deserves to be shot - and his lawyer with him." In sum, by some outside chance, if security contractors, like the South Africans in the hypothetical, do fit into the definition of mercenary under Protocol I, then they are considered unlawful combatants, and thus, are considered to have engaged in criminal enterprise and may be prosecuted for their crimes. The diverse services provided by the private military industry do not fit neatly into the Protocol I mercenary definition, and the industry, for the most part, operates outside the legally defined mercenary regime.

---

110 Id. at 388.
111 Heaton, supra note 101, at 176.