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Promoting compliance of private security and military companies with international humanitarian law

Benjamin Perrin

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Abstract

Private security and military companies have become a ubiquitous part of modern armed conflict and post-conflict reconstruction. Their diverse clients include governments in the developed and developing world alike, non-state belligerents, international corporations, non-governmental organizations, the United Nations, and private individuals. The implications of this proliferation of private security and military companies for international humanitarian law and human rights are only beginning to be appreciated, as potential violations and misconduct by their employees have come to light in Iraq and Afghanistan. The author critically examines the theoretical risks posed by private military and security company activity with respect to violations of international humanitarian law and human rights, together with the incentives that these companies have to comply with those norms. Empirical evidence is also presented to expand on this theoretical framework. Taking a multidisciplinary approach, the author draws on law, international relations theory, criminology, economics, corporate strategy and political economy, as well as psychology and sociology, to analyse the competing “risk-factors” and “compliance levers” that interact at each level of private military and security company activity to enhance or reduce the likelihood of a violation occurring. These findings are then applied by the author to assess emergent measures to deal with private security and military companies outside the legal sphere, including a programme of the International Committee of the Red Cross and the advent of the International Peace Operations Association.



Introduction

Private security companies¹ and private military companies² have become a ubiquitous part of modern armed conflict and post-conflict reconstruction.³ The implications of this proliferation of private military and security company activity for international humanitarian law⁴ are only beginning to be realized as potential violations by their employees come to light.⁵

Despite a wealth of legal and political science literature on private security and military companies, no truly systematic analysis has been undertaken to illuminate the theoretical risks of violations of international humanitarian law by such companies and the incentives they have to comply with it. The result is an incomplete picture that fails to adequately appreciate the complex interrelationship between each component of private military and security company activity and their impact on compliance with international humanitarian law. Compounding this blind spot in the literature is the limited recourse that has been had to relevant multidisciplinary tools of analysis and empirical evidence.

Recognizing these concerns, this article sets out to identify and examine critically examine the competing “risk factors” and “compliance levers” (or incentives) that interact at each level of private military and security company

- 1 Private security companies are companies that provide defensive armed protection for premises or people, capable of defending against guerrilla forces or serving as personal bodyguards. By contrast, Non-lethal services providers (NSPs) provide logistical support such as de-mining, laundry and food services. Doug Brooks, “Protecting people: The PMC potential: Comments and suggestions for the UK Green Paper on regulating private military services”, 25 July 2002, pp. 2–3.
- 2 Private military companies include both “active PMCs willing to carry weapons into combat, and passive PMCs that focus on training and organizational issues”. Ibid.
- 3 The industry is expected to grow from US\$55.6 billion in 1990 to \$210 billion by 2010. Paul Keilthy, “Private security firms in war zones worry NGOs”, 11 August 2004, online at AlertNet, <<http://www.alertnet.org/>> (visited 23 October 2006).
- 4 “[T]he personnel of private military and security companies must respect international humanitarian law and can be prosecuted if they commit war crimes.” See “The ICRC to expand contacts with private military and security companies”, International Committee of the Red Cross, 4 August 2004, online at <<http://www.icrc.org/>> (visited 23 October 2006).
- 5 See, e.g., in Afghanistan, *United States v. Passaro*, No. 5:04-CR-211-1, 2004 WL 1431014 (E.D.N.C.) (Central Intelligence Agency contractor charged with two counts of assault with a dangerous weapon with intent to do bodily harm, and two counts of assault resulting in serious bodily injury against a detainee); Shaista Shameem, “Report of the Special Rapporteur: Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”, Commission on Human Rights, 61st Sess., UN Doc. E/CN.4/2005/14, 8 December 2004, p. 14 (three United States contractors found guilty by an Afghan court in September 2004 for torture, running a private prison and illegal detention); in Iraq, Major General Taguba, *Article 15–6 Investigation of the 800th Military Police Brigade*, 2004, online at <http://www.npr.org/iraq/2004/prison_abuse_report.pdf> (Taguba Report, implicating private military and security company interrogators and translators in the abuse of Iraqi prisoners at the Abu Ghraib detention facility) (visited 23 October 2006); but see HC 577 Private Military Companies: Options for Regulation 2001–02, Foreign and Commonwealth Office (United Kingdom), The Stationary Office, London, 12 February 2002, pp. 17, 19 (hereinafter UK, Options for Regulation) (private military and security companies often respect international humanitarian law and human rights better than national armies or peacekeeping forces).

activity to enhance or reduce the likelihood of a violation of international humanitarian law. The relevant levels of analysis are (i) states of incorporation of private security and military companies; (ii) states from which personnel of private security and military companies are recruited; (iii) states in which private security and military companies actually operate; (iv) clients of private security and military companies; (v) the private security and military company industry as a whole; (vi) individual private security and military firms (including their officers and directors); and (vii) employees of private security and military companies. At each of these levels, the strongest risk factors and compliance levers are explored from relevant multidisciplinary perspectives, including law, international relations, criminology, economics, management and political economy, as well as psychology and sociology. Empirical evidence is offered to illustrate the theoretical findings. This research concludes by linking these findings with emergent approaches *outside* formal law to promote private military and security company compliance with international humanitarian law.

The compliance framework: risk factors and compliance levers

International relations scholar Elke Krahnmann describes the “functional fragmentation” of global security away from a state-centric model towards “multiple and separate authorities, including public or private actors”.⁶ Nowhere is this more apparent than in private military and security company activity, with its many potential sites of normativity. There are risks that each player will contribute to an international humanitarian law violation occurring on the ground, but paradoxically, at the same time they have often powerful incentives to promote compliance. It is the result of this contest of risks and incentives that will largely determine whether international humanitarian law is respected. Deconstructing the main risks and countervailing incentives at play is the aim of the present analysis.

State of incorporation

Most private security and military companies are incorporated in the United States, the United Kingdom and South Africa.⁷ States of incorporation may contribute to the risk of international humanitarian law violations owing to the “charter shopping” phenomenon, weak extraterritorial regimes and the privileging of foreign policy interests rather than international humanitarian law concerns.

6 Elke Krahnmann, “The privatization of security governance: Developments, problems, solutions”, 1/2003, *Arbeitspapiere zur internationalen Politik*, p. 6, online at <<http://www.politik.uni-koeln.de/jaeger/downloads/aipa0103.pdf>> (visited 23 October 2006).

7 Carlos Ortiz, “Regulating private military companies: States and the expanding business of commercial security provision”, in Kees van der Pijl et al. (eds.), *Global Regulation: Managing Crises after the Imperial Turn*, Palgrave Macmillan, New York, 2004, p. 211.

Conversely, it is generally in the reputational and economic interests of these states to promote compliance with international humanitarian law.

The contribution of states of incorporation to risk of violations

Charter shopping. Where the “legal environment” becomes too restrictive, companies may relocate to a more favourable jurisdiction, engaging in an economic phenomenon known as “charter shopping”.⁸ When private security and military companies engage in charter shopping, this may contribute to the risk of an international humanitarian law violation if their new state of incorporation is one where “regulation is at best lax and often non-existent”.⁹ There is anecdotal evidence that charter shopping took place after South Africa adopted laws in 1998 which the private military and security company industry denounced as “over-regulation” and “ungainly”.¹⁰ Firms threaten that they “can become very nomadic in order to evade nationally applied legislation which they regard as inappropriate or excessive”.¹¹ However, this risk should not be overstated, because “companies [which] choose to base themselves offshore in order to avoid scrutiny ... pay a price in terms of perceived lack of legitimacy”.¹²

The weakness of extraterritorial jurisdiction schemes. With the notable exception of the United States and South Africa, most states are reluctant to exercise extraterritorial jurisdiction over their private security and military companies.¹³ Even where laws authorize the extraterritorial regulation of national firms, there are significant monitoring problems.¹⁴ Given that states of incorporation are generally unwilling or unable to monitor the international humanitarian law compliance of their private security and military companies (unless they are also the clients of those firms), there is an enhanced risk that violations will go undetected and unpunished, contributing to a sense of impunity that may further increase the likelihood of international humanitarian law violations recurring.

Privileging foreign policy interests. Private security and military companies may be an important extension of the foreign policy of their states of incorporation.

8 See generally Jacob S. Ziegel et al., *Cases and Materials on Partnerships and Canadian Business Corporations*, 3rd edn, Vol. 1, Carswell, Toronto, 1994, pp. 248–51.

9 Ortiz, above note 7, p. 218.

10 Brooks, above note 1, p. 5. South Africa is considering stricter legislation that could heighten these concerns: see *Prohibition on Mercenary Activities and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill, 2005 (South Africa)* (on file with author).

11 “Private military companies: Independent or regulated”, Sandline International, 28 March 1998, p. 3, online at <<http://www.sandline.com/white/regulation.doc>> (visited 24 October 2006).

12 Henry Cummins, “Perception and profit: Understanding commercial military and security service provision”, Discussion Paper, Centre for Studies in Security and Diplomacy: University of Birmingham, 14 June 2002, p. 6; see also UK, *Options for Regulation*, above note 5, p. 21.

13 See generally, Ortiz, above note 7, pp. 217–218.

14 Ellen L. Frye, “Private military firms in the new world order: How redefining “mercenary” can tame the “dogs of war””, *Fordham Law Review*, Vol. 73 (2005), p. 2647.

For example, the United States Munitions List and International Traffic in Arms Regulations, which also govern military service contracts, are “updated and amended to reflect changing foreign policy goals”.¹⁵ In the 1990s, these regulations prohibited US-based private security and military companies from working for certain parties in the former Yugoslavia, and in 2002 for the government of Zimbabwe.¹⁶ The United Kingdom has stated that “it would retain reserve powers to prevent [private security and military companies] from undertaking a contract if it ran counter to UK interests or policy”.¹⁷ Even without regulations in place, some British private military and security companies have a “stated policy ... to consult the Government before entering into any contract with a foreign client”.¹⁸

While both the United States and the United Kingdom have recognized detailed human rights and international humanitarian law commitments governing private military and security company activity in voluntary codes of conduct, such as the UN Global Compact “Voluntary Principles on Security and Human Rights”,¹⁹ such obligations are conspicuously absent in national legislation. This strongly suggests that national regulation of the private military and security company industry has very little to do with promoting compliance with international humanitarian law; rather it is overwhelmingly concerned with the foreign policy and national security interests of states in which such companies are incorporated.

The incentives of states of incorporation to promote compliance

Reputational concerns and diplomatic repercussions. International legal compliance literature postulates, among other things, that states “obey international law when it serves their short- or long-term self-interest to do so”.²⁰ In this case, states of incorporation will “ensure respect”²¹ for international humanitarian law when it is in the interests of their reputation to do so. There is strong evidence that national regulatory activity is triggered by allegations of improper conduct by private security and military companies abroad.

South Africa faced international pressure to control notorious firms based there – notably Executive Outcomes – leading to the enactment of the Regulation of Foreign Military Assistance Act 1998.²² Parliamentary consideration of private

15 Ortiz, above note 7, p. 213.

16 Ibid.

17 UK, Options for Regulation, above note 5, p. 25.

18 “We don’t operate in the shadows”, *Telegraph* (United Kingdom), Issue 1632, 3 December 1999, online at <<http://www.telegraph.co.uk/>> (visited 24 October 2006).

19 See UN Global Compact, Voluntary Principles on Security and Human Rights, posted 24 June 1992, online at <<http://www.unglobalcompact.org/>> (visited 24 October 2006).

20 Harold Hongju Koh, “Transnational legal process”, *Nebraska Law Review*, Vol. 75 (1996), p. 199; but see Markus Burgstaller, *Theories of Compliance with International Law*, Martinus Nijhoff, Leiden, 2005, p. 157–65.

21 See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949 (First Geneva Convention), 75 UNTS 973, Art. 1, online at <<http://www.icrc.org/>> (visited 24 October 2006).

22 Ortiz, above note 7, p. 215; Regulation of Foreign Military Assistance Act (South Africa), No. 15 of 1998.

military and security company regulation in the United Kingdom was spurred by the “Arms to Africa” affair involving a former British colonel, Tim Spicer, of the now defunct Sandline International, which had offices in London.²³ In the United States there has been a flurry of legislative activity in the wake of the prisoner abuse scandal at Abu Ghraib, in which US contractors were implicated.²⁴

Economic interest in the legitimacy of national private military and security companies. Henry Cummins argues that states of incorporation have an economic interest in fostering a perception that their private military and security companies are legitimate.²⁵ While it is true that many states of incorporation potentially benefit from the tax revenues and the contribution to gross national product of their said companies, the strength of this incentive should not be overstated. It is also based on the assumption that “bad” private security and military companies are unprofitable – an assumption that is challenged below.

States of personnel

Private military and security company personnel hail from an increasingly diverse group of states. While most personnel were traditionally ex-military members from developed countries, there is now a trend for private security and military companies to hire former combatants from developing countries such as Colombia, Guatemala, El Salvador, Nicaragua and Chile.²⁶ In Iraq local recruitment is increasing, with the effect that the ratio of expatriate to local staff is 1:10. This has caused problems for firms such as Aegis Defense Systems, which failed a recent US government audit that found that its Iraqi employees were insufficiently vetted.²⁷

The contribution of states of personnel to risk of violations

Monitoring problems and weak extraterritorial enforcement. As discussed in detail above with respect to states of incorporation, states of personnel are even less likely to be in a position to monitor geographically remote violations of international humanitarian law by their nationals. Extraterritorial claims of

23 UK, Options for Regulation, above note 5, p. 6.

24 See, e.g., Contractor Accountability Act of 2004 (United States), HR 4387, 18 May 2004; MEJA Clarification Act of 2004 (United States), 108th Congress, 2nd Sess., HR 4390, 19 May 2004; Stabilization and Reconstruction Civilian Management Act of 2005 (United States), 109th Congress, 1st Sess., S 209, 31 January 2005; International Security Enhancement Act of 2005 (United States), 109th Congress, 1st Sess., HR 1361, 17 March 2005; Transparency and Accountability in Security Contracting Act (United States), 109th Congress, 1st Sess., 26 April 2005; Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, S 2400, § 864, 865, 1021.

25 See Cummins, above note 12, p. 9.

26 Sonni Efron, “Troops for hire”, *Edmonton Journal*, 2 August 2005, p. E11 (Proquest); see also Richard Norton-Taylor, “Army fears loss of top troops to private firms”, *Guardian* (United Kingdom), 8 August 2005, online at Corpwatch, <<http://www.corpwatch.org/>> (visited 24 October 2006).

27 Tony Capaccio, “U.S. military tightens rules for contractors in combat zones”, *Bloomberg*, 27 October 2005, online at IPOA, <<http://www.ipoaonline.org/>> (visited 24 October 2006).

jurisdiction solely on the basis of nationality of the offender remain relatively rare in practice.

The incentives of states of personnel to promote compliance

Diplomatic repercussions. Throughout history and up to the present day, many states have opted to impose prohibitions on their citizens engaging in military activity abroad without the approval of the sovereign or state, reflecting foreign policy concerns including the diplomatic repercussions of being perceived as indirectly participating in a war.²⁸ Most recently South Africa, for example, was concerned that it was being seen as indirectly supporting the US-led war in Iraq, as well as a coup plot in Equatorial Guinea, because significant numbers of its nationals were allegedly working for private security and military companies in those countries.²⁹

However, the diplomatic incentives of states of personnel are likely to be weaker than similar incentives of states of incorporation. This is due to the secrecy within the industry, which means that the identities of private military and security company personnel are usually kept in strict confidence.³⁰

State of operation

Private security and military companies have a significant operational presence in over fifty states around the world.³¹ The most high-profile incidents of private military and security company activity since the end of the Cold War have taken place in the former Yugoslavia, Sierra Leone, Angola, Papua New Guinea, Afghanistan and Iraq. Some states, such as Angola, actually required foreign companies to “provide their own security by hiring PSCs”.³² States where private security and military companies are active have relatively strong incentives to curb violations of international humanitarian law committed by these companies when they act for non-state clients. However, this is limited to the extent to which the

28 See, e.g., *A Proclamation Prohibiting His Majesties Subjects to Enter into the Service of Foreign Princes and Lands*, Sovereign, 1685–1688: James II, England and Wales, reproduced in *Early English Books Online: 1641–1700*, UMI, Ann Arbor, Mich., 1999–2005, p. 962:5; Penal Code (Sweden), 1999:36, c. 18: s. 4, online at Buffalo Criminal Law Center, <<http://wings.buffalo.edu/law/bclc/sweden.pdf>> (visited 24 October 2006); Crimes (Foreign Incursions and Recruitment) Act 1978 (Australia), Act No. 13 of 1978 as amended to Act No. 104 of 2004, s. 6(1); Foreign Enlistment Act (Canada), R.S.C. 1985, c. F-28; Shameem, above note 5, p. 7 (Namibian law).

29 Claude Voillat, “Private military companies: A word of caution”, online at Humanitarian Practice Network, <<http://www.odihpn.org/report.asp?ID=2675>> (visited 24 October 2006); see also “Memorandum on the object of the Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill, 2005” (South Africa) (on file with author).

30 See, e.g., CACI, “Employees in Iraq”, 4 November 2004, online at <http://www.caci.com/iraq_faqs.shtml> (visited 24 October 2006).

31 Shameem, above note 5, p. 12.

32 *Private Military Firms: Working Group on Private Military Companies*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, 2004, p. 12.

state of operation has full control over its territory – something that may be doubtful during an armed conflict.

The contribution of states of operation to risk of violations

Loss of full control over national territory; insufficient resources for monitoring. The risk of international humanitarian law violations by private security and military companies in states of operation stems mainly from practical considerations resulting from the very existence of an armed conflict. States of operation frequently lose some measure of effective control over their national territory during an armed conflict and have insufficient resources available to devote to monitoring private security and military companies. For example, as an occupying power, and thus effectively acting as the state of operation, only in the rarest cases has the US military intervened to deal with allegations of improper private military and security company behaviour. Indeed, when personnel from Zapata Engineering were detained in Fallujah by US marines for allegedly shooting indiscriminately at civilians, this action only took place when the soldiers actually witnessed the alleged violation firsthand.³³ Likewise, in Afghanistan it was only after the United States as the state of operation had regained almost full control over its territory that it appears to have begun to investigate and prosecute private military and security company employees for alleged violations.³⁴

Additionally, private security and military companies that are hired by opposing parties in the conflict are likely simply to be treated as “the enemy”, and will thus be ignored as an independent player with which to engage in a dialogue concerning international humanitarian law compliance.

Incentives of states of operation to promote compliance

Protecting the political support base from violations. Political economy theory suggests that government officials will respond to situations that could affect their individual interests as politicians, such as their political base weakening or turning against them.³⁵ For example, empirical studies have found a direct correlation between increases in defence spending and electoral cycles in states facing armed conflict.³⁶ States of operation therefore have an incentive to regulate private security and military companies working in their territory, which is in line with their obligations under international law “to ensure respect for IHL [international

33 “Army Chief notes “problematic” potential of armed contractors on the battlefield”, *Defense Daily International*, Vol. 6, Issue 35, 9 September 2005, p. 1 (Proquest).

34 In September 2004, three American private military company personnel were sentenced to 10 years’ imprisonment by an Afghan court for torture, running a private prison and illegal detention: Shameem, above note 5, p. 14.

35 See, e.g., “Administrative & civil service reform”, World Bank Group, online at <<http://www1.worldbank.org/prem/acr/mainpage.html>> (visited 24 October 2006).

36 Alex Mintz and Michael D. Ward, “Electoral cycles and defence spending in Israel: An analysis of quarterly data”, in Andrew L. Ross (ed.), *The Political Economy of Defence: Issues and Perspectives*, Greenwood Press, New York, 1991, pp. 135–7, 150–1.

humanitarian law] and exercise what's known as "due diligence", by doing what's necessary to prevent and punish violations committed by individuals or entities operating on or from their territory".³⁷

In Papua New Guinea the activities of Sandline International became a major election issue such that "every sitting Member of Parliament had to face this criticism whether they were part of the Government or not".³⁸ In Iraq, the Coalition Provisional Authority responded to the proliferation of private security and military companies by promulgating Coalition Provisional Authority Memorandum No. 17, which, *inter alia*, requires all private security and military companies, their officers and personnel to be "vetted" "to ensure that any criminal or hostile elements are identified".³⁹ Private security and military companies risk forfeiture of a US\$25,000 bond and the suspension or revocation of their operating licence if there is a reasonable basis for believing that they have violated applicable law.⁴⁰ They may be permitted to continue operations if they promptly terminate the employment of personnel who allegedly violated the law, and co-operate with law enforcement officials.⁴¹

Clients

The clients of private security and military companies are quite diverse and include states, non-state armed groups, corporations, non-governmental organizations (NGOs), international organizations such as the United Nations, and private individuals.⁴² Sandline International founder Tim Spicer ominously admitted that "our clients may not be democratically elected in terms we all understand in the West, but they are supported".⁴³ Despite this diversity of clients, there is some degree of similarity in the risks and incentives regarding the private military and security companies that they hire.

Contribution of clients to risk of violations

"*Othering*" perpetrators. Clients may hire private security and military companies to undertake certain activities in order to distance themselves, politically or perhaps even legally, from improper or unpopular activities by those companies they hire.⁴⁴

37 ICRC, above note 4.

38 *Aita Ivarato v. Peti Lafanama and Electoral Commission of Papua New Guinea* [1998] PGSC 27 (28 August, 1998) (Supreme Court of Papua New Guinea) (PacLI).

39 "Coalition Provisional Authority Memorandum Number 17: Registration Requirements for Private Security Companies (PSC)" (Iraq, CPA/MEM/26 June 2004/17, 26 June 2004, s. 2(5).

40 *Ibid.*, ss. 3(3), 4(2)(b).

41 *Ibid.*, s. 4(2)(b).

42 Even the ICRC admits to hiring these firms, but "only in exceptional cases and exclusively for the protection of premises". ICRC, above note 4.

43 Andrew Gilligan, "Inside Lt. Col. Spicer's new model army", *Telegraph* (United Kingdom), Issue 1276, 22 November 1998, online at <<http://www.telegraph.co.uk/>> (visited 24 October 2006).

44 For an example of *political* distancing generally, see Kevin A. O'Brien, "Leash the dogs of war", *Financial Times*, 20 February 2002, online at Global Policy Forum, <<http://www.globalpolicy.org>> (United States hiring DynCorp to conduct the Kosovo monitoring force) (visited 24 October 2006).

Criminologists Ruth Jamieson and Kieran McEvoy argue that states attempt to “obfuscate their responsibility in state crime through “othering” both perpetrators and victims”,⁴⁵ including “the use of private-sector mercenaries and military firms to outsource state deviance”.⁴⁶ Political scientist Peter Singer agrees that a key risk of private security and military companies is that they “allow governments to carry out actions that would not otherwise be possible, such as those that would not gain legislative or public approval”.⁴⁷ State crime may be circumscribed by media exposure, but criminologists caution that the power of this control is variable, depending on the ideological alignment of media outlets and their access to or ability to discover violations.⁴⁸ This combination of reliance on private security and military companies to “do the dirty work” and removal of democratic oversight is a troubling prospect that increases the risk of a violation of international humanitarian law.

It has also been suggested that “the large rewards offered for the capture of Al-Qaida members in Afghanistan have contributed to the expansion of private security activity in the country”.⁴⁹ This “reward” approach further distances the United States from allegations of alleged wrongdoing, since there is no direct relationship between these enterprising private security and military companies and the US government.

Market demand for “aggressive” or “disreputable” services. Economic theory suggests that market demand for a particular service will result in the emergence of a supplier willing to offer its services if it is profitable to do so. Even private security and military companies themselves have admitted that “the commercial reward being offered by a particular prospective client may simply be too great for the company to ignore, or perhaps the company is a maverick and more interested in working for unrecognised rebel groups rather than legitimate governments.”⁵⁰

Deborah Avant has observed an increasingly strong pattern in the US hiring of private security and military companies to select so-called “cowboy” firms – those which take a more aggressive posture in the field. The consequence is that “the more the US chooses cowboy firms the more it is likely to influence a change in the norms that govern PSCs”.⁵¹ In a more nuanced example, “MPRI [a US private security company] employees admitted that it was sometimes tough to

45 Ruth Jamieson and Kieran McEvoy, “State crime by proxy and juridical othering”, *British Journal of Criminology*, Vol. 45 (2005), p. 504.

46 Ibid.

47 P. W. Singer, “Outsourcing war”, *Foreign Affairs*, Vol. 84, Issue 2 (2005), p. 119 (Proquest).

48 Jeffrey Ian Ross, “The future of controlling state crime: Where do we go from here?”, in Jeffrey Ian Ross (ed.), *Controlling State Crime*, 2nd edn, Transaction Publishers, London, 2000, p. 423; see also “Media complicity in a “fine little war””, in Christina Jacqueline Johns and P. Ward Johnson (eds.), *State Crime, the Media, and the Invasion of Panama*, Praeger, Westport, Connecticut, 1994, p. 63

49 Shameem, above note 5, p. 14.

50 Sandline, above note 11, p. 2.

51 Deborah D. Avant, *The Market for Force: The Consequences of Privatizing Security*, Cambridge University Press, Cambridge, 2005, p. 228.

walk the line between advocating strict and clear adherence to the laws of war and developing a mutual understanding with the personnel they were training so as to better influence their judgments and behaviour in the future”.⁵² Other implications of this phenomenon at the individual private military and security company level are discussed in detail later.

Poor contract administration. Management studies have shown that poor contract management and administration is a systematic problem, given that it is a “manual, time-consuming process” and because contract data are a mix of qualitative and quantitative findings that are not easily amalgamated for tracking and synthesis.⁵³ This is an especially serious problem, given that the “monitoring and sanctioning capacity of consumers” has been recognized as an important aspect of establishing client control over private military and security company activity,⁵⁴ but such management and oversight are frequently non-existent in practice.⁵⁵ Management studies have also shown that most service failures stem from misunderstanding by the customer as to how the service delivery process is to take place.⁵⁶ This is apparent in the Fay Report into prisoner abuses at Abu Ghraib, which found that US soldiers “never received any parameters or guidance as to how the CACI [a US private military company] personnel were to be utilized”, and they were “never informed that the Government could reject unsatisfactory CACI employees”.⁵⁷

Criminal liability of clients difficult to establish. In many national jurisdictions, there are legal barriers to holding corporate clients criminally liable for the conduct of the private security and military companies they hire,⁵⁸ and these may add to the risk of an international humanitarian law violation occurring. A provision at the international level that would have allowed the International Criminal Court to have jurisdiction over corporate entities was notably rejected during negotiations.⁵⁹

52 Ibid., p. 224.

53 Ashif Mawji, “Compliant or competitive: How about both?”, *Contract Management*, Vol. 45, Issue 8 (2005), p. 38, figure 1 (Proquest). For best practices in contract administration, see Gregory A. Garrett et al., “Managing contracts in turbulent times: The contract management maturity model”, *Contract Management*, Vol. 45, Issue 9 (2005), p. 48 (Proquest).

54 Avant, above note 51, p. 220.

55 Singer, above note 47.

56 Anders Gustafsson and Michael D. Johnson, *Competing in a Service Economy: How to Create a Competitive Advantage through Service Development and Innovation*, Jossey-Bass, San Francisco, 2003, p. 50.

57 Major-General George R. Fay, *AR 15–6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* (Fay Report), August 2004, p. 50, online at United States Department of Defense, <<http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>> (CACI was the firm hired to provide contractor interrogators at Abu Ghraib) (visited 24 October 2006).

58 ICRC, above note 4.

59 Rebecca Bratspies, ““Organs of society”: A plea for human rights accountability for transnational enterprises and other business entities”, *Michigan State Journal of International Law*, Vol. 13 (2005), pp. 25–7.

Incentives of clients to promote compliance

State responsibility for state clients. The international law of state responsibility offers a limited counterbalance to the risk of “othering” discussed above. Under the Draft Articles on Responsibility of States for Internationally Wrongful Acts, a client state could incur international responsibility for violations of international humanitarian law committed by its private military and security companies if that firm was (a) empowered by law to exercise governmental authority; (b) acting on the instructions of, or under direction and control of, that state; or (c) exercising de facto governmental authority in absence/default of governmental officials.⁶⁰ Nevertheless, state responsibility remains a largely theoretical exercise that has only been infrequently invoked in practice. It is also significant that the US Department of Defense recently adopted regulations on private military and security company contractors which could have the effect of limiting some aspects of state responsibility of the United States for international humanitarian law violations committed by their contractors. These instructions specify that “functions and duties that are *inherently governmental* are barred from private sector performance.”⁶¹

Market demand for “reputable” services. A key distinction must be made between clients who hire private security and military companies with the expectation – as a purpose or contingency – that they may fail to fully respect international humanitarian law (as discussed above), and those who demand strict adherence to international humanitarian law norms. Some private security and military companies recognize that many clients have an interest in hiring firms that are “internationally acceptable”, and for this reason they favour a regime of certification.⁶² Clients that demand “reputable” private security and military companies’ services may enhance compliance with international humanitarian law more generally throughout the market. So-called “blue chip” clients, such as the United Nations and the International Committee of the Red Cross (ICRC), have extremely strong incentives to only hire private military and security companies with a spotless record of international humanitarian law compliance. However, the market power of these international organizations is by no means predominant. The consequences of a market split between consumer demand for “disreputable” and “reputable” private military and security company services may be significant:

60 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted at 53rd Sess., November 2001, Arts. 5, 8, 9, online at ILC, <<http://www.un.org/law/ilc/>> (visited 24 October 2006). See also ICRC, above note 4; and see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986 (for “effective control” test).

61 US Department of Defense, *Instruction No. 3020.41: Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, 3 October 2005, s. 6.1.5 (emphasis added).

62 Sandline International, above note 11, p. 3.

Those who pay are both states and non state actors – to what degree will these different types of consumers come to agreement about what constitutes legitimate behavior or legitimate authorization? If they do not, *competing norms should weaken the hold of any norm on behavior*.⁶³

Client interest in proper service delivery and contractual protections. Clients have a general economic and legal interest in obtaining what they contracted for – no more and no less. They accordingly have an incentive to ensure the proper delivery of private military and security company services, in the course of which international humanitarian law violations (where they are unanticipated) constitute a breach of the terms of service. An activist approach by “reputable” clients would see them demanding contractual mechanisms to monitor and punish violations of international humanitarian law by the private security and military companies they hire. According to the International Peace Operations Association (IPOA), a US-based industry association of private military and security companies, “contractual obligations can be much more specific and invasive than general guidelines and regulations. They could include military observers, increased transparency and detailed financial and legal penalties for noncompliance”.⁶⁴

For example, the US Department of Defense’s contract with Titan Inc. to provide interrogation linguists at Abu Ghraib included a clause “that allows the Contracting Officer to direct the contractor to remove linguists from the theatre in which they are performing. This clause has been invoked on occasion for misconduct.”⁶⁵ But the limitations on any client’s ability to properly manage a contract must be borne in mind, as discussed above. It has also been argued that “in general, market mechanisms are blunt tools and markets offer fewer pathways for consumers to explain their choices than hierarchies offer to superiors.”⁶⁶

Civil liability of clients. International legal scholars have pointed out that companies may be held civilly liable under the US Alien Tort Claims Act⁶⁷ for grave breaches of international humanitarian law.⁶⁸ Some have argued that there is a basis in existing case-law for corporate clients to be liable for international humanitarian law violations if there is a “substantial degree of cooperation”

63 Deborah Avant, “Market allocation of force and the prospects for global security professionals”, Conference “Beyond Terror: A New Security Agenda”, 3–4 June 2005, online at Watson Institute for International Studies, <<http://www.watsoninstitute.org/gbeyondterror/avant.htm>> (emphasis added).

64 Brooks, above note 1, p. 4.

65 Fay Report, above note 57, p. 48.

66 Avant, above note 51, p. 220.

67 Alien Tort Claims Act (United States), 28 USC §1350.

68 Gregory G. A. Tzetschler, “Corporate violator: The alien tort liability of transnational corporations for human rights abuses abroad”, *Columbia Human Rights Law Review*, Vol. 30 (1999), pp. 411–12.

between them and the private security and military companies they hire.⁶⁹ However, there has yet to be a case of a corporation being held liable under the Alien Tort Claims Act for the violations of a private military and security company that it has hired; it is an enactment that has been narrowed in scope in recent jurisprudence, continues to have significant jurisdictional hurdles to overcome in many cases, and is not replicated in other jurisdictions.⁷⁰ The limited possibility of civil liability of corporate clients for private military and security company violations committed abroad therefore remains a relatively weak compliance incentive at this point in time.

The private military and security company industry

Through the lens of corporate strategy, the private military and security company industry would view its principal incumbent competitor as being public national armed forces. This realization brings with it both risks and incentives for compliance with international humanitarian law.

The contribution of the industry to risk of violations

Certain interests are not conducive to observance of international humanitarian law. One of the main “competitive advantages” of private security and military companies vis-à-vis national armed forces is the ability of the former to deploy quickly and project force rapidly. Claude Voillat of the ICRC has warned that this “pressure for profitability [is] not conducive to the solid integration of international humanitarian law into their business practices”.⁷¹ These concerns are consistent with the risk identified in the sociology literature that “[e]conomic success, competition for scarce resources, and norm erosion”⁷² may generate unlawful behaviour by organizations on a *systematic* basis.

Blanket denials of international humanitarian law violations. The private military and security company industry’s interest in being perceived as legitimate can increase the risk of international humanitarian law violations occurring if it leads the industry to issue blanket denials that any such violations have taken place. For its part, the IPOA denies that violations of human rights or international humanitarian law are widespread, arguing that “the majority of fears articulated by critics exist only as academic theory”.⁷³ Sandline International, while it was

69 Tina Garmon, “Domesticating international corporate responsibility: Holding private military firms accountable under the Alien Tort Claims Act”, *Tulane Journal of International and Comparative Law*, Vol. 11 (2003), p. 353.

70 See *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law*, International Peace Academy and Fafo, Allkopi Sarpsborg, Norway, 2002, pp. 14–15.

71 Voillat, above note 29.

72 Diane Vaughan, *Controlling Unlawful Organizational Behavior: Social Structure and Corporate Misconduct*, University of Chicago Press, Chicago, 1983, p. 62.

73 Brooks, above note 1, p. 4.

operating, chalked up claims of violations that it was alleged to have committed to propaganda by its clients' military opponents.⁷⁴ Similarly, despite reports implicating its personnel in potential violations of international humanitarian law at Abu Ghraib, CACI continues to deny any impropriety.⁷⁵

An inability of the private military and security company industry to recognize the problem of violations is in itself a serious cause for concern. Issuing denials that violations are occurring is one thing – but making public the findings of investigations and prosecuting known offenders is another.

Incentives for the industry to promote compliance

Acceptance of industry's legitimacy. Private security and military companies “are eager to present themselves as respectable bodies with a natural niche in the often complicated post-Cold War world order”.⁷⁶ If the private military and security company industry is to become a sustainable competitor to national armed forces, corporate strategy suggests that it must gain acceptance and legitimacy for respecting international humanitarian law. Henry Cummins describes legitimacy in this context as “moral advantage” based on “[r]eputation, transparency, history, [and] ethical conduct”.⁷⁷ The industry therefore has a powerful incentive to identify and “blacklist” firms within its midst that violate international humanitarian law.

Although this incentive has yet to manifest itself fully in practice, it is a realistic possibility. Many leading private security and military companies, particularly US firms, are members of the IPOA, which in 2005 adopted a Code of Conduct written largely by NGOs,⁷⁸ in which its members agreed to respect international humanitarian law:

In all their operations, Signatories will respect the dignity of all human beings and strictly adhere to all relevant international laws and protocols on human rights. They will take every practicable measure to minimize loss of life and destruction of property. Signatories agree to follow all rules of international humanitarian law and human rights law that are applicable as well as all relevant international protocols and conventions, including but not limited to:

- Universal Declaration of Human Rights (1948)
- Geneva Conventions (1949)
- Protocols Additional to the Geneva Conventions (1977)
- Protocol on the Use of Toxic and Chemical Weapons (1979)
- Voluntary Principles on Security and Human Rights (2000)

74 Sandline International, above note 11, p. 3.

75 CACI, above note 30.

76 Gilligan, above note 43.

77 Cummins, above note 12, p. 5.

78 Brooks, above note 1, p. 4.

... While minor infractions should be proactively addressed by companies themselves, Signatories pledge, to the extent possible and subject to contractual and legal limitations, to fully cooperate with official investigations into allegations of contractual violations and violations of international humanitarian law and human rights law.⁷⁹

While no formal complaints have been made public by the IPOA, failure to respect the code of conduct may result in sanctions, including expulsion from the association. The IPOA has also created a standards committee that is charged with revising and enforcing the said code.⁸⁰ The viability of this emerging model is considered in more detail in the Conclusion below.

Incumbent firms have greater interest in the industry's good reputation. Long-standing or incumbent private military and security companies have a greater interest in protecting the reputation of the industry as a whole than do new entrants or upstarts,⁸¹ because they have invested more in their brand equity. For example, the 24-year-old ArmorGroup, with headquarters in the United Kingdom, has stated, "It is also worrying that some companies are calling for immunity (from prosecution) in Iraq. We don't want immunity and we don't need it. We always go about our business within the laws of the countries where we work."⁸² This suggests that speaking of a homogeneous "private military and security company industry" may be a simplification in view of the diversity of firms that constitute it. It is this diversity at the level of individual firms that is considered next.

Individual private military and security companies

Jeff Herbst has "predicted that a distinction would emerge between upscale firms (that appeal to the United Nations, INGOs and other upstanding members of the international community by virtue of their willingness to abide by international law) and downscale firms (that appeal to non-lawful elements)".⁸³ Economic theory and corporate strategy, as well as practice, indicate that the private military and security company industry is maturing and that the market segmentation predicted by Herbst is thus beginning to take place at the individual firm level. Market segmentation is characterized by firms adapting or marketing their products or services to specific target groups of consumers. A firm is able to enhance its profitability by tailoring its offerings more closely to the preferences of particular types of customers; as a result, a brand or market reputation becomes

79 IPOA Code of Conduct, IPOA, 31 March 2005, online at <<http://www.ipoaonline.org/en/standards/code.htm>> (visited 24 October 2006).

80 IPOA, "Committees", online at <<http://www.ipoaonline.org/>> (visited 24 October 2006).

81 Voillat, above note 29.

82 Keilthy, above note 3.

83 Avant, above note 51, p. 221, referring to Jeffrey Herbst, "The regulation of private security firms", in Greg Mills and John Stremmler (eds.), *The Privatization of Security in Africa*, SAIIA Press, Johannesburg, 1999, pp. 122–5.

associated with the firm itself or the individuals running it.⁸⁴ With regard to individual private military and security companies this realization carries both incentives for compliance and risks of non-compliance with international humanitarian law.

The contribution by individual companies to risk of violations

Market segmentation – “aggressive” or “bad” firms. One of the most significant risks to international humanitarian law is posed by private military and security companies that profit from their “bad” reputations in a segmented market. Certain clients may seek out firms that are willing to be more “aggressive” in their interpretation of international humanitarian law or even to violate it for a price.⁸⁵ Certain members of the private military and security company industry have recognized that some firms are attractive, in part, precisely because they are outside formal state armed forces, “far less trained, far less accountable, and already tainted, albeit slightly, with a whiff of dirty tricks”.⁸⁶

By hiring these “bad” firms, clients may perceive a benefit in signalling that their posture is more aggressive in a given armed conflict or post-conflict environment, as the United States has done in private military and security company procurement in Iraq, prompted by the growing insurgency. This phenomenon is reflected in the decision to hire Aegis Defence Services, founded by Tim Spicer (founder of the now defunct Sandline International), to conduct “mobile vehicle warfare” as well as “counter-snipping”. Commentators have speculated that Spicer’s “history and record of taking on dicey tasks may have led him to be more attractive than the companies that *play more strictly by the rules*”.⁸⁷ Indeed, given the prospect of private military and security companies rebranding or reincorporating, it appears that the main way in which brand differentiation and market segmentation is taking place in this industry is through the identity of the officers or directors of these firms (such as Col. Spicer).

Competition, declining quality of personnel, costs of vetting. Increased demand for private military and security company services as a result of the armed conflicts in Afghanistan and Iraq has given rise to “[i]ntense competition [that] has driven down prices for security services. Political uncertainty and the escalation of violence have hampered reconstruction, delayed contracts and increased costs”.⁸⁸ This has caused some corporations to cut corners in their screening procedures.

84 See Malcolm McDonald and Ian Dunbar, *Market Segmentation*, Macmillan Business, London, 1995, pp. 15–16.

85 This would be a negative form of “benefit segmentation”, whereby consumers select a given service/product on the basis of the perceived benefits that it confers on them. See J. Paul Peter and Jerry C. Olson, *Consumer Behavior and Marketing Strategy*, 7th edn, McGraw-Hill Irwin, Boston, 2005, pp. 383–4.

86 Avant, above note 51, p. 227.

87 Ibid., pp. 226–7 (emphasis added).

88 James Boxell, “Competition hits security groups in Iraq”, *Financial Times* (United Kingdom), 5 November 2005, p. 16.

For example, U.S. Army investigators of the Abu Ghraib prisoner-abuse scandal found that “approximately 35 percent of the contract interrogators lacked formal military training as interrogators”. In other cases, investigations of contractors serving in Iraq revealed the hiring of a former British Army soldier who had been jailed for working with Irish terrorists, and a former South African soldier who had admitted to firebombing the houses of more than 60 political activists during the apartheid era.⁸⁹

However, other commentators argue that “[a]s competition intensifies, brand advantage becomes more significant, and the battle for solid market share begins in earnest”.⁹⁰

Incentives for individual companies to promote compliance

Market segmentation – “good” firms. Management literature indicates that corporate reputations are built on perception as opposed to facts, and a good corporate reputation may offer a competitive advantage in terms of “social credibility”.⁹¹ The positive side of market segmentation, from an international humanitarian law point of view, is that certain firms will seek to build their business model around an excellent reputation for international humanitarian law compliance.⁹² These firms must maintain their reputation or risk losing contracts and corporate opportunities.⁹³ For example, “Titan’s long anticipated sale to Lockheed Martin imploded, due at least partly to its alleged involvement in the Iraqi prison scandal [at Abu Ghraib].”⁹⁴ However, a problem in linking violations of international humanitarian law to particular private military and security companies arises because their employees are transient, sometimes working for several firms, with the result that “this complicates the development of corporate reputation as a link to accountability or control by clouding the information available.”⁹⁵ An enhanced flow of information could increase the extent to which clients can optimize their purchasing decisions.⁹⁶

Reducing legal uncertainty. Private military and security companies operate in volatile security environments that frequently involve high degrees of legal

89 Singer, above note 47.

90 Cummins, above note 12, p. 8.

91 Arlo Kristjan O. Brady, *The Sustainability Effect: Rethinking Corporate Reputation in the 21st Century*, Palgrave Macmillan, New York, 2005, pp. 64–5.

92 See, e.g., Avant, above note 51, p. 221.

93 See Kevin T. Jackson, *Building Reputational Capital: Strategies for Integrity and Fair Play that Improve the Bottom Line*, Oxford University Press, Oxford, 2004, pp. 178–80; Joe Marconi, *Reputation Marketing: Building and Sustaining Your Organization’s Greatest Asset*, McGraw-Hill, Chicago, 2002, pp. 13–19.

94 “Still, Titan does not seem to have been cut out of the U.S. DoD procurement loop”. David Isenberg, “A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq”, British American Security Information Council, Research Report 2004.4, September 2004, p. 52, online at <<http://www.basicint.org/pubs/Research/2004PMC.pdf>> (visited 24 October, 2006).

95 Avant, above note 51, p. 222.

96 Ibid., p. 221.

uncertainty as to the status of their personnel and legitimacy of their activities. It is in the interest of individual private military and security companies to clarify the existing regulations and rules that govern them.⁹⁷ For example, incidents like the detention of personnel of the UK-based Logo Logistics Ltd in Zimbabwe on 7 March 2004 on suspicion of mercenary activity would have been a significant business disruption if we believe Logo officials' statements that their team was not deploying to participate in a coup d'état but was, in fact, headed for the Democratic Republic of Congo to assist a mining company with its security.⁹⁸

The possibility of civil and criminal liability. Liability of private military and security companies as corporate entities for violations of international humanitarian law offers a theoretical incentive for them to respect those norms. However, the strength of this incentive is highly variable, depending on the jurisdiction(s) in question. According to the ICRC, civil liability for private military and security companies is "generally accepted" if these firms commit violations of international humanitarian law, although their criminal liability "is [very] limited in most countries".⁹⁹ At any rate, finding a viable forum may be difficult. Courts in a conflict or post-conflict zone are unlikely to be fully operative, and very few states of incorporation are willing to reach out extraterritorially to regulate the conduct of their private military and security companies abroad.¹⁰⁰ In practice, it has been difficult, outside a few high-profile cases, to establish and secure the civil liability of companies for grave violations of international humanitarian law.¹⁰¹ Hence it is not surprising that, in global terms, the "the protection scheme cobbled together from these poor tools is hopelessly inadequate".¹⁰²

Employees of private military and security companies

As discussed above in the "States of personnel" section, private military and security company employees hail from an increasingly diverse set of countries. Sociology and psychology studies such as the *Roots of Behaviour in War*¹⁰³ project conducted by the ICRC may be extrapolated to demonstrate that private military and security company personnel present a greater inherent risk from an

97 Capaccio, above note 27.

98 Frye, above note 14, p. 2607.

99 ICRC, above note 4.

100 Ibid.

101 See Fafo, above note 70, pp. 13–15. Indeed, *Al Rawi v. Titan Corporation*, which is a class action claim in the US District Court for the Southern District of California, appears to be the first civil claim alleging violations of international humanitarian law by a private military and security company – in this case concerning the Abu Ghraib scandal. *Al Rawi et al. v. Titan Corporation et al.*, Complaint of Plaintiffs, 9 June 2004 (U.S. Dist. Ct. – S. CA) (Findlaw).

102 Bratspies, above note 59, p. 28; but see Garmon, above note 69.

103 *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, 2004.

international humanitarian law perspective than members of national armed forces.

The contribution of private military and security company employees to risk of violations

Non-membership of permanent military hierarchies and sense of impunity. One of the main findings of the *Roots of Behaviour in War* study is that the behaviour of combatants is determined, in part, by their role in a group which demands adherence to norms, and their place in a hierarchical structure which can impose sanctions for violations of those norms.¹⁰⁴ Ted Itani, Humanitarian Issues Advisor to the Canadian Red Cross, explained further that a “sense of impunity from accountability or prosecution” and an “absence of discipline” are two factors explaining breaches of international humanitarian law by individuals in armed conflict.¹⁰⁵ Most disturbingly, none of the private military and security company personnel implicated in the Abu Ghraib violations has yet had to face criminal charges, despite the fact that some US soldiers have meanwhile been held accountable.¹⁰⁶ Such a situation contributes to a sense of impunity that increases the risk of an international humanitarian law violation. This risk is compounded by the secrecy of the private military and security company industry and the international mobility of their employees.

Variable degree of training in international humanitarian law. Insufficient integration of international humanitarian law into all aspects of military operations raises the risk of a violation taking place.¹⁰⁷ Claude Voillat of the ICRC has recognized that “another cause for concern is the poor training in international humanitarian law that some of these private actors receive, if they are trained at all.”¹⁰⁸ Interestingly, the US Department of Defense recently unveiled new requirements, based in part on post-Abu Ghraib recommendations, for a sub-category of private military and security company contractors termed “Contractors Deploying with the Force”. These individuals are subject to more rigorous vetting, and prior to deployment they must “validate or complete any required training (e.g.; Geneva Conventions; law of armed conflict; ...)”¹⁰⁹

Incentives of private military and security company employees to promote compliance

International labour market. Economic theory suggests that in labour markets characterized by repeated interactions between employers and employees (as in

104 Ibid., p. 15.

105 Remarks of Ted Itani, Canadian Red Cross Conference on Customary International Humanitarian Law, McGill University, Montreal, 1 October 2005.

106 Capaccio, above note 27; see Taguba Report, above note 5, and CACI, above note 30.

107 ICRC, above note 103, pp. 15–16.

108 Voillat, above note 29.

109 US Department of Defense, above note 61, s. 6.2.7.1.

the private military and security company industry where employees have been observed to work for several firms, as discussed earlier), “norm-driven behaviour” plays an important role, even in competitive markets.¹¹⁰ According to Deborah Avant, the market may “punish” private military and security company employees who violate norms of international humanitarian law:

The career and network patterns among professionals in some parts of the world suggest that this may be a more robust control mechanism than the reputation of firms. Many individuals working for PSCs began their careers in military service but have since moved back and forth between service to the UN, service to PSCs, and service to INGOs ... *their future employment depends on their reputation for professionalism, [and] they should be more likely to behave according to professional norms.*¹¹¹

Criminal prosecution for violations. Criminal prosecution of private military and security company employees for violations of international humanitarian law is theoretically possible, but such prosecutions are very unlikely in actual fact. Assertions of universal jurisdiction against them for violations of that nature are rare in practice. Under US law, which takes an aggressive approach to extraterritorial jurisdiction concerning private military and security company employees, significant gaps still arise in practice. In the *United States v. Passaro*, the accused, a Central Intelligence Agency (CIA) contractor, could not be charged under the Military Extraterritorial Jurisdiction Act because it only confers jurisdiction on contractors of the Department of Defense.¹¹² Instead, he was charged under US Code, Title 18, Section 7(9)(A), which was applicable only because the incidents of abuse allegedly took place at a US military base.¹¹³ Nor will all violations of international humanitarian law necessarily incur individual criminal responsibility under international law; typically only violations which are “serious” in nature or are “grave breaches” of the 1949 Geneva Conventions or 1977 Additional Protocols may be prosecuted.

Conclusion

Through the preceding multidisciplinary investigation of each level of private military and security company activity, several important insights emerge. First,

110 Simon Gächter and Armin Falk, “Reputation and reciprocity: Consequence for labour relations”, *Scandinavian Journal of Economics*, Vol. 104, Issue 1 (2002), pp. 1, 15.

111 Avant, above note 51, p. 223 (emphasis added); the applicability of this argument across local and expatriate personnel remains to be seen.

112 *Passaro*, above note 5; Military Extraterritorial Jurisdiction Act of 2000 (United States), 106th Congress, Public Law 106–523, 22 November 2000; see also MEJA Clarification Act of 2004 (United States), 108th Congress, 2nd Sess., HR 4390, 19 May 2004.

113 Human Rights Watch, “QandA: Private military contractors and the law: States have an obligation to prosecute perpetrators of war crimes in their courts”, 21 October 2004, online at Global Policy Forum, <<http://www.globalpolicy.org/>> (visited 24 October 2006). Notably, with reference to Iraq: “Many of the contractors working in Iraq worked for companies that had contracts not with the Defense Department, but with the Department of the Interior” (ibid.).

and most importantly, a deeper and more nuanced understanding of this modern phenomenon has been made possible. This stands in stark contrast to the sweeping generalizations often made by special interest groups in the private military and security company debate, which contribute little to appreciating the theoretical compliance risks and incentives such companies present from an international humanitarian law perspective.

Second, these findings may serve to help formulate a proactive agenda for reform, to improve international humanitarian law compliance by private military and security companies by maximizing incentives and mitigating risks identified above. This agenda should be informed by the fact that many of the most powerful risks and incentives with regard to such compliance have been shown to be grounded in behaviour and norms which fall *outside* formal law. If we are truly interested in promoting compliance with international humanitarian law by these pervasive non-state entities in modern armed conflict, we would be well advised to consider emergent approaches which similarly operate outside formal law, particularly in view of the disagreement within the international community on how to cope with private military and security company activity. Two initiatives which deserve greater support and development in this respect are the compliance mechanisms in the 2005 Code of Conduct of the IPOA,¹¹⁴ and the initiative of the ICRC, which began in late 2004.¹¹⁵

The IPOA Code of Conduct, discussed in detail earlier, is premised on the strong incentive of the private military and security company industry to be perceived as legitimate, to “blacklist” violators of international humanitarian law in their midst and to marginalize firms that seek to profit from a “bad” reputation. While codes of conduct “can be important in setting expectations and norms within which the market works”,¹¹⁶ it is unclear as yet whether the IPOA will consider it to be in the interests of the industry to discipline violating members. There is of course the problem that in ruling on whether to expel a member, the association would find itself in a conflict of interest. First, while it could be in the industry’s best interest to expel a violating member, the association could be concerned that the expulsion of members could deter new members from signing up for fear of being similarly expelled. Second, there is a risk that the association’s board, which is composed exclusively of private military and security company executives, may be more rigorous in sanctioning their competitors than their own companies.

These problems in the industry’s compliance mechanism can be mitigated to enhance the potential normative pull of the IPOA Code of Conduct. First, outside directors should be added to the board to manage the potential conflicts of interest discussed above. This is also a prudent measure for corporate governance more generally. Second, and more importantly, a graduated scale of remedial measures should be announced by the IPOA to promote private military and

114 IPOA Code of Conduct, above note 79.

115 ICRC, above note 4.

116 Avant, above note 51, p. 220.

security company compliance with international humanitarian law when an alleged violation occurs. These could include the following possible steps for the association to take: issuing an order for the impugned member to co-operate with public authorities in investigations and to implement appropriate internal disciplinary measures; imposing a confidential written sanction on the member; imposing a public written sanction on the member; ordering the impugned member to issue a private or public apology; requiring the member to pay a fine to the association or make a charitable contribution to an international humanitarian organization; overseeing the payment of restitution to identifiable victims of the member's wrongful conduct; requiring the member to establish more effective internal policies and procedures; mandating enhanced training in international humanitarian law for employees as well as officers and directors of the impugned member; requiring the member to monitor its operations for compliance with international humanitarian law and to report back to the association at regular intervals; for repeated or very serious violations, temporally suspending the member; and, in extreme cases, expelling the member from the association.¹¹⁷ These recommendations could be adopted by the IPOA and the newly created British Association of Private Security Companies (launched in January 2006),¹¹⁸ to accentuate the strong incentives for the industry to be perceived as legitimate through compliance, and to reduce the serious risk of individual firms benefiting from an "aggressive" or "bad" reputation.

Another initiative that warrants attention began in August 2004 when the ICRC announced its intention to set up a systematic programme to engage private military and security companies in a dialogue in order to promote their compliance with international humanitarian law.¹¹⁹ This new initiative has the purpose of:

- (i) informing private military and security companies of their obligations under international humanitarian law;
- (ii) ensuring "transparent accountability processes exist to prevent and punish violations of these provisions";¹²⁰
- (iii) encouraging private military and security companies to incorporate international humanitarian law into the training and military advice they offer to clients; and
- (iv) ensuring that private military and security companies do not inhibit ICRC access to victims of armed conflict.¹²¹

117 Many of these measures exist under national criminal law for corporate wrongdoing in Canada. See, e.g., Criminal Code (Canada), R.S.C. 1985, c. C-46, s. 732.1(3.1).

118 Peter Almond, "UK: War's fertile grounds for soldiers of fortune", *Sunday Times* (United Kingdom), 30 October 2005, online at Corpwatch, <<http://www.corpwatch.org/article.php?id=12711>> (visited 24 October 2006); "Andy Bearpark", Intelligence Online No. 511, 9 November 2005, online at <<http://www.intelligenceonline.com/>> (visited 24 October 2006).

119 Until now, contact between the ICRC and private military and security companies has been on an "informal basis". ICRC, above note 4.

120 Voillat, above note 29.

121 ICRC, above note 4.

Given the size of the industry, the ICRC's programme focuses on private military and security companies that are active in "conflict situations" or engaged in training and advising armed forces, their state of incorporation and their clients;¹²² it is thus based on a "triangular strategy".¹²³ Before this approach was adopted, "there has been little or no engagement between [private military and security companies] and other stakeholders".¹²⁴

The ICRC's initiative is an admirable effort addressed to at least three of the main players in private military and security company activity. It has the potential to align several strong incentives promoting compliance with international humanitarian law, including the motivations of individual firms that seek to profit from a "good" reputation for respecting international humanitarian law, the reputational and economic interests of states of incorporation, and clients' interest in proper service delivery. However, the ICRC programme would benefit from a more explicit and direct involvement of industry associations, in view of the role they may play as potential "sites of normativity" within the sector as a whole. Further, industry associations operate across armed conflicts, which has the benefit of ensuring that sustainable progress is made in instilling respect for international humanitarian law in the private military and security company sector. In addition, the ICRC should be careful not to fall into the same trap as the UN Global Compact, which has been very reluctant to include private military and security companies in the Voluntary Principles on Security and Human Rights,¹²⁵ "fearing that they will use the VPs as a way to garner new business".¹²⁶ One of the most powerful incentives for such a company to comply with international humanitarian law is, as shown above, the resulting enhancement of its corporate reputation. The desire to be of good standing is conducive to this progressive acceptance of norms, as are meetings with the ICRC. While this contact will be troubling to some, it is consistent with the ICRC's pragmatic approach to promoting compliance with international humanitarian law, and offers a more realistic prospect of doing so than the prevailing attitude towards private military and security companies, which ranges from ignoring them to unabashedly castigating them.

As with any multidisciplinary analysis, constructive criticism and refinement of the risks and incentives that have been identified in this article by experts in their respective fields should be welcomed. A collaborative development in our appreciation of the complexity of private military and security company activity will foster better understanding of the role of those companies in modern armed conflict, and provide valuable lessons for initiatives designed to promote compliance by these non-state entities with international humanitarian law.

122 Ibid.

123 Isenberg, above note 94, p. 66.

124 Cummins, above note 12, p. 2.

125 *Voluntary Principles*, above note 19.

126 Karen Ballentine, "Consolidation of the GC policy dialogue on the role of the private sector in zones of conflict: Identifying public policy options to promote conflict-sensitive business practices", 7–8 October 2004, p. 8, online at United Nations, <<http://www.unglobalcompact.org>> (visited 24 October 2006).