

**HUMANITARIAN  
ASSISTANCE AND THE  
PRIVATE SECURITY  
DEBATE:**

**AN INTERNATIONAL  
HUMANITARIAN LAW  
PERSPECTIVE**

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## ABSTRACT

The changing nature of armed conflict has had a dramatic impact on the security risks facing humanitarian personnel. Historically, the safety of humanitarian aid delivery was secured through the consent of the relevant Parties to the conflict. However, non-international ethnically-motivated armed conflicts, failed and failing states, and insurgency-based warfare have fundamentally challenged the viability of this traditional security paradigm.

In confronting today's complex security climate, humanitarian organizations are faced with a diverse menu of alternatives to enhance their security. The debate over armed protection that has sharply divided the humanitarian community is explored in this paper, including a critique of specific armed protection options. Tensions between the safe and efficient delivery of aid, and principles of impartiality, neutrality and independence are discussed.

The implications of humanitarian organizations using private security companies for defensive armed protection have been relatively unexplored, particularly with respect to international humanitarian law. This paper aims to address this shortcoming by considering two threshold questions: is the protected status of humanitarian personnel under international humanitarian law suspended or lost if they use armed private security contractors; and, is humanitarian access to provide relief legally affected by the decision to hire a private security company for armed protection of relief consignments?

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## **HUMANITARIAN ASSISTANCE & THE PRIVATE SECURITY DEBATE: AN INTERNATIONAL HUMANITARIAN LAW PERSPECTIVE**

**BENJAMIN PERRIN\***

“Without security, there can be no humanitarian aid or assistance, no reconstruction, no democratic development. To suggest, as some have, that we can do one without the other is nothing short of pure folly and, in fact, it’s dangerous.”<sup>1</sup>

– The Hon. Peter MacKay, Minister of National Defence, Government of Canada

### **I. INTRODUCTION**

Nowhere has the impact of the changing nature of armed conflict on the delivery of humanitarian assistance been more profound as in the controversial topic of security for humanitarian actors. While it has long been recognized that “[t]he safety and security of humanitarian relief personnel is an indispensable condition for the delivery of humanitarian relief to civilian populations”,<sup>2</sup> there is a quiet, but intense, debate in the humanitarian community about when, if ever, humanitarian organizations can resort to private security for the defensive armed protection of humanitarian personnel, property, and materiel.

Unfortunately, the literature on private military and security companies has overwhelmingly focused on states as clients. Comparatively little attention has been paid to other clients, such as humanitarian organizations.<sup>3</sup> Those studies that have been undertaken on the prevalence of private security usage by humanitarian actors have not engaged in any sustained analysis of the international humanitarian law implications of this practice. This paper aims to contribute to this gap, while highlighting the tension

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<sup>1</sup> CBC, “Development without security 'pure folly,' MacKay says in jab at Liberals”, February 9, 2008, online: CBC <<http://www.cbc.ca/canada/story/2008/02/09/mackay-halifax.html>>.

<sup>2</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law: Vol. I* (Cambridge, UK: Cambridge University Press, 2005) at 105 [Henckaerts & Doswald-Beck].

<sup>3</sup> Two main studies undertaken on this topic will be referred to throughout this paper: James Cockayne, *Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study* (New York: International Peace Academy, 2006) [Cockayne]; and, Tony Vaux, Chris Seiple, Greg Nakano & Koenraad Van Brabant, *Humanitarian Action and Private Security Companies: Opening the Debate* (2002), online: International Alert <<http://www.globalpolicy.org/nations/sovereign/military/0302humanitaction.pdf>> [Vaux]. A conference on this topic in 2001 found “no consensus amongst participants at the workshop on the way forward, and how aid agencies could best address the use of private security companies”: Feinstein International Famine Center and Alert International, “The Politicisation of Humanitarian Action and Staff Security: The Use of Private Security Companies by Humanitarian Agencies” (International Workshop Summary Report, Tufts University, Boston, Massachusetts, USA, 23-24 April 2001) at 5, online: <<http://www.sces.msh-paris.fr/Tuftsreport.pdf>> [Feinstein International Famine Center].

between classical humanitarian principles of independence, impartiality, and neutrality, and the imperatives of delivering humanitarian aid in the complex security environments of today.

Part I of this paper examines the historical approach to protection of humanitarian actors during armed conflict and occupation, and the shift that took place after the Cold War, with an increase in non-international ethnic-based armed conflicts, failed and failing states, and a renaissance of insurgency-based warfare. The reasons behind the increased security risks to humanitarian actors in these contemporary manifestations of armed conflict are explored along with the legal response of the international community.

Part II identifies the alternative approaches that have been taken in the last two decades to both the delivery of humanitarian assistance, and ensuring the security of those delivering such aid, in order to situate the use of private security by humanitarian organizations within the menu of available options. The main strengths and weaknesses of alternatives are described, as well as the rationale cited by leading humanitarian organizations for opting among these approaches.

Part III analyzes the potential consequences of humanitarian actors hiring private security contractors for defensive armed protection under international humanitarian law. The focus of this analysis is with respect to their protected status and humanitarian access. Finally, this paper concludes with preliminary recommendations to manage some of the risks involved in humanitarian organizations hiring private security companies.

## **II. HISTORICAL CONTEXT & MODERN CHALLENGES**

Humanitarian organizations exist to alleviate suffering during, and in the aftermath of, armed conflict. As a result, they inevitably operate in dangerous situations where their personnel are at risk of being harmed. In order for these organizations to do their job, humanitarian personnel, premises, and materiel must be protected. After describing the historical consent-based approach to delivering humanitarian aid, the implications of the changing nature of armed conflict on security for humanitarian aid delivery are explored.

### **A. HISTORICAL APPROACH TO PROTECTION OF HUMANITARIAN ACTORS**

A great deal has changed since the birth of the modern humanitarian movement in 1859 when Henry Dunant, who would go on to create the Red Cross, witnessed the suffering of the Battle of Solferino.<sup>4</sup> During the international armed conflicts of the Westphalian state-centric world order, humanitarian organizations relied on the consent, goodwill, and assurances of national militaries to protect relief workers. Safe passage agreements, together with clear identification, generally helped to ensure the safety of humanitarian actors in the field.

Almost 150 years after the Battle of Solferino, Dunant's International Committee of the Red Cross (ICRC) remains firmly committed to a classical approach to protecting its humanitarian personnel, based on the negotiated consent of parties to the armed conflict. The reasons are both pragmatic and principled. Consent of the parties is viewed by the ICRC both as a basis for ensuring security of its personnel and to

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<sup>4</sup> See Hans Haug, *Humanity for All: The International Red Cross and Red Crescent Movement* (Henry Dunant Institute Berne: Paul Haupt Berne Publishers, 1993) at 27.

respect its neutral and impartial mandate: “[i]t is very dangerous if not impossible to organize a large-scale relief effort in secret or against the wishes of a fighting party. The ICRC operates on the principle of neutrality, which means that in theory, and in fact 99 percent of the time, it does not allow any weapons in the vicinity of its operations. [T]he ICRC normally negotiates the terms of its access for its unarmed relief efforts. . . . [I]t is all too often the fighting parties with their weapons that control the extent of, and nature of, humanitarian relief.”<sup>5</sup> The remaining “1%” of the time where the ICRC has departed from its general policy against armed protection will be explored below.

Other humanitarian actors that emerged after WWII, and in particular, after the end of the Cold War, have not been as stringent in requiring state consent before initiating humanitarian relief efforts. This was most pronounced with Dr. Bernard Kouchner’s *sans frontierism* movement in the late 1960s and early 1970s where “Kouchner and others asserted the right to intervene for humanitarian purposes whether or not governmental permissions were granted.”<sup>6</sup> This emergence of a willingness to intervene without the consent of the state or parties to the conflict affords primacy to the humanitarian needs of the civilian populace over state sovereignty and, perhaps, principles of neutrality and impartiality. Where humanitarian action is pursued in this manner, the security of humanitarian personnel can no longer depend on the assurances and goodwill of the state or parties to the conflict. Unwillingness or inability of the parties to guarantee the safety of humanitarian personnel and materiel creates the impetus for alternative approaches to enhancing security of humanitarian actors. However, the call for humanitarian action regardless of state consent is only one of many factors that have driven the need for alternative security arrangements for humanitarians.

## B. CHANGING NATURE OF MODERN ARMED CONFLICT & HUMANITARIAN ACTORS

Non-international armed conflicts, including ethnically-motivated attacks, and the growth of insurgency warfare has tragically cost many humanitarians their lives. These contemporary manifestations of armed conflict have taken place alongside a significant proliferation of the number and scope of humanitarian organizations. Estimates put the number of people assisted by non-governmental organizations at two hundred and fifty million,<sup>7</sup> and the “total value of assistance delivered by NGOs now outweighs that disbursed by the UN system”.<sup>8</sup> Humanitarian actors “regularly enter high-threat locations, arriving on scene before the military and remaining after the military departs”.<sup>9</sup>

The foundational assumptions of the historical protection afforded to humanitarian actors are in serious jeopardy. Consent of the parties to a conflict historically involved the ICRC negotiating with representatives of two or more states, both of which had ratified basic international humanitarian law

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<sup>5</sup> David P. Forsythe & Barbara Ann J. Rieffler-Flanagan, *The International Committee of the Red Cross: A Neutral Humanitarian Actor* (London & New York: Routledge, 2007) at 57 [emphasis added] [Forsythe].

<sup>6</sup> Sheri Fink, “Protection of Civilians in Armed Conflict: A Decade of Promises” in Kevin M. Cahill, ed., *The Pulse of Humanitarian Assistance* (New York: Fordham University Press, 2007) 22 at 34 [Fink].

<sup>7</sup> Major Lisa L. Turner & Major Lynn G. Norton, “Civilians at the Tip of the Spear” (2001) 51 *Air Force Law Review* 1 at 14 [Turner & Norton].

<sup>8</sup> Thomas G. Weiss, “The UN’s Prevention Pipe-Dream”, (1996) 14 *Berkeley Journal of International Law* 423 at 431 [Weiss].

<sup>9</sup> Turner & Norton, *supra* note 7 at 14.

treaties. While there are notable exceptions to this before the end of the Cold War, it remained the dominant conceptual model during this period.

The assumptions underlying the consent-based approach to security for humanitarian actors substantially eroded after the end of the Cold War. In the five years following the collapse of the Berlin Wall, at least seventy-nine out of eighty-two armed conflicts were non-international armed conflicts, involving state militaries and a litany of non-state armed groups.<sup>10</sup> During this period, NGOs disbursed approximately US\$8-10 billion in development aid, half earmarked for emergency relief. This represented a six-fold increase in humanitarian activity over the prior decade.<sup>11</sup>

Among the serious challenges that this new reality posed to humanitarian actors was the difficulty of identifying representatives of non-state armed groups with which to negotiate humanitarian access (many of whom did not have recognizable command structures), a lack of knowledge or respect for the protected status of humanitarian personnel under international humanitarian law, and the challenge of navigating the often complex politics of a multiplicity of non-state armed groups in a given space. Compounding the difficulties, Mary Ellen O'Connell observes that "[r]ebel groups have been known to dishonor agreements intentionally to create new occasions to negotiate. These groups believe that negotiating with international aid organizations enhances their status."<sup>12</sup>

In addition to these challenges, many non-international armed conflicts involved ethnically-motivated attacks on civilians, such that the delivery of relief assistance was viewed as an opposing factor to be confronted.<sup>13</sup> Indeed, "where the objective is to obliterate a particular group (ethnic or otherwise), impartial humanitarian intervention is difficult to achieve."<sup>14</sup>

An even more fundamental challenge to the consent-based approach to humanitarian security arose with the problem of failed and failing states. Somalia was a watershed, both because of the number of humanitarian actors involved and because of the complex security situation that this failed state presented. Between 1991 and 1993 over fifty non-governmental organizations (NGOs) participated in humanitarian relief in Somalia.<sup>15</sup>

Without any central authority in Somalia with which to negotiate humanitarian access, the ICRC was forced to decide between refusing to provide humanitarian assistance or obtaining alternative security for its humanitarian personnel to stave off a catastrophe. The ICRC chose the latter. In a recent account of

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<sup>10</sup> United Nations Development Programme, *Human Development Report 1994* (New York: Oxford University Press, 1994), cited in Weiss, *supra* note 8 at 427.

<sup>11</sup> Weiss, *supra* note 8 at 431.

<sup>12</sup> Mary Ellen O'Connell, "Enhancing the Status of Non-State Actors Through a Global War on Terror?" (2005) 43 *Columbia Journal of Transnational Law* 435 at 442 [O'Connell].

<sup>13</sup> More recently, civilians and humanitarian personnel alike have been attacked and killed in Darfur, Sudan: see Fink, *supra* note 6 at 33.

<sup>14</sup> Lindsay Jill Suttner, "Recent Developments: Curing the Humanitarian Crisis: Resolution 1502" (2005) 4 *Washington University Global Studies Law Review* 187 at 194 [Suttner].

<sup>15</sup> As an indicator of the growth of humanitarian organizations, "during the 1999 Kosovo crisis, already more than 400 NGOs participated in the humanitarian relief effort. Currently [2005], UNHCR efforts are implemented by more than 600 NGOs, receiving almost \$270 million, more than one fifth of UNHCR's annual budget." Liesbet Heyse, *Choosing the Lesser Evil: Understanding Decision Making in Humanitarian Aid NGOs* (Aldershot, UK: Ashgate, 2006) at 3 [citations omitted] [Heyse].

this departure from the ICRC's general policy against armed protection, David Forsythe and Barbara Rieffler-Flanagan write:

For the first time in its history, the ICRC took the decision to operate as part of a military mission, because that was the only way, in [the] view of the top decision-makers of the organization, that widespread starvation could be checked in Somalia. Previously the ICRC had required even military transports carrying its relief goods to be weapons-free, even as the organization then turned and hired local security forces to guard its facilities and resources on the ground.<sup>16</sup>

In addition to abandoning the consent-based approach in Somalia, since it was rendered moot, the ICRC also retreated from another traditional practice of clearly marking its vehicles with the Red Cross emblem, because “[r]ather than providing security from attack, the emblem had become a target for attacks.”<sup>17</sup>

The ICRC was not alone in securing alternative security arrangements in Somalia. Even more controversial, other humanitarian organizations associated themselves with different tribal factions in order to bring relief aid to civilians – an indication that the principle of impartiality may have been compromised by reliance on security personnel holding vested interests in the conflict. Those organizations that did not hire local armed guards reportedly lost up to 50% of aid supplies. Other Western aid representatives that had hired local guards were threatened when they attempted to terminate the arrangement, suggesting a “protection racket” had been established as part of the war economy.<sup>18</sup>

More recently, insurgency warfare in Afghanistan and Iraq has presented new challenges for humanitarians. While counter-insurgency warfare is not “new”,<sup>19</sup> the presence of a large number of humanitarian actors in the midst of this type of conflict is a relatively recent phenomenon. For example, as Andrew Bearpark explains, in Iraq during 2003-2004 there was the “tragic bombing of the UN, and a few weeks later you had the attack on the ICRC office and the kidnappings and murders of individual aid workers, with the tragic death of Margaret Hassan from CARE as one example. There was a total change in atmosphere – from being neutral do-gooders, the aid workers had suddenly become perceived as part of the war environment, and that’s where the need for security arose.”<sup>20</sup>

### C. UNDERSTANDING THE INCREASED RISK TO HUMANITARIAN PERSONNEL

The combined effect of these complex modern security environments with the increasing number and scope of humanitarian actors has been, in some cases, deadly. Sean Greenaway and Andrew Harris observe that “[i]n virtually every part of the world, those providing aid to distressed populations have been robbed, beaten, raped, abducted and murdered . . . Only 6% of those interviewed – which included

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<sup>16</sup> Forsythe, *supra* note 5 at 70-71.

<sup>17</sup> *Ibid.*, at 72.

<sup>18</sup> Vaux, *supra* note 3 at 23.

<sup>19</sup> “Rebels in the American Revolution took thirteen years to defeat the British armed forces and adopt the Constitution. American armed forces took seventeen years to pacify the Philippines. British armed forces took twelve years to subdue Malaysian communist guerrillas.” See Commander Albert S. Janin, “Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage” (2007) *Army Law Review* 82.

<sup>20</sup> “Interview with Andrew Bearpark” (2006) 863 *International Review of the Red Cross* 449 at 450 [Bearpark].

development workers – recorded no security problems at their work location.”<sup>21</sup> Greenaway and Harris identify four types of security risks facing humanitarian personnel: accident, criminality, banditry, and targeting.

Accidents encompass “being caught in crossfire, being in the wrong place at the wrong time, falling victim to landmines, or aviation and road accidents and the like”; criminality, they say is “largely self-explanatory”; banditry “refers to armed factions seeking to plunder aid agency assets with an economic value in order to feed their war machine or for personal gain . . . [h]ostage-taking for ransom”; and targeting “refers to deliberate attacks or threats aimed at an agency in order to disrupt its activities or to influence the behavior of third party, mainly international, actors”.<sup>22</sup> Based on the state of affairs prevailing in 1998, Greenaway and Harris considered “that, apart from accident, the criminality and banditry categories predominate” but “[t]argeting, however, probably constitutes the greatest threat to humanitarian action in the instances where it occurs.”<sup>23</sup>

In 1996, 153 delegates of the ICRC were affected by a variety of “security incidents” in which they were killed or wounded – a lower figure than 1993/1994 when attacks on ICRC delegates peaked.<sup>24</sup> A decade later in 2006, the ICRC reported three deaths of staff members during the year, in Haiti, Senegal, and Sudan.<sup>25</sup> Whether this represents a stable downward trend is uncertain.

Statistics maintained by the United Nations of attacks on their personnel are by far the most detailed over time, and offer some insights in to the types of security incidents that humanitarian personnel are affected by in the field:

Over the past decade, threats against the safety and security of UN personnel have escalated at an unprecedented pace. Forced to operate in increasingly dangerous environments and in complex emergencies, the mortality and distress rates of field staff have increased dramatically. From January 1992 to April 2003, 220 civilian UN staff members lost their lives through the deliberate machinations of perpetrators, only 22 of whom have been brought to justice . . . Between January 1994 and October 2002, 74 incidents involving hostage-taking or kidnapping involving 262 staff occurred – eight in 2002 in separate incidents in Somalia, the Sudan and Guyana. . . . This list does not include the growing number of incidents of rape, sexual assault, armed robbery, car-jacking, attack on humanitarian convoys and operations and harassment perpetrated upon UN staff.<sup>26</sup>

The reasons behind these statistics are far more complex than the numbers reveal. In addition to the contribution of modern forms of armed conflict, discussed above, the following factors are believed to have increased the security risks facing humanitarian actors in recent years:

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<sup>21</sup> Sean Greenaway & Andrew J. Harris, “Humanitarian Security: Challenges and Responses” (Paper presented to the Forging Peace Conference, Harvard University, Cambridge, Massachusetts, USA, 13-15 March 1998), online: <<http://www.reliefweb.int/library/documents/echoanser.html>> [Greenaway & Harris].

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> International Committee of the Red Cross, *Annual Report 2006* (Geneva, ICRC, 2007) at 8.

<sup>26</sup> Nuchhi Currier, “Protecting the Protectors – Strengthening Staff Security: Priorities and Challenges” (2003) 2 *U.N. Chronicle* 5, online: United Nations <<http://www.un.org/Pubs/chronicle/2003/issue2/0203p5.html>> [Currier].

- Lack of situational awareness and local knowledge among humanitarian personnel in their initial period of deployment;<sup>27</sup>
- Competition between humanitarian organizations, resulting in inexperienced staff in the field and increased risk-taking;<sup>28</sup>
- Targeting of civilians by combatants, with aid workers viewed as a threat to achieving this objective;<sup>29</sup>
- Targeting of humanitarian workers directly because they are not perceived as neutral, due to their foreign nationality, perceived cooperation / relationship with opposing military forces, or their human rights advocacy;<sup>30</sup>
- Targeting of humanitarian workers to discredit the ability of the occupying authority to protect civilians,<sup>31</sup> “a desire to influence a third party, force withdrawal of the agency, or invite greater force in the conflict”;<sup>32</sup>
- Lack of respect for the protected status of humanitarian workers under international humanitarian law;<sup>33</sup> and,
- Economic motivations of belligerents or “criminal profiteering”<sup>34</sup> to obtain materiel and supplies directly, or because the aid, if delivered, would negatively affect their economic power in the conflict.<sup>35</sup>

#### D. LEGAL RESPONSE TO ATTACKS ON HUMANITARIAN PERSONNEL

The legal response of the international community to the post-Cold War rise in attacks on U.N. and humanitarian workers has consisted primarily of the *Convention on the Safety of United Nations and Associated Personnel* (U.N. Safety Convention), a series of largely reactive U.N. Security Council Resolutions in response to attacks, and the affirmation in the *Rome Statute of the International Criminal Court* that intentional attacks on humanitarian workers constitute war crimes. A detailed analysis of the legal protection afforded to humanitarian personnel provides important insights into the contemporary view of this class of protected persons under international law.

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<sup>27</sup> “A study of deaths among aid workers showed that most occur within the first three months of arrival in a country, rather than after they have spent time and made enough mistakes to make some enemies on one side of a conflict or another or have angered some black marketers or local authorities.” See Barbara Smith, “The Dangers of Aid Work” in Yael Danieli, ed., *Sharing the Front Line and the Back Hills – International Protectors and Providers: Peacekeepers, Humanitarian Aid Workers and the Media in the Midst of Crisis* (Amityville, NY: Baywood Publishing, 2002) 171 at 175.

<sup>28</sup> Greenaway & Harris, *supra* note 21.

<sup>29</sup> Suttner, *supra* note 14 at 194.

<sup>30</sup> Bearpark, *supra* note 20 at 450; Vaux, *supra* note 3 at 12; Suttner, *supra* note 14 at 193.

<sup>31</sup> Suttner, *supra* note 14 at 193-4.

<sup>32</sup> Currier, *supra* note 26.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> Suttner, *supra* note 14 at 194.

First, the 1994 U.N. Safety Convention was adopted in response to the “growing number of deaths and injuries resulting from deliberate attacks against United Nations and associated personnel”.<sup>36</sup> The Convention was drafted with a view to ensuring consistency with international humanitarian law, such that it “shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies”.<sup>37</sup>

The most important provision of the Convention for humanitarian organizations concerns the definition of “associated personnel” in Article (1)(b)(iii). The term is defined as:

Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency, to carry out activities in support of the fulfillment of the mandate of a United Nations operation . . .<sup>38</sup>

In other words, the U.N. Safety Convention is narrowly focused on U.N. operations and protects only those humanitarian NGOs that are specifically engaged to support such missions. This is, nevertheless, potentially a substantial number of organizations. For example, the UNHCR alone implements its programs through the work of over 600 NGOs.<sup>39</sup>

In addition to affirming the protected status of these “associated” humanitarian organizations under international humanitarian law, the U.N. Safety Convention requires States Parties to criminalize attacks on humanitarians and assist in prosecuting offenders.<sup>40</sup>

Notably, the U.N. Safety Convention states: “[n]othing in this Convention shall be construed so as to derogate from the right to act in self-defence”<sup>41</sup> However, it also provides that associated personnel are required to “[r]efrain from any action or activity incompatible with the impartial and international nature of their duties”.<sup>42</sup> The Convention goes on to specify that it should not be taken to affect the applicability of international humanitarian law.<sup>43</sup> As we will see in Part III, the allowable scope of self-defence and meaning of impartiality are critical concepts under international humanitarian law that serve to, respectively, support and detract from the ability of humanitarian actors to engage private security to meet their perceived protection needs.

The second legal response to attacks on humanitarian organizations has been more broadly formulated than the U.N. Safety Convention. A series of U.N. Security Council resolutions reacting to attacks on

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<sup>36</sup> *Convention on the Safety of United Nations and Associated Personnel*, Dec. 9, 1994, preamble, online: United Nations <<http://www.un.org/law/cod/safety.htm>> [U.N. Safety Convention].

<sup>37</sup> *Ibid.*, art. 2(2).

<sup>38</sup> *Ibid.*, art. 1(b)(iii).

<sup>39</sup> Heyse, *supra* note 15 at 3.

<sup>40</sup> U.N. Safety Convention, *supra* note 36, arts. 7, 9.

<sup>41</sup> *Ibid.*, art. 21.

<sup>42</sup> *Ibid.*, art. 6(1)(b).

<sup>43</sup> *Ibid.*, art. 20(1).

humanitarian personnel over the years have grown increasingly insistent and specific, albeit frequently to little avail.<sup>44</sup> In 1992, Resolution 751 on Somalia did little more than call for “full respect for the security and safety of the personnel of humanitarian organizations”.<sup>45</sup> By 2000, Resolution 1296 was far more specific in terms of the obligations on state and non-state actors to provide both for the safety and access of humanitarian organizations during armed conflict:

The United Nations Security Council

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Underlines the importance of safe and unimpeded access of humanitarian personnel to civilians in armed conflicts, calls upon all parties concerned, including neighbouring States, to cooperate fully with the United Nations Humanitarian Coordinator and United Nations agencies in providing such access, invites States and the Secretary-General to bring to its attention information regarding the deliberate denial of such access in violation of international law, where such denial may constitute a threat to international peace and security, and, in this regard, expresses its willingness to consider such information and, when necessary, to adopt appropriate steps;<sup>46</sup>

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Reiterates its call to all parties concerned, including non-State parties, to ensure the safety, security and freedom of movement of United Nations and associated personnel, as well as personnel of humanitarian organizations . . .<sup>47</sup>

As with the U.N. Safety Convention, Resolution 1296 reiterated “the importance for humanitarian organizations to uphold the principles of neutrality, impartiality and humanity in their humanitarian activities”.<sup>48</sup>

More recently, Resolution 1502 was passed in response to the August 19, 2003 bombing of the U.N. headquarters in Baghdad, Iraq. Lindsay Suttner argues that “with the passage of Security Council Resolution 1502, the United Nations attempted to *strike a balance* between maintaining humanitarian organizations’ neutrality in the eyes of the world and ensuring their safety while in the field”.<sup>49</sup>

Resolution 1502 is very similar to Resolution 1296 in terms of recognizing the protected status and right of humanitarian access of humanitarian personnel, as well as the need for neutrality and impartiality.<sup>50</sup> However, it explicitly mentions an additional constraint on these organizations, namely, “the obligation of all humanitarian personnel and United Nations and its associated personnel to observe and respect the laws of the country in which they are operating, in accordance with international law and the Charter of

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<sup>44</sup> In addition to those cited below, see *U.N. Security Council Resolution 1265 (1999)*, 17 September 1999, paras. 7-8 (on the protection of civilians in armed conflict).

<sup>45</sup> *U.N. Security Council Resolution 751 (1992)*, 24 April 1992, para. 14.

<sup>46</sup> *U.N. Security Council Resolution 1296 (2000)*, 19 April 2000, para. 8.

<sup>47</sup> *Ibid.*, para. 12.

<sup>48</sup> *Ibid.*, para. 11.

<sup>49</sup> Suttner, *supra* note 14 at 189.

<sup>50</sup> *U.N. Security Council Resolution 1502 (2003)*, 26 August 2003, preamble, paras. 3-4 (protection of United Nations personnel, associated personnel and humanitarian personnel in conflict zones) [U.N. Res. 1502].

the United Nations”.<sup>51</sup> This language betrays an important compromise between states of operation, on the one hand, and intervening states and humanitarian organizations, on the other: rights of protected status and humanitarian access in Resolution 1502 are tied to (1) respect for local law – at least to the extent it is not inconsistent with the U.N. Charter and international law; and, (2) the principles of neutrality and impartiality.<sup>52</sup> These imperatives have potentially significant implications for the practice of humanitarian organizations hiring private security contractors, as discussed in Part III.

Finally, under international criminal law, intentionally directing attacks against personnel, installations, materiel, units or vehicles involved in a humanitarian assistance mission constitutes a war crime in both international and non-international armed conflict. There are two requirements related to the character of the humanitarian mission: (1) it must be in accordance with the U.N. Charter, and (2) intentionally attacking humanitarian personnel and objects is only a war crime “as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”.<sup>53</sup> In other words, if the protected status of humanitarian personnel or objects as civilians is suspended or lost (as discussed in Part III), then any intentional attack will not constitute a war crime. Thus, protected status is a pivotal concept in this aspect of the legal protection regime for humanitarians.

## **II. ALTERNATIVES TO HUMANITARIAN ASSISTANCE & SECURITY**

Responding to the complexity and instability of modern armed conflict, two trends with respect to humanitarian assistance and security may be observed. First, humanitarian organizations no longer have a monopoly on the delivery of humanitarian assistance in difficult security environments. Other actors, including state armed forces and, more rarely, private military and security companies now deliver humanitarian aid directly. Second, many humanitarian organizations have managed their security risks by adopting an array of new, and sometimes controversial, approaches to protection.

As a result of these twin phenomena, there has been both an expansion of the actors delivering humanitarian assistance, and the actors providing security for that assistance, as summarized in the table below. The implications of these humanitarian assistance and security combinations have a certain impact in considering the security alternatives available to humanitarian organizations.

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<sup>51</sup> *Ibid.*, preamble.

<sup>52</sup> It is, of course, routine for insurgents who have kidnapped and/or murdered humanitarian aid workers to claim, without any evidence, that those workers were spies for a foreign government to which they have committed themselves to destroy by any means necessary.

<sup>53</sup> *Rome Statute of the International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, arts. 8(2)(b)(iii) (international armed conflict), 8(2)(e)(iii) (non-international armed conflict) [*Rome Statute*]; *Statute of the Special Court for Sierra Leone* in Report the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 55<sup>th</sup> Sess., U.N. Doc. S/2000/915 (2000), art. 4(b). See also, *Elements of Crimes*, International Criminal Court, ICC-ASP/1/3, at 131, 149.

**TABLE 1 –HUMANITARIAN ASSISTANCE & SECURITY MATRIX**

<b>ACTORS DELIVERING HUMANITARIAN ASSISTANCE</b>	<b>APPROACHES TO SECURITY / PROTECTION</b>
<b>Humanitarian Organizations</b>	<ul style="list-style-type: none"> <li>• Withdraw, or never enter, due to security risk</li> <li>• Utilize “soft security”: training, policies, infrastructure, collaboration with other humanitarian organizations</li> <li>• Engage state armed forces</li> <li>• Engage non-state armed groups</li> <li>• Engage populace/community</li> <li>• Integrate in-house security officers;</li> <li>• Local guards for (un)armed protection</li> <li>• Private security company for (un)armed protection</li> <li>• Armed security from state armed forces</li> </ul>
<b>State Armed Forces</b>	<ul style="list-style-type: none"> <li>• State armed forces</li> </ul>
	<ul style="list-style-type: none"> <li>• Private military and security companies</li> </ul>
<b>Private Military and Security Companies</b>	

After exploring the direct delivery of humanitarian assistance by state armed forces and private military/security companies as independent actors, the security alternatives facing humanitarian organizations themselves are considered.

#### **A. OTHER ACTORS DELIVERING HUMANITARIAN ASSISTANCE**

State and non-state actors that specialize in providing security have undertaken a greater role in directly delivering humanitarian assistance themselves, without necessarily involving humanitarian organizations at all. Pursuing counter-insurgency doctrines or the so-called “3-D” model (Defence, Diplomacy, and Development), state armed forces are increasingly involved in providing humanitarian relief aid as well as longer-term development assistance. Less frequent, but notable, is the contracting out of humanitarian aid to private military and security companies themselves. While national armed forces and private military/security companies bring a particular expertise in security, it is not surprising that their delivery of humanitarian assistance has been criticized by incumbent humanitarian organizations.

## *I. STATE ARMED FORCES*

The delivery of humanitarian assistance directly by state armed forces has been celebrated as a form of humanitarian intervention, but also decried. One side of the critique assails the “militarization of the humanitarian space”, while the other is concerned with the “humanitarianization of the military space.”

On the positive side, military involvement in humanitarian assistance has been viewed as “an indication that the community of states is finally getting serious about assisting and protecting vulnerable civilian populations.”<sup>54</sup> Indeed, traditional humanitarian organizations have opted in some cases to wait until the security environment has improved before intervening; whereas, state armed forces engaged in peace enforcement missions, at least theoretically, do not wait as long to act. However, in delivering humanitarian assistance, intervening armed forces have struggled to “maintain the fiction that they are not a belligerent force.”<sup>55</sup> Consistent with the ICRC study on customary international humanitarian law, combatants delivering humanitarian aid are not afforded protected status as humanitarian personnel.<sup>56</sup>

On the other hand, some humanitarian activists are uneasy about an enhanced role for state armed forces in delivering aid, arguing that “as a matter of principle and practice, humanitarian action is – and should remain – first and foremost civilian in character.”<sup>57</sup> This concern is linked to the principle of non-discriminatory delivery of humanitarian aid. A distinction is made by some with respect to long-term development assistance, which may be partial and selective.

There is no doubt that many state armed forces often now view humanitarian and development assistance as part of their military strategy. While the Somalia mission in the early 1990s brought into question whether military forces should be involved in humanitarian assistance,<sup>58</sup> that reticence has been definitively set aside in the counterinsurgency tactics employed in Iraq and Afghanistan only a decade later. Lt. Gen. Anthony Zinni of the U.S. Marine Corps has said, “[w]e see humanitarian tasks as a full-fledged military mission”.<sup>59</sup> Likewise, Major Lisa L. Turner and Major Lynn G. Norton have recognized that combining military capabilities with humanitarian assistance is a “force multiplier”.<sup>60</sup> As a result of this current view, the delivery of humanitarian assistance directly by, or with the support of, state armed forces is now “more or less inevitable”.<sup>61</sup>

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<sup>54</sup> Larry Minear, *The Humanitarian Enterprise: Dilemmas and Discoveries* (Bloomfield, CT: Kumarian Press, 2002) at 104 [Minear].

<sup>55</sup> Major J.D. Godwin, “NATO’s Role in Peace Operations: Reexamining the Treaty after Bosnia and Kosovo” (1999) 160 *Military Law Review* 1 at 29.

<sup>56</sup> See Henckaerts & Doswald-Beck, *supra* note 2 at 105.

<sup>57</sup> Minear, *supra* note 54 at 105.

<sup>58</sup> Greenaway & Harris, *supra* note 21.

<sup>59</sup> Quoted in Minear, *supra* note 54 at 99.

<sup>60</sup> Turner & Norton, *supra* note 7 at 14.

<sup>61</sup> Minear, *supra* note 54 at 104.

## 2. PRIVATE MILITARY/SECURITY COMPANIES

While it has received relatively little publicity to date, private military/security companies have received contracts to directly deliver humanitarian assistance, based on their capability to rapidly deploy and provide their own security. These firms see business opportunities in a vast array of operations, including “state-building, supporting and even providing humanitarian and disaster relief, which includes logistics, communications and energy services.”<sup>62</sup> These firms have also reportedly advised and provided protection for displaced populations.<sup>63</sup>

In the early 1990s, MPRI was reportedly hired by the U.S. State Department to provide humanitarian relief to the Newly Independent States of the former Soviet Union. The firm is said to have shipped over US\$380 million in humanitarian supplies by 1994 to the region.<sup>64</sup> While current examples of private military and security companies delivering humanitarian aid have not been widely publicized, it is a phenomenon that bears monitoring.

### B. ENSURING SAFETY OF HUMANITARIAN PERSONNEL

As discussed in Part I, humanitarian organizations have widely proliferated since the end of the Cold War. To enter or remain in the business of delivering humanitarian aid in modern armed conflict situations, these organizations have been compelled to consider an array of alternative approaches to protecting their personnel, property, and materiel. In short, many are no longer content to simply rely on their protected status under international humanitarian law or the traditional consent-based approach to protection, discussed earlier.

In confronting today’s complex security climate, humanitarian organizations have a diverse menu of alternatives to consider, including:

- Withdraw, or never enter, due to unacceptable risk;
- Utilize “soft security”: training, policies, procedures, security information management, infrastructure, collaboration with other organizations;
- Engage state armed forces to mitigate security risks;
- Engage non-state armed groups to mitigate security risks;
- Engage populace/community to mitigate security risks (“acceptance” strategy);
- Integrate in-house security officers;
- Hire local guards to provide (un)armed protection;
- Hire a private security company to provide (un)armed protection; and
- Align with a state to obtain armed security from state armed forces.

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<sup>62</sup> Bearpark, *supra* note 20 at 451.

<sup>63</sup> Vaux, *supra* note 3 at 8.

<sup>64</sup> Joni Balter, “Charities Urged to Try to Keep Donations from Going Overseas”, *Seattle Times* (December 17, 1994) A1, cited in Juan Carlos Zarate, “The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder” (1998) 34 *Stanford Journal of International Law* 75 at 105. See also Major Todd S. Milliard, “Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies” (2003) 176 *Military Law Review* 1 at n. 65.

Humanitarian organizations share the common goal of “safe, effective delivery of relief and provision of temporary protection to those in need”.<sup>65</sup> However, many organizations disagree on which of these security alternatives actually satisfy this objective, both in the short-term and long-term.

The threshold security question that all humanitarian organizations face is whether to enter a conflict or post-conflict area at all. While humanitarian organizations have a responsibility to deliver relief, they also have obligations to protect their staff and conduct due diligence on the security risks involved. The potential consequences of refusing to enter a theatre of operations to deliver humanitarian assistance is the damning observation that “[t]he resulting loss of life in the affected population is significant – both from lack of access to relief programs and from the protection international agencies offer as ‘witnesses’ to deter atrocities.”<sup>66</sup> Typically, the option of withdrawal, suspension of operations or refusal to enter the area where humanitarian relief is required will be based on the failure of parties to the conflict to provide a secure environment and an unwillingness or inability of the relevant organization to pursue alternatives to mitigate the security risks involved. In the case of long-standing humanitarian organizations, fundamental philosophies about the use of armed security loom larger than the immediate conflict taking place. However, as witnessed in Somalia, there are exceptions to every such policy.

Between refusal to enter an area of operations and resorting to external security options, there is a range of “soft” approaches to security that humanitarian organizations have adopted. Security training, procedures, and awareness have a role in mitigating security risks. Many larger humanitarian organizations have become increasingly apt at developing internal capacity in this area, in addition to bringing in outside security consultants. However, some organizations lack the expertise and information to adequately provide such training. Coordination between humanitarian organizations, including with respect to evacuation planning, is one approach to overcoming these shortcomings.<sup>67</sup>

“Engagement” is a broad category of proactive approaches pursued by humanitarian organizations to mitigate security risks. To this end, various humanitarian organizations directly consult and negotiate with state armed forces, non-state armed groups, and the local populace. For some organizations, engagement or “acceptance” as a security strategy is intended to overcome the need for physical “hard” security alternatives.

A strategy of engaging state armed forces can include consulting and sharing information with local, foreign, and international military commanders. For example, the U.S. military has worked with humanitarian organizations through the Combined Military Operations Center (CMOC) in Somalia, Haiti, and northern Iraq. Daily meetings between commanders and representatives from relevant humanitarian organizations and NGOs take place with the CMOC.<sup>68</sup> Humanitarian organizations will have varying degrees of comfort with such collaboration, depending on the stricture with which they balance security concerns with the principles of neutrality, impartiality, and independence.

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<sup>65</sup> Greenaway & Harris, *supra* note 21.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> Turner & Norton, *supra* note 7 at 46.

Pragmatic considerations of obtaining access to contested areas of operations have long led the U.N. and ICRC to negotiate access agreements with various non-state armed groups. As Nuchhi Currier has noted, for these agreements to succeed, they must be “transparent, neutral and a humanitarian necessity”.<sup>69</sup> The challenges with obtaining such agreements in contemporary armed conflict situations as part of the consent-based strategy have been canvassed in Part I.

While engaging the populace<sup>70</sup> as a security strategy is considered by some to be the alternative “closest to humanitarian principles”, its effectiveness may be quite limited. To succeed in providing timely information to humanitarian actors and foster community protection, this approach requires early and sustained effort by experienced humanitarian personnel.<sup>71</sup>

Going beyond these “soft” security alternatives, humanitarian organizations have at least three external “hard” security options: (1) local “guards”, (2) state armed forces, and (3) foreign private security contractors. The decision of a humanitarian organization to rely on any of these alternatives for the defensive protection of personnel, property, and materiel is inextricably linked to the broader debate about the use of armed protection by humanitarians.

## *1. THE ARMED PROTECTION DEBATE*

The use of armed protection – delivered by local guards, state armed forces, or private security companies – has divided the humanitarian community.

On one side of the debate, organizations like the ICRC and Médecins sans Frontières (MSF) have resisted the use of armed protection. The ICRC’s philosophy is that security is best achieved through adhering to its core principles of neutrality, impartiality, and independence. The ICRC’s *Report on the Use of Armed Protection for Humanitarian Assistance* states: “the ability to deliver humanitarian assistance and to carry out humanitarian activities in violent situations is a product first and foremost of our ethical and professional standards and the way we conduct ourselves. It is not a function of armed escorts and flak-jackets”.<sup>72</sup> As a result of this approach, the ICRC has had to temporarily suspended operations (as in Bosnia and the Democratic Republic of Congo) due to security risks that the organization was unable to manage within the confines of its general policy against armed protection.<sup>73</sup> MSF has also resisted armed protection by “robustly defending the right of intervention on the principle[s] of impartiality and neutrality”.<sup>74</sup>

Conversely, organizations like CARE and the World Food Programme (WFP) have extensively used armed escorts in transporting aid to populations in need. An International Alert study found that these

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<sup>69</sup> Currier, *supra* note 26.

<sup>70</sup> Also referred to as the “acceptance” strategy or “anthropological” approach.

<sup>71</sup> Feinstein International Famine Center, *supra* note 3 at 3.

<sup>72</sup> International Committee of the Red Cross, *Report on the Use of Armed Protection for Humanitarian Assistance*, Extract from Working Paper 95/CD/12/1, ICRC and International Federation, Council of Delegates (Geneva, 1-2 December 1995), online: ICRC <<http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JNEG>> [*Report on the Use of Armed Protection for Humanitarian Assistance*].

<sup>73</sup> Forsythe, *supra* note 5 at 57.

<sup>74</sup> Vaux, *supra* note 3 at 14.

armed escorts are usually provided by the host government, but in some cases where the state authorities lack effective control these organizations have hired private security companies to provide armed protection to aid convoys.<sup>75</sup>

## 2. SECURITY BY STATE ARMED FORCES

Reliance on state armed forces for close protection has been resisted by humanitarian organizations on the basis that it undermines impartiality, neutrality, and independence.<sup>76</sup> For example, with respect to the Red Cross, the Commentaries on Additional Protocol I (AP I) take the view that “the neutrality of the emblem should preclude them from being escorted by members of the armed forces”.<sup>77</sup>

Fred Schreier and Marina Caparini argue that the “use of military protection in support of humanitarian operations should only occur when there is no comparable civilian alternative”.<sup>78</sup> There is also concern that being in such close proximity to military personnel will undermine the effectiveness of the protected status of humanitarian actors as civilians under international humanitarian law.<sup>79</sup>

From the perspective of state armed forces, Major Lisa Turner and Major Lynn Norton highlight two competing views on providing protection to humanitarian organizations. On one hand, while noting the independence of humanitarian organizations, military commanders may see a strategic advantage in being able to influence humanitarian action – doing so through logistical support, security, and communications. On the other hand, requests for security by humanitarian organizations may be viewed as “unreasonable, unnecessary, and untenable in their effects upon the military mission”.<sup>80</sup>

## 3. LOCAL GUARDS AS PRIVATE SECURITY

In an attempt to balance security concerns with principles of neutrality and impartiality, some humanitarian organizations have hired local “guards” – armed and unarmed – to escort personnel and supply convoys, or to provide security at fixed locations.

An Alert International study found that American NGOs typically hire local guards to deter banditry by providing (usually) unarmed protection at fixed sites, such as warehouses.<sup>81</sup> However, there are instances where these “flashlight and radio” guards at various sites are able to call-in armed response teams on short notice. The study noted:

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<sup>75</sup> *Ibid.*, at 15.

<sup>76</sup> Greenaway & Harris, *supra* note 21.

<sup>77</sup> International Committee of the Red Cross, *Commentaries: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, at 827, para. 2858 to 829, para. 2864 [AP I Commentaries].

<sup>78</sup> Fred Schreier & Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Geneva Centre for the Democratic Control of Armed Forces, Occasional Paper No. 6 (Geneva: DCAF, 2005) at 93 [Schreier & Caparini].

<sup>79</sup> Turner & Norton, *supra* note 7 at 26.

<sup>80</sup> *Ibid.*, at 64-65.

<sup>81</sup> Vaux, *supra* note 3 at 24.

Another disturbing issue, of which aid agencies seem to be unaware, is that the local company with its unarmed guards may have the facility to call upon armed back-up (which might even include armoured cars and rocket-launchers). . . . Aid staff might be surprised to find that in the event of a security incident there could be a rapid escalation and the use of sophisticated weapons.<sup>82</sup>

Many of the non-governmental organizations in the Alert International study expressed a greater willingness to use armed guards to “ride shotgun” for convoys in unstable areas.<sup>83</sup> Even the ICRC (in Somalia and the Northern Caucasus) and MSF (in Somalia and Pakistan) have both reportedly hired local guards to escort aid convoys.<sup>84</sup>

The use of local guards has been a preferred security alternative among certain humanitarian organizations for several reasons. Locally hired security guards are presumed to be knowledgeable about the players, politics, and language of the area of operations. It is assumed that locally hired guards promote the neutrality and independence of humanitarian organizations because they are presumed not to be affiliated with state armed forces or non-state armed groups, who may otherwise have to be relied upon to provide protection.

However, there are several serious concerns with the hiring of local individuals to provide armed or unarmed protection to humanitarian organizations. Local personnel may have ethnic or tribal affiliations with parties to the conflict.<sup>85</sup> James Cockayne has characterized the ICRC’s approach in Somalia as building “a small army out of a patchwork of different clansmen, in an effort to ensure humanitarian access for aid convoys”.<sup>86</sup> At the time that a Western humanitarian organization is attempting to initially establish its operations, local affiliations will be very difficult to fully appreciate. As a result, the image of the humanitarian organization may be tarnished by hiring unsavory local characters as “guards”, or even worse, the organization may unwittingly associate itself with a party to the conflict and, thus, become the target of attacks.

A second set of concerns over hiring local guards is the broader impact of this practice. There is the risk that hiring local guards will result in a localized “arms race” because in order to provide credible deterrence, local guards must be equipped to repel local security threats.<sup>87</sup> Further, hiring local guards may fuel the local war economy and encourage a protection racket. The lack of thought given to what armed local guards will do to make a living after their contract terminates is problematic – there is a risk that they will turn to criminality, or join one of the parties to the armed conflict.

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<sup>82</sup> *Ibid.*, at 17, 24-25.

<sup>83</sup> *Ibid.*, at 26.

<sup>84</sup> Cockayne, *supra* note 3 at 6.

<sup>85</sup> Minear, *supra* note 54 at 110.

<sup>86</sup> Cockayne, *supra* note 3 at 6.

<sup>87</sup> *Ibid.*, at 11.

#### 4. *HIRING A PRIVATE SECURITY COMPANY*

The nature and extent to which humanitarian organizations hire private security companies remains relatively unexplored. Neither the private military and security company literature<sup>88</sup> nor industry surveys, which suffer from poor response rates and are at too high a level of generalization,<sup>89</sup> provide detailed information on the prevalence of private security company usage by humanitarian organizations. Major General Tim Cross has gone so far as to say that the practice of humanitarian organizations hiring private security firms has “taken place under a veil of silence, in an *ad hoc* way”.<sup>90</sup>

Typically, statements about the use of private security firms by humanitarian organizations are very general in nature, withholding the identity of the organization, firm and scope of the contract.<sup>91</sup> For example, Larry Minear states that “humanitarian organizations have contracted with international security firms to provide protection for operations and personnel in places such as Sierra Leone, Angola and the Congo”.<sup>92</sup> Andrew Bearpark, who represents an industry association of British private security firms, has noted that aid agencies in Iraq and Afghanistan have resorted to private security companies.<sup>93</sup>

What is apparent is that private security companies are engaged in a wide range of activities for humanitarian organizations, of which armed protection is likely a very small aspect.<sup>94</sup> The March 2002 Alert International study on the prevalence of private security companies being hired by aid organizations, based on interviews with some of the leading international humanitarian organizations, made the following findings:

In terms of aid agencies (non-governmental and UN), national and international private security companies are being used for the protection of staff and premises. The most common services provided are risk analysis, security training for staff, crisis management advice (e.g. regarding kidnapping), undertaking security audits, and especially the provision of guards (mostly unarmed) for site protection, notably of offices, warehouses and residences. Where as in the past there have been instances in which aid agencies have hired personnel from a private security company to serve as agency security officers, this practice nowadays seems to have stopped. In a recent review of twenty aid agencies it was revealed that, while security management had, on the whole, improved in recent years, by and large no policies existed for the use of private security companies. Where some experience has been translated into guidelines, these have generally not been formalised nor the ethical and management dimensions of using private security companies been fully thought through.<sup>95</sup>

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<sup>88</sup> Vaux, *supra* note 3 at 9.

<sup>89</sup> See, e.g. Peace Operations Institute, *State of the Peace and Stability Operations Industry : Second Annual Survey 2007* (Washington, D.C., 2007) at 11 (6.10% response rate, with 23 of 334 companies responding; “contracting entities” are not described in a manner to identify humanitarian organizations directly).

<sup>90</sup> Maj. Gen. Tim Cross, “The Humanitarian Community and the Private Sector” in Kevin M. Cahill, ed., *The Pulse of Humanitarian Assistance* (New York: Fordham University Press, 2007) 79 at 100 [Cross].

<sup>91</sup> “Some humanitarian organizations regularly hire them [private security companies] to provide security for their operations, in addition to the many reconstruction firms that hire them in Iraq and elsewhere”: Lindsey Cameron, “Private Military Companies: Their status under international humanitarian law and its impact on their regulation” (2006) 863 *International Review of the Red Cross* 573 at 576 [Cameron].

<sup>92</sup> Minear, *supra* note 54 at 110.

<sup>93</sup> Bearpark, *supra* note 20.

<sup>94</sup> Feinstein International Famine Center, *supra* note 3 at 4.

<sup>95</sup> Vaux, *supra* note 3 at 8.

A notable exception, U.K.-based ArmorGroup is a private security company that has been quite open about working for humanitarian organizations. On a global basis, ArmorGroup has a client list that reads like a “who’s who” of the humanitarian and development community, including: U.N. agencies, ECHO, US Agency for International Development (USAID), DfID, ICRC, International Rescue Committee, CARE, and Caritas.<sup>96</sup>

ArmorGroup has been quite vocal about the need for accountability for private security contractors and claims that it does not seek immunity for its personnel, stating: “[i]t 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.”<sup>97</sup>

The demand for private security services by reputable “blue chip” clients like humanitarian organization may exert a positive market force for such firms to ensure they maintain an excellent record for international humanitarian law and human rights compliance. However, the strength of this incentive on the private military/security industry is limited due to the relatively small portion of the market that such clients comprise.<sup>98</sup>

Furthermore, it is at least theoretically plausible that foreign private security contractors are more neutral and impartial players than either locally hired guards or members of state armed forces.<sup>99</sup> However, this argument is becoming less persuasive with the widespread practice in recent years of private security companies hiring an increasing percentage of local staff. For example, in Iraq, the ratio of expatriate to local staff employed by private military and security companies is 1:10.<sup>100</sup>

Similar to the practice of hiring local guards, there are broader concerns about the impact in a given theatre of operations of hiring private security contractors. Some argue that armed private security can have the unintended consequence of increasing the security threat facing humanitarian organizations, both since “the introduction of another armed faction inside an already unstable region would only increase the probability of the use of armed force”,<sup>101</sup> and because the presence of armed personnel make the protected personnel or assets more noticeable by belligerents or criminal elements.

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<sup>96</sup> *Ibid.*, at 16.

<sup>97</sup> Paul Keilthy, “Private security firms in war zones worry NGOs”, *AlertNet* (11 August 2004), online: AlertNet <<http://www.alertnet.org>>.

<sup>98</sup> Benjamin Perrin, “Promoting Compliance of Private Security and Military Companies with International Humanitarian Law” (2006) 863 *International Review of the Red Cross* 613 at 624 [Perrin]. An example of this phenomenon is raised in Vaux, *supra* note 3 at 16: “ArmorGroup’s support of BP in Colombia led to an extremely controversial role in relation to violations of human rights committed by state security forces with which it worked. Public perception would deeply undermine the credibility of an agency connected with those events and claiming to be impartial.”

<sup>99</sup> Schreier & Caparini, *supra* note 78 at 93.

<sup>100</sup> Perrin, *supra* note 98 at 618.

<sup>101</sup> Vaux, *supra* note 3 at 25.

### **III. INTERNATIONAL HUMANITARIAN LAW IMPLICATIONS**

The changing nature of armed conflict since the end of the Cold War together with the complex security risks facing humanitarian organizations, and the shortcomings of relying on local guards or state armed forces for protection, have combined to make the use of private security companies the least-worst alternative for some humanitarian organizations. While the extent of the practice is difficult to assess, it is clear that humanitarian organizations have hired private security companies for a range of activities, including, in certain cases, for armed defensive protection. The consequences of this trend in terms of the rights and obligations of humanitarian actors under international humanitarian law have received little attention to date.

In 1977 when the Additional Protocols were adopted, the use of private security firms as an alternative means of ensuring security for humanitarian action was not envisaged. The post-Cold War expansion of deliberately targeting humanitarian personnel, failed and failing states, and ethnic-based non-international armed conflicts was similarly not in the minds of the framers. As a result, there is no explicit directive in either the Geneva Conventions or Additional Protocols as to whether humanitarian organizations may hire unarmed or armed private security companies to provide protection for humanitarian personnel, property or materiel. It is necessary to go back to first principles in order to address this issue.

The use of private security companies by humanitarian organizations raises several challenging questions for international humanitarian law. Two threshold issues that must be addressed are:

- Is the protected status of humanitarian personnel under international humanitarian law suspended or lost if they use armed private security contractors?
- Is humanitarian access to provide relief affected by the decision to hire a private security company for armed protection of relief consignments?

#### **A. PROTECTED STATUS**

##### ***1. OBLIGATIONS TO RESPECT AND PROTECT HUMANITARIAN PERSONNEL***

Parties to an international armed conflict have a legal obligation to protect humanitarian relief consignments and personnel under international humanitarian law. This has been recognized as a rule of customary international law.<sup>102</sup> Article 70(4) of AP I provides that “[t]he Parties to the conflict shall protect relief consignments and facilitate their rapid distribution”, while Article 71(2) of AP I states that personnel participating in relief actions “shall be respected and protected”.<sup>103</sup> The Commentaries on Article 70(4) of AP I follow the traditional consent-based approach to humanitarian security:

If the authorities do not have the means to ensure such protection, particularly if they cannot prevent looting and diversion of relief consignments, the whole question whether the relief action can continue is obviously put in jeopardy, first from the point of view of the donors, then the Parties allowing the passage over their territory, and finally, and most of all, the adverse Parties of the receiving Party.<sup>104</sup>

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<sup>102</sup> Henckaerts & Doswald-Beck, *supra* note 2 at 105-111 (Rules 31 and 32).

<sup>103</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, arts. 70(4), 71(2) [AP I].

<sup>104</sup> AP I Commentaries, *supra* note 77 at 827, para. 2858 to 829, para. 2864.

Likewise, Article 71(2) of AP I confers only modest protection for humanitarian personnel, such that the Parties to the conflict must “inform and instruct their armed forces not to attack such personnel.”<sup>105</sup> Banditry and riots by a starving population is a risk recognized in the Commentaries, and may be dealt with by reliance on the local police force, if it is necessary and requested.<sup>106</sup>

The relevant Party to an international armed conflict is also required to provide security and access to civilian medical personnel where medical services are needed.<sup>107</sup> Additionally, “[i]f needed, all available help shall be afforded to civilian medical personnel in an area where civilian medical services are disrupted by reason of combat activity.”<sup>108</sup>

During a non-international armed conflict, the obligation to respect and protect humanitarian relief personnel and consignments has been recognized under customary international law, despite the general lack of treaty-based provisions analogous to those applicable to international armed conflicts.<sup>109</sup> Article 9(1) of Additional Protocol II (AP II), however, explicitly states that medical personnel “shall be respected and protected”.<sup>110</sup> Article 11(2) of AP II states that “[t]he protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function”.<sup>111</sup>

## *2. PROTECTED STATUS AS CIVILIANS*

Humanitarian personnel are civilians under international humanitarian law and, thus, have protected status, which grants them immunity from attack during international and non-international armed conflicts.<sup>112</sup> Persons denied civilian status under international humanitarian law are identified in Articles 4A(1); (2); (3); and (6) of the Third Geneva Convention 1949 and Article 43 of AP I; and, in those cases where an individual’s status is in doubt, “that person shall be considered a civilian”.<sup>113</sup> Humanitarian personnel are clearly civilians. On the basis of Article 50(1) of AP I, security personnel accompanying them should similarly be considered as having civilian status unless and until such time as they directly participate in hostilities.

Protected status as a civilian subsists “unless and for such time as they take a direct part in hostilities”.<sup>114</sup> A significant consequence of the suspension or loss of protected status is that the individual may legally

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<sup>105</sup> *Ibid.*, at 834, para. 2885.

<sup>106</sup> *Ibid.*, at 829, para. 2864.

<sup>107</sup> AP I, *supra* note 103, art. 15(4).

<sup>108</sup> *Ibid.*, art. 15(2).

<sup>109</sup> Henckaerts & Doswald-Beck, *supra* note 2 at 105-111 (Rules 31 and 32).

<sup>110</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, art. 9(1) [AP II].

<sup>111</sup> *Ibid.*, art. 11(2).

<sup>112</sup> Henckaerts & Doswald-Beck, *supra* note 2 at 17-19 (Rule 5).

<sup>113</sup> See AP I, *supra* note 103, arts. 43, 50(1).

<sup>114</sup> *Ibid.*, art. 51(3).

be subject to attack.<sup>115</sup> Consistent with this principle, as noted above, the ICRC study on customary international humanitarian law has recognized that military personnel delivering humanitarian aid are not afforded protected status as humanitarian personnel.<sup>116</sup>

Unfortunately, the meaning of “direct participation in hostilities” remains complex and unsettled in international humanitarian law, despite recent sustained attempts to arrive at a common interpretation of this pivotal concept.<sup>117</sup>

Starting from first principles, the ICRC Commentaries to AP I state that direct participation “means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces”,<sup>118</sup> and that “[h]ostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.”<sup>119</sup> The Commentaries express the view that on a temporal basis, “the word ‘hostilities’ covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon”.<sup>120</sup>

Essentially the same approach applies to civilians in non-international armed conflicts. The Commentaries on AP II “implies that there is a sufficient causal relationship between the act of participation and its immediate consequences”,<sup>121</sup> in order for a civilian to have taken a direct part in hostilities.

### *3. ARMED PRIVATE SECURITY & DIRECT PARTICIPATION IN HOSTILITIES*

The private military and security company literature has not engaged in an analysis of whether humanitarian actors using armed private security for defensive purposes constitutes “direct participation in hostilities”.<sup>122</sup> There are, however, two positions that have been staked out on the matter. Fred Schreier

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<sup>115</sup> There are other consequences (such as capture, detention, prisoner of war status, prosecution under domestic criminal law for acts that do not violate international humanitarian law) that may flow from suspension or loss of protected status depending on whether the conflict is international or non-international in character.

<sup>116</sup> Henckaerts & Doswald-Beck, *supra* note 2 at 105.

<sup>117</sup> Most recently, a series of informal expert consultations co-organized by the ICRC and the TMC Asser Institute took place between 2003-2005. See International Committee of the Red Cross, “Direct Participation in Hostilities” (December 31, 2005), online: ICRC <<http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205>>.

<sup>118</sup> AP I Commentaries, *supra* note 77 at 619, para. 1944. See also *ibid.*, para. 1679: attacks defined as “acts of war which are intended by their nature or their purpose to hit specifically the personnel and the ‘matériel’ of the armed forces of the adverse Party . . . 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.”

<sup>119</sup> *Ibid.*, at 618, para. 1942.

<sup>120</sup> *Ibid.*, at 618-619, para. 1943.

<sup>121</sup> International Committee of the Red Cross, *Commentaries: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, at 1453, para. 4788.

<sup>122</sup> Recent articles on “direct participation in hostilities” by private military/security companies focus on state armed forces as clients: see, e.g., Michael N. Schmitt, “Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees” (2004) 5 *Chicago Journal of International Law* 511 [Schmitt]; Cameron, *supra*

and Marina Caparini state that armed escorts by a private security company “would in practice constitute a military operation”, according to the ICRC’s view.<sup>123</sup> Conversely, Emanuela-Chiara Gillard, a legal advisor to the ICRC, has written that “all employees of PMCs/PSCs [private military and security companies] present in situations of armed conflict and hired by entities *other than states*” will be entitled to civilian status, unless and for such time as they take a direct part in hostilities.<sup>124</sup>

The need for physical armed protection of various forms of humanitarian activity has received some recognition in international humanitarian treaty law. For example, civilian medical units retain their protected status as civilians under Article 13(2) of AP I when they “are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge” and are “guarded by a picket or by sentries or by an escort”.<sup>125</sup> Medical aircraft personnel are permitted under Article 28(3) of AP I to carry “light individual weapons as may be necessary to enable the medical personnel on board to defend themselves and the wounded, sick and shipwrecked in their charge”.<sup>126</sup> Additionally, civil defence forces, which may be responsible for a wide range of humanitarian tasks during occupation, are *not* considered to have undertaken an act harmful to the enemy when their personnel “bear light individual weapons for the purpose of maintaining order or for self-defence”.<sup>127</sup> However, the occupying forces “may disarm civil defence personnel for reasons of security”.<sup>128</sup> Likewise, the more recent U.N. Safety Convention recognizes “the right to act in self-defence”<sup>129</sup> of U.N. and associated personnel, which may include humanitarian personnel. These international treaty provisions suggest that a civilian does *not* take a direct part in hostilities simply on account of carrying light weapons for individual self-defence against, at least, banditry and criminality.

Therefore, blanket assertions that humanitarian personnel *automatically* lose their protected status as civilians by using armed private security contractors is not consistent with international humanitarian law. The contextual nature of the inquiry into the suspension or loss of civilian status through “direct participation in hostilities”, and recognition in treaty law of certain rights of armed individual self-defence by civilians, discussed above, requires a case-by-case assessment into whether the use of private security contractors in a given situation entails the loss or suspension of protected status by humanitarian personnel and premises that are the subject of defensive armed protection.

As a result of this conclusion, the key to whether humanitarian personnel or objects lose their protected status, or their safety put at risk by their own private security contractors (in close proximity) having their protected status lost, is the nature of the *conduct* of the armed private security contractor.

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note 91; Shannon Bosch, “Private Security Contractors and International Humanitarian Law – A Skirmish for Recognition in International Armed Conflicts” (2007) 16 *African Security Review* 34.

<sup>123</sup> Schreier & Caparini, *supra* note 78 at 94.

<sup>124</sup> Emanuela-Chiara Gillard, “Business Goes to War: Private military/security companies and international humanitarian law” (2006) 863 *International Review of the Red Cross* 525 at 539 [emphasis added].

<sup>125</sup> AP I, *supra* note 103, art. 13(2)(a)-(b).

<sup>126</sup> *Ibid.*, art. 28(3).

<sup>127</sup> *Ibid.*, arts. 65(3), 67(1)(d).

<sup>128</sup> *Ibid.*, art. 63(3).

<sup>129</sup> U.N. Safety Convention, *supra* note 36, art. 21.

A civilian that uses armed force in self-defence that is a necessary and proportionate response to a threat by an individual or group that is not a Party to the armed conflict would not entail a loss of protected status because it is not directed at the personnel and equipment of the enemy armed forces. Therefore, if armed private security contractors hired by a humanitarian organization fire their weapons in legitimate self-defence to protect their client against banditry and criminality by individuals or groups that are not Parties to the armed conflict, legally there will be no loss of protected status. Taking this further, Michael Schmitt argues that a private security company defending civilians or civilian objects against an attack by unlawful combatants engaged in criminal activities or war crimes would similarly not constitute direct participation in hostilities.<sup>130</sup>

If a civilian fires a weapon at a combatant without provocation, then certainly he would be taking a direct part in hostilities, such that his protected status is lost for the duration of the participation. The more controversial issue is whether a civilian loses their protected status if they fire a weapon at a combatant in order to defend themselves against the unlawful acts of the combatant. In other words, does the retention of protected status as a civilian preclude the use of armed force in self-defence against combatant who is illegally targeting the civilian?

On one hand, Lindsey Cameron argues that if a private security guard returns fire to defend against a Party to the conflict, the guard will be directly participating in hostilities, entailing a loss of protected status.<sup>131</sup> For this argument, Cameron relies on Article 49(1) of AP I, which states that “[a]ttacks’ means acts of violence against the adversary, whether in offence or in defence”. With respect, this analysis is misplaced. The definition of attacks in Article 49(1) does not relate to the concept of what types of acts will constitute “direct participation in hostilities” by a civilian. Rather, the definition of “attacks” is related to the *prohibition* against an attack on civilians, as in Article 51(2) and (4). In other words, Article 49(1) ensures that civilians are protected from acts of violence taken by the adversary, either in defence or offence. Therefore, Article 49(1) does not offer any assistance for the present analysis.

On the other hand, Michael Schmitt argues that civilians have a right of self-defence against unlawful actions by combatants, such that they retain protected status:

Civilians may also always defend themselves (because they are not legitimate targets under humanitarian law). In such cases, the civilian is acting either to enforce the law or in accordance with their right to defend persons and property in domestic and international criminal law. It would be absurd to hold that the law disallows defense against illegal actions by the victims thereof or by those who might come to their aid. . . . Of course, any lawful use of force must be necessary and proportionate.<sup>132</sup>

At least one of the experts in the ICRC consultative meetings on “direct participation in hostilities” agrees that “if a private security contractor’s role is defensive and involves defending persons who are not

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<sup>130</sup> Schmitt, *supra* note 122 at 538.

<sup>131</sup> Cameron, *supra* note 91 at 589-590.

<sup>132</sup> Schmitt, *supra* note 122 at 539.

legitimate targets themselves, then they should not be regarded as engaged in DPH [direct participation in hostilities] even if they have to use considerable force to do so”.<sup>133</sup>

Under international criminal law, “an imminent and unlawful use of force” – such as the intentional targeting of humanitarian personnel – may be repelled with force that is reasonable and proportionate to protect oneself or another, or property essential for the survival of that person or another.<sup>134</sup> As with the “direct participation in hostilities” test, however, any argument related to self-defence under international criminal law “must be assessed on its own facts and in the specific circumstances relating to each charge”.<sup>135</sup>

A private security contractor using armed force against a combatant to defend humanitarian personnel against an unlawful attack would not be criminally responsible under international law. This does not, however, directly answer the question of whether in the process, they would lose their protected status as a civilian.

It would be incongruous for international criminal law to authorize a civilian to respond with reasonable, necessary, and proportionate force to an imminent unlawful attack by a combatant, only to have international humanitarian law deem that that very act of defence authorizes the illegal attacker to then legitimately attack the civilian, since they are directly participating in hostilities at that time. If the initial attack on the civilian was illegal under international humanitarian law, then it would be inconsistent with general principles of law for the attacker to rely on their own breach of law to justify their continued attack. Consequently, neither the private security contractor nor the humanitarian personnel they are protecting would be taking a direct part in hostilities, entailing a loss of protected status, if they use reasonable, necessary, and proportionate force to defend themselves against illegal intentional targeting by any individual or group, including Parties to the conflict.

Regardless of whether humanitarian personnel retain their protected status as civilians *de jure* under international humanitarian law, it has been argued that such status will be of little effect as a matter of practice. For example, “[b]oth ICRC and MSF refuse to use security contractors in Afghanistan and Iraq, on the basis that to do so would in fact decrease staff security by risking associating them with parties to an armed conflict”.<sup>136</sup>

Likewise, while the U.S. military “asserts that it does not violate international law for a civilian employee or a contractor with an armed force to carry a weapon for personal defense . . . Joint Publication 4-0 acknowledges that the wear of arms by contractors in an ‘uncertain or hostile environment can cloud their status, leaving them open to being targeted as a combatant’.”<sup>137</sup> An even more serious problem is where private security firms are retained to provide services to both civilian and military clients in the same area

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<sup>133</sup> *Second Expert Meeting: Direct Participation in Hostilities under International Humanitarian Law*, Co-organized by the ICRC and the TMC Asser Institute, The Hague (25 – 26 October 2004) at 14, online: ICRC <<http://www.icrc.org/>>.

<sup>134</sup> *Rome Statute*, *supra* note 53, art. 31(1)(c).

<sup>135</sup> *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, Trial Chamber, Judgement (26 February 2001), para. 452.

<sup>136</sup> *Cockayne*, *supra* note 3 at 14.

<sup>137</sup> *Turner & Norton*, *supra* note 7 at 56, 58.

of operations. In such circumstances, problems with the principle of distinction between combatants and civilians are likely to arise.<sup>138</sup>

## B. HUMANITARIAN ACCESS

A second issue related to the rights and obligations of humanitarian organizations that hire private security contractors is whether access to provide relief is affected by the decision to hire a private security company for armed protection of relief consignments.

Under international humanitarian law, the delivery of humanitarian assistance must be neutral and impartial in both international and non-international armed conflicts.<sup>139</sup> In *Nicaragua v. United States of America*, the International Court of Justice emphasized that humanitarian aid is not unlawful intervention, so long as it is neutral and non-discriminatory:

There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that ‘The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours – in its international and national capacity – to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples’ and that ‘It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress.’<sup>140</sup>

As discussed in Part II(B), resort to local armed guards or state armed forces to protect humanitarian personnel, property, or materiel is arguably more likely to offend the principle of neutrality than hiring a foreign private security company for such services.

However, there are countervailing concerns related to state sovereignty in Additional Protocol I that would require a humanitarian organization hiring a private security company to provide defensive armed protection to obtain the approval of the state. Article 71(4) of AP I states: “[u]nder no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated”.<sup>141</sup> The Commentaries to Article 71 of AP I state that personnel participating in relief actions “do not have a ‘right’ to carry out a particular task, and the reason for granting them a status in international humanitarian law is to allow them to ‘act’ effectively for the benefit of a civilian population lacking essential supplies”.<sup>142</sup>

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<sup>138</sup> Cockayne, *supra* note 3 at 13.

<sup>139</sup> See O’Connell, *supra* note 12 at 440; see also AP II, *supra* note 110, art. 18(2).

<sup>140</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. LEXIS 4, para. 242.

<sup>141</sup> AP I, *supra* note 103, art. 71(4).

<sup>142</sup> AP I Commentaries, *supra* note 77 at 832, para. 2871.

## IV. CONCLUSION

Non-international armed conflict, ethnically-motivated violence, failed and failing states, and insurgency warfare have come to dominate modern armed conflict. The need for humanitarian assistance, however, has remained and, in some cases, increased dramatically. It is in this environment that a *mélange* of state and non-state actors operate across the spectrum of players involved both as belligerents propagating violence, and humanitarians attempting to mitigate suffering.

The traditional humanitarian security paradigm, premised on a state-centric world order with a limited number of players, has been stretched to the breaking point in many instances. Lack of respect for international humanitarian law by certain non-state armed groups, intentional targeting of humanitarian personnel, and the numerous other factors explored in this paper, have rendered the consent-based approach to ensuring protection of humanitarian personnel, property, and materiel obsolete in many cases.

The inadequacy of the consent-based model of humanitarian protection, coupled with the increased risk to humanitarian personnel in the field, has resulted in a proliferation of both the actors involved in delivering humanitarian aid and the security options humanitarian organizations have resorted to. The armed protection debate in the humanitarian community is only likely to grow more intense given these realities.

Where a humanitarian organization makes the decision to remain in a theatre of operations where armed protection is a necessity, it is faced with the options of hiring local guards, obtaining protection from state armed forces, or hiring a private security company. This paper has argued that hiring professional foreign security contractors is more likely to support the neutrality and impartiality of humanitarian organizations than the hiring of local guards, which is fraught with challenges, including concerns of protection rackets and affiliations with local armed groups. Furthermore, relying on physical security from state armed forces is often more likely to associate a humanitarian organization with a Party to the conflict than relying on foreign private security contractors. As a consequence, where defensive armed security is sought by a humanitarian organization, private security companies are likely to be seriously considered.

Before a humanitarian organization hires a private security company to protect its personnel, property, or materiel, a number of factors should be considered to ensure its rights and obligations under international humanitarian law are respected. This paper has focused on two threshold issues, namely, the impact on the protected status of humanitarians, and their ability to access populations in need. Debate on these implications and further research to identify other potential international humanitarian law implications should be welcomed to bring some clarity to this murky and complex area of law.

With respect to maintaining protected status under international humanitarian law, involving immunity from attack and other legal protections, international treaty provisions examined in this paper suggest that a civilian does *not* take a direct part in hostilities simply on account of carrying light weapons for individual self-defence against banditry and criminality. A private security contractor using necessary, reasonable, and proportionate force to defend humanitarian personnel, property, and materiel against banditry, criminality, or unlawful combatants would not be taking a direct part in hostilities. As a result, protected status should not be in jeopardy in such a situation. It is notable that studies discussed in this paper found the most common security risk faced by humanitarian organizations to be from individuals or groups that are not Parties to the conflict. However, the security threats will vary from conflict to conflict.

If a private security contractor hired by a humanitarian organization were to use unprovoked armed force against a party to the conflict, they *would* be taking a direct part in hostilities and their protected status

would be lost until such time as their participation ceased. At a minimum, the relevant Party to the conflict could argue that they were legally responding to an attack by the contractors and that the harm visited on humanitarian personnel or premises was consistent with rules governing collateral damage. More aggressively and controversially, the Party to the conflict could argue that the acts of direct participation in hostilities by the private security contractors constitute acts of the humanitarian personnel based on their relationship, such that the protected status of both the contractors and humanitarian objects are suspended, justifying the direct targeting of the humanitarian personnel as such.

The most problematic scenario arises where a Party to the conflict intentionally targets humanitarian personnel, property, or materiel illegally, and private security contractors respond in defence with proportionate, necessary, and reasonable force. This paper has concluded that neither the private security contractor nor the humanitarian personnel they are protecting should be considered to have taken a direct part in hostilities in such a situation.

As a result of these conclusions regarding protected status, a case-by-case assessment of the nature of the conduct of private security contractors hired by a humanitarian organization will determine whether protected status is maintained as a matter of law. Given this realization, we are concerned with how private security contractors *actually* behave in practice, as opposed to what the terms of their contract and rules of engagement specify. In other words, if the agreed terms between a private security company and humanitarian organization specify rules of engagement that would, on paper, prevent contractors from engaging in conduct that could be interpreted as direct participation in hostilities, humanitarian personnel or premises could nevertheless be harmed in a legal attack if their contractors exceeded their rules of engagement and directly participated in hostilities. In the pitch of such a firefight, it would be of no avail for a humanitarian organization to simply rely on the language of the contract in an attempt to distance their humanitarian personnel from the contractors they hired.

Consequently, ensuring proper conduct by private security contractors requires a range of preventative and reactive measures before a humanitarian organization can reasonably manage the risk of retaining such a firm.<sup>143</sup> A preliminary list of such measures, similar to those that would be required for other clients, could include the following:

1) Preventative approaches:

- a) Obtaining information on the human rights record and past performance of the company;
- b) Well-defined scope of activities covered under the contract;
- c) Clear and appropriate rules of engagement, including rules on carrying and use of firearms, as well as disclosure of whether armed force will be on hand or on call;
- d) Requirements for contractors to be subject to and compliant with local laws;
- e) Clauses to remove contractors from duty and terminate contract (with penalties to the contractor) for improper conduct;

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<sup>143</sup> See discussion in Cockayne, *supra* note 3 at 10-12; see also *Report on the Use of Armed Protection for Humanitarian Assistance*, *supra* note 72; K. Van Brabant, *Operational Security Management in Violent Environments: A Field Manual for Aid Agencies* (Overseas Development Institute: London, 2000); see generally, Michael Cottier, "Elements for Contracting and Regulating Private Security and Military Companies" (2006) 863 *International Review of the Red Cross* 637.

- f) Vetting of individual contractors;
  - g) Training requirements for contractors in international humanitarian law and human rights; and
  - h) Monitoring and reporting of activities to determine whether the contractual terms and rules of engagement are followed in practice.
- 2) Reactive approaches:
- a) Investigation of alleged misconduct;
  - b) Considerations of suspension or removal of contractor from duty;
  - c) Consideration of contract termination;
  - d) Reporting violation: state of operation, state of incorporation of firm, state of nationality of perpetrator; and
  - e) Ensuring full cooperation with investigation.

A challenge facing many humanitarian organizations is a shortfall in capacity to conduct these due diligence steps, which is a cause for concern. While enhanced collaboration and information sharing between humanitarian organizations about the private security companies they hire is a positive step, there are mixed reviews on the extent to which this is happening in practice.<sup>144</sup> A concrete proposal by Major General Tim Cross is the creation of an “updated register/database of financially transparent firms with a good track record”.<sup>145</sup>

On an individual organization basis, James Cockayne’s study found that most non-governmental organizations do not take sufficient measures within their power to enhance accountability of the private security contractors they hire and, as a result, there is a “significant lack of control, increasing risk for users”.<sup>146</sup> For example, his study found only one general reference in contracts between humanitarian organizations and private security companies to the international standards on use of force and firearms.<sup>147</sup>

The role of donors in enhancing the policies and procedures of humanitarian organizations hiring private security companies is likely to focus attention on ensuring due diligence is undertaken.<sup>148</sup> At the same time, it must be noted that the bargaining power of humanitarian organizations to secure contractual concessions is limited due to the relatively small segment of the market that they represent.

Finally, to ensure humanitarian access, humanitarian organizations should obtain authorization from the state in which relief is to be delivered before using private security companies for defensive armed

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<sup>144</sup> Vaux, *supra* note 3 at 23 (discussing collaborating through the InterAction Security Working Group); see *contra*, Cockayne, *supra* note 3 at 10.

<sup>145</sup> Cross, *supra* note 90 at 101.

<sup>146</sup> Cockayne, *supra* note 3 at ii.

<sup>147</sup> *Ibid.*, at 11.

<sup>148</sup> Greenaway & Harris, *supra* note 21.

protection. It also bears mentioning that without recognized status under a status of forces agreement (SOFA), a separate agreement with the host government, or an explicit exemption, humanitarian personnel and private security contractors will be fully subject to local laws, which may affect the legality of their use of private security contractors.<sup>149</sup>

Delivering humanitarian assistance in the midst of the diverse and complex forms of modern armed conflict is a significant challenge that strikes at the core assumptions of the early humanitarian movement. Understanding how the changing nature of armed conflict has affected the risks of humanitarian action and expanded alternative approaches to security is an important starting point. Factors affecting the decision to hire private security contractors are likely to vary between organizations, based largely on their philosophical underpinnings.

The use of private security contractors by humanitarian organizations is a topic deserving of greater attention due, in part, to its impact on the broader humanitarian community and the potential impact that this practice has on the decision of state armed forces to directly deliver humanitarian assistance. Humanitarian organizations that choose to hire private security contractors would benefit from an exchange of information with one another and sharing of best practices. Bringing together representatives of humanitarian organizations, state armed forces, private security companies, policy makers, and academics with diverse viewpoints on these matters could also assist in confronting these issues.

At the end of the day, as Sean Greenaway and Andrew Harris have emphasized, throughout this debate what must be forefront in our minds is the common goal of the effective and safe delivery of humanitarian assistance to those in need.<sup>150</sup>

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<sup>149</sup> Turner & Norton, *supra* note 7 at 93; see also U.N. Res. 1502, *supra* note 50, preamble.

<sup>150</sup> Greenaway & Harris, *supra* note 21.